

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

3 **INDICTMENT NO: 3 of 2021**

4
5 **THE QUEEN**



6 **V.**

7 **FRANCIS FERNANDO FERRON**

8
9 **Appearances:**

Mr. Neil Kumar for the Prosecution

10 **Mr. Oliver Grimwood for the Defence**

11 **Before:**

Justice Cheryll Richards Q.C.

12 **Judge Alone trial:**

12th, 13th 15th, 22nd and 23rd April 2021

13 **Verdict Judgment:**

7th July 2021

14
15 **HEADNOTE**

16 *Criminal Law - Section 228L of the Penal Code - Abuse of Trust*
17 *- Trial by Judge Alone*
18

19
20 **VERDICT JUDGMENT**

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Verdict Judgment: R v Ferron. (Francis Fernando). Coram: Richards J. Q.C. Date: 7th July 2021



1 **PREAMBLE**

2 1. Section 12 of the *Youth Justice Act (2019 Revision)* states:

3 “12. (1) *In relation to any proceedings in any court, such court may direct*
4 *[and this court so directs] that-*

5 (a) *no published report of or comment on the proceedings shall*
6 *reveal the name, address or school, or include any*
7 *particulars calculated to lead to the identification, of any*
8 *young person concerned in the proceedings, either as being*
9 *the person by, against or in respect of whom the*
10 *proceedings are taken, or as being a witness in the*
11 *proceedings; and*

12 (b) *no picture shall be published as being or including a*
13 *picture of any young person so concerned in the*
14 *proceedings.*

15 (2) *Whoever publishes any matter in contravention of subsection (1) is*
16 *guilty of an offence and liable on summary conviction, in respect of*
17 *each such offence, to a fine of five thousand dollars or to*
18 *imprisonment for six months.*
19

20 2. Section 31 of the *Criminal Procedure Code (CPC)* (2019 Revision) states as follows:

21 “Anonymity of complainants in rape etc. cases:

22 “31. (1) *After a person is accused of a rape offence, no matter likely*
23 *to lead members of the public to identify a woman as the*
24 *woman against whom the offence is alleged to have been*
25 *committed shall be published in a written publication*
26 *available to the public or be broadcast, except as*
27 *authorised by a direction of the court.*

28 (2) ...

29 (3)

30 (4) ...

31 (5) *If any matter is published or broadcast in contravention of*
32 *subsection (1), the following persons —*

33 (a) *in the case of a publication in a newspaper or*
34 *periodical, the proprietor, editor and publisher of*
35 *the newspaper or periodical;*

1 (b) in the case of any other publication, the person
2 who publishes it;
3 (c) in the case of a broadcast, any person having
4 functions, in relation to the programme in which it
5 is made, corresponding to those of an editor of a
6 newspaper,
7 commit an offence and are each liable on summary
8 conviction to a fine of one thousand dollars.”

9
10 3. For the avoidance of doubt: It is the Court’s view that the charges against this Defendant,
11 based on the particulars of the offence, fall within this section of the law by virtue of the use
12 of the word “*etc.*” and therefore I order that there be no identification of the Complainant in
13 this case.

14
15 4. In pursuance of the section, this Judgment has been anonymized to protect the identity of the
16 Complainant.



18 **THE INDICTMENT**

19
20 5. The Defendant, Francis Fernando Ferron, is charged on Indictment #0003 of 2021 with two
21 offences of Abuse of Position of Trust contrary to s.228L(1)(b) of the **Penal Code** (2019)
22 Revision.

23
24 6. The particulars of the First Count are that he on a day between the 19th day of April 2020
25 and the 11th day of November 2020, within the jurisdiction of the Cayman Islands, being a
26 person over the age of 18 years, in a position of trust in relation to ‘TG’, a child aged 12,
27 engaged with that child in an activity that was sexual in nature.

1 7. The particulars of the Second Count are that he on the 11th day of November 2020 within the
2 jurisdiction of the Cayman Islands, being a person over the age of 18 years, in a position of
3 trust in relation to ‘TG’ a child aged 12, engaged with that child in an activity that was sexual
4 in nature.

5
6 8. The Defendant first appeared before the Grand Court on the 22nd January 2021. He was
7 arraigned on the 5th February 2021. He entered pleas of not guilty to both counts of the
8 Indictment. He elected trial by judge alone in accordance with s.129 of the *Criminal*
9 *Procedure Code*. The trial took place over five days between the 12th and 23rd April 2021.

10
11 **APPLICABLE PRINCIPLES- JUDGE ALONE TRIALS**

12
13 9. In approaching this case, this Court is guided by the Cayman Islands Court of Appeal (CICA)
14 in its judgment in the case of *K. Richards v. R.*¹ in which the Court stated:

15
16 *“When a trial judge sitting alone has advised himself of the applicable principles of*
17 *law and given himself any necessary warning, he must indicate clearly in his*
18 *judgment his reasons for acting as he did, in order to demonstrate that he has acted*
19 *with the requisite degree of caution in mind and has therefore heeded his own*
20 *warning. No specific form of words is necessary for this demonstration. “What is*
21 *necessary is that the judge’s mind upon the matter be clearly revealed”*: see *R. v.*
22 *Simpson (15) ([1993] 3 LRC at 641, per Downer, J.A.)*.”

23
24 10. The Appellate Court adopted the principles of law as set out in the cited cases and stated that
25 a judge sitting alone is required to provide a reasoned judgment in a case and to demonstrate,
26 in so doing, an understanding of the following:



¹ 2001 CILR 496, paragraph 32

- 1 i. The importance of fully articulating the legal principles which apply to the
2 particular case before the Court;
- 3 ii. The importance of warning himself in relation to any special category
4 evidence;
- 5 iii. The necessity to set out the evidence on which he intended to rely for his
6 decisions;
- 7 iv. Specifically and specially determining ultimate facts from that evidence and
8 drawing inferences therefrom; and
- 9 v. Coming to a conclusion and judgment based on his ultimate findings of fact
10 and the applicable rules of law.

11

12 11. Additionally in the case of *Whittaker (Dave Kennedy) v R*², the Appellate Court referred
13 with approval to the decision of the Court of Appeal in Northern Ireland from a decision of
14 a judge sitting alone, and stated:

15 “50 *In R. v. Thompson*³ (11), Lowry, L.C.J., giving the judgment

16 “While on the subject I might say a word on the duty of the judge when giving
17 judgment in a trial under the 1973 Act. He has no jury to charge and therefore
18 will not err if he does not state every relevant legal proposition and review every
19 fact and argument on either side. His duty is not as in a jury trial to instruct
20 laymen as to every relevant aspect of the law or to give (perhaps at the end of a
21 long trial) a full and balanced picture of the facts for decision by others. His
22 task is to reach conclusions and give reasons to support his view and,
23 preferably, to notice any difficult or unusual points of law in order that if there
24 is an appeal, it may be seen how his view of the law informed his approach to
25 the facts.”



² [2010 (1) CILR 29]

³ [1977] NI 74

1 12. This case is approached and considered with these principles in mind. My task is to make
2 findings, to give reasons in support of those findings and to address any areas of law which
3 apply. It is not necessary to detail every fact in the case or all the arguments as would be the
4 case in a jury trial.

5

6 **PRESUMPTION OF INNOCENCE AND BURDEN OF PROOF**

7 13. The presumption of innocence is enshrined in s.7 of the *Cayman Islands Constitution 2009*.
8 This provides:

9 “7. - (1) *Everyone has the right to a fair and public hearing in the determination*
10 *of his or her legal rights and obligations by an independent and impartial*
11 *court within a reasonable time.*

12 (2) *Everyone charged with a criminal offence has the following minimum*
13 *rights -*

14 (a) *to be presumed innocent until proved guilty according to law.”*
15

16 14. In criminal trials the applicable rule is that the burden of proof is on the prosecution to prove
17 its case to the required standard, which is so that the judge or jury feels sure of a defendant’s
18 guilt before there can be a conviction. That burden remains on the prosecution from the
19 beginning and throughout a case and does not shift. There is no burden on a defendant to
20 prove his innocence.

21

22 15. I bore these considerations firmly in mind throughout this case, as I listened to the evidence
23 for the Prosecution and the Defence and as I considered the verdict.

24

25

26





1 **THE LAW**

2 16. The **Penal Code** provides in s.228 L(b) for the offence of Abuse of Position of Trust. This
3 states:

4 “(1) Where a person, being eighteen years or older who, in relation to a child
5 under the age of sixteen years, is in a position of trust -

6 (b) engages with that child in an activity that is sexual in nature.
7 that person commits an offence.

8 ...

9 (4) For the purposes of this section a “position of trust” in relation to a child
10 includes any position which involves —

11 (a) a family relationship with the child;

12 (b) caring for, training, supervising or being in charge of that child; or

13 (c) any other similar special relationship with the child.”

14

15 17. By s.224 of the said **Code**, a child is defined as meaning a person under the age of seventeen
16 years and, in s.228A to s.228C, child includes a person who appears to be under the age of
17 seventeen years.

18

19 18. In order to prove this offence, the Prosecution must prove, to the requisite standard, *inter*
20 *alia* the following elements, that:

21

22 i) The Defendant was over the age of 18 years;

23 ii) The Defendant was in a position of trust towards the Complainant;

24 iii) The Complainant was under seventeen years old at the material time or
25 appeared to be under that age; and that

26 iv) The Defendant engaged with the Complainant in an activity that is sexual in
27 nature.

28

1 19. This offence is similar to the offence in the United Kingdom. The general principles are set
2 out in *Archbold 2021*, paragraph 20-54⁴ and 20-122 et seq. In respect of the fourth element,
3 the test is whether a reasonable person would consider the nature of the alleged activity to
4 be sexual.

5
6 20. The mental element of the offence is said to be the same as for an offence of sexual assault
7 in respect of an adult. This is proof that the act of the Defendant was intentional, coupled
8 with an absence of reasonable belief that the Complainant was consenting. Thus where the
9 activity alleged is ‘touching’, proof is required that the touching was deliberate and a reckless
10 touching would be insufficient⁵. A child’s inability to consent to sexual activity is not
11 specifically stated within s.228A et seq. of the *Penal Code* as it is in ss.132, 132A and 134
12 thereof. In respect of those sections, the consent of the child to the activity is immaterial and
13 thus proof of a lack of consent on the part of the child or the absence of reasonable belief in
14 consent on the part of a defendant is not required.



15 **CASE SUMMARY**

16 21. The Prosecution’s case is that the Complainant, TG, is the niece of the Defendant. She was
17 12 years old at the time of the alleged offences. She has two younger sisters, ages 8 and 4
18 years old. The mother of the children, TC, is the sister of the Defendant.

19
20 22. Both offences are alleged to have occurred at the home of the Defendant. This is a small one-
21 bedroom apartment in which the Defendant resides with his girlfriend and his sixteen (16)
22 year old son “D”. The apartment is a short distance away from the school attended by the

⁴ H, 2005 EWCA Crim 732).

⁵ (See Blackstone’s Criminal Practice 2021, paragraphs, B3.148, B3.108 and B3.69, which refers to the case of *R.v. Heard*.⁵)



1 two younger sisters of the Complainant. At the end of the school day, the Complainant would
2 sometimes travel by bus from her own school to the school of her sisters. With the permission
3 of their mother, the Defendant would sometimes collect all three children from that school
4 and take them to his home. While there they would have an afterschool snack and watch
5 television until the arrival of their mother to pick them up.

6
7 23. In respect of the first count on the Indictment it is alleged that this occurred on a date
8 unknown when the Complainant was 12 years old and was visiting the home of the
9 Defendant. While her sisters were outside playing, the Defendant pulled the Complainant on
10 to his bed and tried to remove her clothing. The Complainant managed to get away from him
11 and ran out of the room. She made no report or complaint as to this incident at that time.

12
13 24. In respect of the second count, on the 11th November 2020, the Defendant at the request of
14 the Complainant, and with the permission of her mother, collected all three children from
15 the school of the younger children and took them to his home. Their cousin "D" was also at
16 home at the time. It is alleged that the Complainant went into his room to ask him about her
17 school socks. He closed the door, pulled her onto his bed, pulled down her clothing and
18 touched her vagina. In the course of his doing this, her mother arrived at the home. One of
19 her sisters and mother knocked on the door and on there being no answer, mother opened
20 the door. She saw the Complainant behind the bedroom door, with her shorts and underwear
21 down to her knees. She saw the Complainant using both hands to pull up her clothing and
22 saw the Defendant lying in his bed covered with a blanket with one hand outstretched
23 towards the Complainant. Mother became angry and demanded to know what was going on.
24 She jumped on and punched the Defendant before leaving the room and then called other
25 relatives by telephone. The Complainant made a complaint to her mother which, on the

1 Prosecution's case, was made, either at the bedroom door, or subsequently in the mother's
2 car while they were leaving the premises.

3
4 25. On the 12th November 2020, the Defendant surrendered himself to the Police at 3:24 am. On
5 the 13th November 2020, he gave an account in an interview under caution to the Police. He
6 also gave evidence on oath during the trial before this Court. He denied trying to remove the
7 Complainant's clothing before the 11th November 2020 and denied removing her clothing
8 and touching her on the 11th November 2020. He does not deny that on mother's entry into
9 the bedroom on that date the clothing of the Complainant was not covering the lower half of
10 her body. He gives an explanation for this and says that his sister jumped to conclusions. He
11 says that he had grabbed at the Complainant who was running away from his bed with his
12 phone. Her shorts were a little loose and with his grabbing at her, both her shorts and
13 underwear went down to just below her buttocks.



14
15 **ISSUE IN THE CASE**

16
17 26. The primary issue in this case is one of the credibility and reliability of the Complainant TG.

18
19 **EVIDENCE AT TRIAL - THE CASE FOR THE PROSECUTION**

20
21 ***EVIDENCE OF THE COMPLAINANT -TG***

22
23 27. The evidence in chief of the witness TG was given by way of three Achieving Best Evidence
24 ("ABE") interviews. The first was done on the 12th November 2020 and commenced at 12:22
25 pm. In this account she gave her date of birth as April 2008 and her age as 12 years old. She
26 said that after school on the 11th November 2020, she called her mother who gave her
27 permission to call her uncle to ask him to pick up herself and her sisters from school. She



1 took the school bus to the school of her younger sisters in Bodden Town and from there her
2 uncle picked her up together with her two sisters and took them to his house.

3
4 28. On arrival at his house, she took off her shoes, school shirt and her skirt. After she removed
5 her outer clothing, she was wearing underneath her skirt, a pair of blue pants which was long
6 to a little bit above her knee, a white merino, a light peach bra, white socks and purple
7 underwear. She then asked her uncle if she could have some cereal. He said yes to this and
8 she shared the cereal with her sisters.

9
10 29. It was after this that she went inside his room to ask about her socks. She said that she had
11 socks which she thought she had left at her uncle's home. These were socks which were long
12 to above her ankles. She needed these socks for school because they were the only pair like
13 that which she had. She had been getting into trouble at school for wearing socks which were
14 below her ankles. When she goes by her uncle she would take off her socks and put them
15 beside her shoes. A couple days after she had last done this she could not find them.

16
17 30. She went into his room and asked her uncle for them and he grabbed her and pushed her on
18 the bed and then pulled her clothes down. She fought him off and he was holding her down
19 even more. He started to take off her clothes and to touch her and that is when her mother
20 came in and he let her go. She was then able to jump out of the bed and put on her clothes.
21 She described how he was holding her as aggressive, that he was on top of her, with part of
22 his body. She said that he would sit down on her legs and both his hands were on her
23 shoulders. When he started to take off her clothes, he took off one of his hands from her
24 shoulders. When he was holding her down she was raising her feet to kind of get up. She
25 was doing that to try to 'wiggle up' and then used her foot to push herself up. She described



1 the bed in the room as kind of low, like the same height as the sofa. There were four pillows
2 and a round pillow on the bed.

3
4 31. She said that when she went inside the room, her uncle got up and locked the door and said
5 that the air conditioning was on. He was wearing grey shorts and his underwear and nothing
6 on the top half of his body. Her sisters were in the kitchen area watching television and her
7 16 year old cousin "D" was also in the kitchen washing dishes. She said that after holding
8 her down on the bed, he took one of his hands and started to pull down her clothes, then he
9 started to touch her vagina using his hand. He was rubbing both the outside and the inside of
10 her vagina. She felt scared when he was doing that. She started to say get off. He did not say
11 anything to her. This lasted about five minutes. Her mother came and that is when he jumped
12 off of her. She said that when her mother opened the door, that is when she started to pull
13 her clothes up. Her mother jumped onto her uncle and started fighting him. Then her mother
14 told them to get their stuff and go into the car.

15
16 32. She said that there had been one other incident which happened at his apartment in his room
17 when she was also twelve. He tried to take off her clothes. She kicked him off and then ran
18 out the door. She said that her sisters were there at the time but they were outside playing.
19 She had hurt her foot when she was at school so she did not want to go outside. They wanted
20 to play football. She stayed inside and was watching television in the living area. She got
21 hungry and went by his room door to ask her uncle whether she could have some cereal. He
22 always has cereal there that she likes. He grabbed her and threw her on the bed because
23 nobody else was inside. He was on top of her and was holding her down. He started to take
24 off her clothes and that is when she kicked him off and ran out. She thinks that she was
25 wearing her uniform at the time.

1 33. She said that she would call her mother and ask if she can go by her uncle because there is a
2 new teacher at school who says that she is the one making a mess in the canteen and tells her
3 to leave the canteen. Outside of the canteen it is hot and there are sandflies so that is the
4 reason that she called her mother and asked if she could go by her uncle.

5
6 34. The first time the incident with her uncle happened, she did not tell anybody because she
7 was scared to tell her mother. She was scared because she felt that her uncle would do
8 something to her. During the first incident he did not do anything other than try to take her
9 clothes off. The incident on the 11th November 2020, he was rubbing, touching her vagina
10 for two minutes.

11
12 35. The second ABE interview took place on the 13th November 2020. In this interview she
13 provided some additional detail. She said that her uncle pulled down her pants and underwear
14 to a little bit below her knees and then started to touch her on her vagina. She said a couple
15 minutes after that her mother came. She said that is when he let her go and she was able to
16 jump out of the bed. When her mother came through the door as soon as the door opened, he
17 jumped off her. He covered himself with the sheet and this was when she jumped up. When
18 she jumped up she pulled up her pants and underwear.

19
20 36. She said that her uncle has a Samsung cell phone. She has used it before to watch TikTok.
21 She does not normally use it when she goes over to his house. She remembers last using it
22 last year. She did not use it on the 11th November 2020. She saw it in the room - it was on
23 the bed beside him. She did not use her phone when she was in the room. She went into the
24 room and asked him for her socks. He said that he had not seen them. She was going to walk
25 out and that is when he grabbed her.



1 37. In her third ABE interview, which was on the 10th April 2021, she said that when her mother
2 came into the room, her mother did not ask what had happened. She said she did tell her
3 mother what happened when they were in the car. She said that she told her mother that he
4 had grabbed her and thrown her against the bed, held her down aggressively, started to pull
5 down her clothes and touch her on her vagina. Her pants and underwear were a little bit
6 below her knees. He touched her vagina for about five minutes. She said that she had told
7 her mother the truth.



8
9 **CROSS- EXAMINATION**

10
11 38. In cross-examination, TG said that she does not really go to her uncle's house often. She
12 goes there sometimes when mother cannot pick her up from school, so her uncle comes and
13 picks her up. She also goes there sometimes on the holidays to see her cousin "D". When
14 she is there, she likes to play around with cousin "D" and sometimes play fights with him.
15 She said that she does not tell her little sisters to slap "D", when she is playing around. She
16 did not agree that on one occasion when she was playing around with "D", that she had
17 thrown a stone at his head or that she plays pranks on him. She said that she did remember
18 taking "D's" phone and hiding it but did not remember on one occasion hiding his lunch
19 money from him. She said that it did not happen that her mother had to give it back because
20 she had hidden it.

21
22 39. At her uncle's house sometimes, she plays outside or inside and sometimes she just watches
23 television. She said her sisters sometimes like to watch different television programs from
24 the ones she likes. At her uncle's house they watch television in the living room. She said
25 that it is not true that she watches television in her uncle's room if she does not want to watch



1 the same programmes as her sisters. There is a televisions in there. Both televisions have
2 *Netflix* on. In her uncle's room there is air conditioning. There is none in the kitchen/living
3 room area. There are fans there instead. She said that it is not really that she prefers to be
4 inside in the cool of the air conditioning than in the living room.

5
6 40. She agreed that her parents are a bit stricter than her Uncle Francis. Her mother is a bit strict
7 about what she is allowed to look at on the internet and has put restrictions on her iPad and
8 tablet so that she cannot look at anything that she would like to. She is also not allowed to
9 download certain 'apps' on her phone, like TikTok. Sometimes she would use her uncle's
10 phone to watch TikTok videos. Sometimes she takes his phone so she can watch TikTok
11 videos. Sometimes he takes it back from her and tells her to give it back. She said that it is
12 not that she says no when he asks for his phone back sometimes. She said that she did not
13 remember one time when he left his bedroom to go to the bathroom and she ran into his room
14 and took his phone to play TikTok. She said her mother does not like her watching TikTok
15 videos.

16
17 41. She said that it is right that she did not want to wait at school that day. It was because the
18 teacher did not like her waiting around because the teacher thinks that she makes a mess.
19 That is the reason she asked her mother if she could call her uncle. Then she rang him to see
20 if he could come and collect her earlier. She spoke to her mother and then called her uncle.
21 She said that she was a little bit happy to go to Uncle's house. She did not have a problem
22 picking up the phone to ask him. When she got to her uncle's house she changed out of her
23 school uniform. Her two sisters were watching television. Her cousin had a balloon that he
24 was playing with. When she was playing she ended up popping the balloon. She said that

1 she did not remember her uncle coming out and telling them to keep the noise down after
2 the balloon popped.

3
4 42. In response to suggestions being put to her, she said that she did not go into her uncle's room
5 twice when she was there. She remembers going into that room only once. She said that it is
6 not correct that she went in first and asked about a sock and then she left. She said that she
7 did eat some cereal when she was at his house. She did ask him if they could have the cereal.
8 She did not go into his bedroom to ask whether she could have the cereal. She was in the
9 kitchen when she asked him about the cereal and he was in the kitchen at the time. She said
10 that she would say that it is not true that he was in the bedroom when she asked him about
11 the cereal. It is not correct that she ate it in her uncle's room while she was watching
12 television. She ate the cereal at the dining table. She is not supposed to eat in her uncle's
13 room. She is not told off if she walks in with food. The only thing she has been told is to take
14 the food off her cousin's bed. She has been told not to sit on her cousin's bed and eat food.

15
16 43. When she went into the room, Uncle Francis was not sleeping in the bed. He was watching
17 a movie. She asked about the socks and he got up and sat at the end of the bed. He said that
18 he did not know. She was standing there and he got up to close the bedroom door because
19 he said the air conditioning was on. When she was about to leave, he grabbed her and shoved
20 her on the bed. He sat on the end of the bed first then he closed the door. He did not stand
21 up and close the door because the bed is close to the door. He leaned over to the door and
22 pushed it closed. He told her that he had not seen the socks. After she finished asking him,
23 and after he closed the door, he then said that he had not seen them.



1 44. She said that he was wearing a grey pants. It is not correct that he was just wearing his
2 underwear. She was on the bed about 4 or 5 minutes before she managed to get up. She did
3 not shout out for her cousin or her sisters. She said that it is right that she said that she tried
4 to push Uncle Francis off. She tried to kick her hips. She was also ‘wiggling’ to try to get
5 him off her.

6
7 45. In response to the defence case being put to her, she said that it is not right that she came
8 into his room with a bowl of cereal and ate it in his room. It is not right that she was watching
9 television in the room while she ate the cereal. It is not right that she was lying on the bed
10 after watching television. It is not right that she was lying there and her body was touching
11 Uncle Francis. She said that it is a lie that he pushed her away. She said:

12 *“No sir not right that I picked up his phone and started to run out of the*
13 *room.*

14 *Not right that he tried to grab me as I ran away.*

15 *Not right that he tried to grab me.”*
16

17 46. She said that after her mommy came into the room she remembers her saying things like,
18 “*what have you been doing to my baby?*” and that her mother was accusing Uncle Francis of
19 doing bad things with her. She did not leave the house with her mommy. Her mommy told
20 her to go to the car and she left with her two sisters. Then her mommy came outside. Before
21 her mommy came outside she was arguing and shouting at Uncle Francis. She was shouting
22 at him for doing bad things to her.



23
24 47. She remembers that when her mother came outside, she used her phone to ring other people.
25 She was in the car with her mother when her mother was using her phone. One of the people
26 she rang was her stepfather and she also rang her father. She also spoke to her stepmother at

1 one stage. When her mother rang them she could hear what her mother was saying. Her
2 mother was telling them that Uncle Francis had done some bad things to her. She said that
3 she knew what Counsel meant by bad things, meaning sexual things to her. That is what her
4 mother was saying to the adults.

5
6 48. Her mother drove her and her sisters to a friend's house. She asked that person to look after
7 them for a while. She did not hear her mother explain why she needed the friend to look after
8 them.

9
10 49. She said that she did say that Uncle Francis had grabbed her once before. She did not tell
11 anyone about that at the time until November when this incident happened. She was still
12 happy to go to her cousin's house to play. She said that it is not correct that Uncle Francis
13 did not try to grab her on any previous occasion.

14
15 50. She said that her mother did not ask her about the case when they were back home that night.

16
17 51. In response to a question from the Court she said that she did not shout out for her cousin or
18 her sisters because she was afraid he would hurt her.

19
20 52. In response to a further question from Defence Counsel, she agreed that she had said that she
21 had 'wiggled' to try to get him off her. She was not afraid to 'wiggle' because:

22 *"if I wiggle nobody would hear but if I shouted out somebody would hear*
23 *it."*



24
25 **EVIDENCE OF TC**

26
27 53. TC, the mother of the Complainant TG, testified that on the 11th November 2020, she was
28 not working because she had a sick note from the Doctor. She had pulled a muscle. She



1 recalled receiving a telephone call from TG. TG asked if her uncle could pick her up earlier
2 because she did not want to wait so long because she was not feeling so well. TG would
3 usually have to wait until 6pm for the other girls to finish school because they do after-school
4 (programmes). As a result she gave permission to TG to ask her uncle. She was at home
5 when she had this conversation with TG. She then had a conversation with TG's uncle. This
6 was a little after 3pm, probably about 3:20pm. He asked if she needed him to pick up the
7 girls and agreed to do so. The arrangement was that she was to pick them up from him.

8
9 54. She said that she went to his home to collect them herself about 4:30pm. She walked into the
10 house. The front door was not locked. Her nephew "D" was outside. She saw her two
11 youngest daughters in the living room. They were 7 years old and 4 years old at the time.
12 They were watching television. She asked the older one ("R") where is your sister. "R" said
13 that she is in the room, referring to the bedroom. She then said:

14 *"R. went and knocked on the door, and I was right behind her, and as she*
15 *knocked we didn't hear anything. So same time I went and tried the lock,*
16 *which all kind of feelings started going through me at the time."*

17
18 55. She said that the door was not locked with the lock so she was able to open the door and she
19 was able to walk in. Her evidence continued:-

20 *"TC: As I opened the door I saw TG behind the door, bending pulling up*
21 *her clothes.*

22 *Q.: What clothes are you referring to?*

23 *A.: Her shorts and her underwear which was almost down to her knees.*

24 *Q.: And how did she pull up her underwear?*

25 *A.: She was pulling everything. When I walked in, how I saw her, like*
26 *she was holding on to her clothes.*

27 ...

1 Q.: You are demonstrating using two hands, is that correct?
2 A.: Yes
3 Q.: Was there anything else in her hands at this time?
4 A.: No. Not to any observance, no
5 Q.: What about Francis? What if any observations had you made of him
6 when you first walked into the room?
7 A.: Him lying in the bed, the blanket thrown over him and his hands
8 outstretched to my daughter.”
9

10 56. She said that she then said to him “*what the f... is going on?*” She jumped up on him in the
11 bed and punched him all over, wherever she could hit. He was still in the bed at that time.
12 He had a sheet covering him. She said to him “*what are you doing with my baby? You are*
13 *my brother. What the hell are you doing? What is going on?*”
14

15 57. She said that she remembers speaking to TG about what happened. She said that she asked
16 her what took place, if he tried to penetrate her. TG said no ma’am. She asked TG if he
17 touched her anywhere, she said yes, on her vagina. She said that she proceeded to ask if
18 penetration happened, if anything like that happened. TG said no. She asked if he made her
19 touch him on his private part and in response TG said no.
20

21 58. TG told her that she went in to look for one of her tall socks that she left there the last time
22 that she was there. TG said that he grabbed her and pushed her onto the bed. She tried to get
23 up and he pushed her down with both of his hands on her shoulder, down into the bed and
24 she tried to push him off with her feet.



25
26 59. TC was then asked:

27 Q.: Can you recall whether she said anything else?

1 A.: *She said once she was--when she was trying to get away from the bed is*
2 *when he grabbed hold of her pants and must be underwear, everything,*
3 *same time and started to pull her clothes off when she was trying to get out*
4 *of the bed. So I figure more or less that's the time I walked in."*

5
6 60. TC said that she kept on asking her if this is the first time and if there was any form of
7 penetration.

8
9 61. TC said the very next thing that happened after she spoke to TG was that she called her
10 husband and TG's father. She said she did not get through to TG's father so she called his
11 wife. TC spoke to her husband. She did not remain there but took the children by car to the
12 house of a friend a short distance away. She then returned to the house.

13
14 **CROSS-EXAMINATION**



15
16 62. TC was cross- examined by Counsel for the Defence. She said that the first contact that she
17 had with TG surrounding this incident was a telephone call from her asking whether her
18 uncle could pick her up. About 10 minutes, after that, her brother rang to confirm everything
19 with her. This was not the first time this had happened. Sometimes he has helped out by
20 picking up the children from school. Sometimes at her request. On other occasions TG asks
21 so that she does not have to wait around.

22
23 63. She said that as she entered the bedroom, TG was sort of behind the door and she could see
24 TG pulling her clothes back up. Her two hands were on the sides of her shorts pulling them
25 up. She agreed that she had said that TG told her that when she was getting out of the bed,
26 her uncle had grabbed at her and he had pulled her clothes down. She said that TG did not

1 give her any more detail about that. She could see the Defendant with one arm outstretched.
2 She agreed that it seemed to her as if he was grabbing towards TG or that he had just grabbed
3 towards her.

4
5 64. When she spoke to her husband she told him a summary of the reason that she had telephoned
6 him, that is, what had just gone on. Part of the information which she relayed to him, was
7 that she believed TG may have been sexually assaulted.

8
9 65. She spoke to TG's stepmother because at first she could not get hold of her father. She told
10 her in summary that she believed that TG may have been sexually assaulted. At the time she
11 did not ask her to call the Police. She said the same thing to TG's father.

12
13 66. In response to a question from the Court, she said that she told TG's father that she believed
14 sexual assault had taken place. She believed this, because of the information that she got
15 from her daughter and from what she walked in and saw.



16
17 **INTERVIEW OF THE DEFENDANT**

18
19 67. The Defendant was interviewed by the Police on the 13th November 2020. The interview
20 was under caution and in the presence of his Attorney. He gave his date of birth as October
21 1977 making him 43 years old. He described his residence as a small house with one
22 bedroom, one bathroom and a kitchen and living area. He resides with his girlfriend and his
23 son "D". "D" sleeps on a bed in the living room/kitchen area.

24
25 68. He said that at about 2pm on the day in question he was at home sleeping because he was
26 working at nights. He received a call from his niece TG asking him to pick them up from
27 school. He telephoned her mother who confirmed that he could do so. He went to the school



1 by bus at about 3pm, picked them up and they all took the bus back to his house. They got
2 to his house at about 4pm. His son was at home when they arrived.

3
4 69. He said that he went back into his room and was lying down. Everyone else was in the living
5 room. TG came into his room and got on the bed. At first she was eating cereal when she
6 came into the room. This was not the first time that she has done this. She has come into the
7 room to watch television because sometimes the children argue over the television.

8
9 70. She came in there and locked the door. She was eating cereal then she put it down. He was
10 kind of dozing off. She started rubbing herself on him while he was lying on the bed. She
11 was rubbing her bottom on his penis. He pushed her off. He was wearing his underpants
12 because he was lying down. He jumped up and told her to stop. This was the first time she
13 had ever done this.

14
15 71. When he pushed her off, she grabbed his phone and started to run with it. He said:

16
17 *“When I grab her, her clothes pull down, because she had on a shorts and*
18 *I grabbed it and pull her back.”*

19 ..

20 *When she run off, dat’s wa I say, when she run off, I grab her,*

21 ..

22 *And pull her back, trying to pull her back, but her clothes pull down.”*

23
24 72. He said that he did not do this deliberately it was out of reflex. The shorts did not come all
25 the way off, but were about half way on her bottom.

26
27 73. He said that she is always taking up his phone and playing around with it. So he grabbed her
28 shorts to try to pull her back. As he did so his sister came and knocked on the door. She

1 opened the door, came inside and saw him holding or pulling TG close. His sister jumped to
2 conclusions.

3
4 74. He said that TG always tries to come in on him when he is bathing or such and always tries
5 to come into the bathroom. This was about two years ago when she was about 10 years old.
6 He talked to her about it. He did not tell her mother because he did not want to get her into
7 trouble. He loves his niece and tries to counsel her. He never tries to do anything bad to
8 them. She always tries to come into the room where he is and *'trouble his phone'*.

9
10 75. It is normal for him to pick them up from school at the request of his sister, or one or other
11 of his nieces would ask if they can come over to visit. It was not the first time that she had
12 come into his room. The children would sometimes argue over the television, so she would
13 come inside his room to watch television. He does not have a problem with this. He denied
14 that he had pulled her into his room when she came to inquire about some socks. He said
15 that she came into his room willingly. His nieces were there so he could not pull TG into the
16 room like that.

17
18 76. He said that when he grabbed her, her clothes pulled down. He grabbed her shorts and pulled
19 her back. The pants was below her buttocks but it was not off. He denied touching her in her
20 vagina.

21
22 77. Prior to that day, the children had last visited a week or two before then.

23
24 **EVIDENCE OF DC ANDRE SAVOURY**



25
26 78. DC Andre Savoury is the Investigating Officer in the case. He is currently attached to the
27 Family Support Unit (FSU) of the Royal Cayman Islands Police Service (RCIPS).

1 79. On the 12th November 2020 he interviewed TG and “D” and on the following day the
2 Defendant in the morning and a second interview with TG in the afternoon.

3
4 80. In cross-examination he agreed that the Defendant surrendered himself to the Police on the
5 12th November 2020 at 3:24 in the morning. He said that following his surrender he was
6 remanded to the Detention Centre and was not allowed to speak with anyone who was a
7 potential witness in the matter. He said that the pre-interview disclosure which was provided
8 to the Defendant did not include any mention of the Defendant grabbing the pants of the
9 Complainant and causing them to fall down.

10
11 81. He said that it is correct that the account of the mother of the Complainant that at the time of
12 entry into the bedroom, the Defendant was under the blanket with his arms stretched out as
13 if he was grabbing at the Complainant was contained in the mother’s second witness
14 statement. That statement was taken on the 13th November 2020, after the Defendant had
15 already been interviewed.



16
17 **THE ADMISSIONS**

18
19 82. There were agreed facts by way Admissions in the case. These include the dates and times
20 of various interviews, the arrest and caution of the Defendant and the following:

21
22 ***Good Character***

23 *Francis Fernando Ferron has no previous convictions and is of good character.*

24
25 ***Photographs***

26 *On the 11th of November 2020 at 7:17 p.m., CSI Sara Hough photographed the*
27 *interior and exterior of the premises at .., Bodden Town.*

28
29 ***Medical evidence***

1 *“T” was examined at 6:58 p.m., on the 11th of November 2020 at the George Town*
2 *Hospital. The examination was confined to her genital region. External*
3 *examination revealed no abrasions or lacerations to the genitalia. There were no*
4 *signs of injury to the posterior fourchette. There were no signs of recent genital*
5 *trauma.*

6
7 *It is the opinion of Dr. Gillian Evans-Belfonte that:*

8
9 *i. the presence of recent genital injury is not required to validate evidence of*
10 *sexual assault as described by (TG) (his hand touching her in her private*
11 *area); and*

12
13 *ii. the examination’s findings can be used to exclude recent vaginal*
14 *penetration.*

15
16 ***Other Investigative Inquiries***

17 *On the 22nd of March 2021 DC Andre Savoury obtained (TG’s) school records*
18 *(behavior logs) for the year 2020-2021 academic year.*

19
20 *On the 23rd of March 2021 DC Andre Savoury received written confirmation from*
21 *the Department of Children and Family Services that they have had no previous*
22 *direct involvement with (TG).”*

23
24
25 83. Photographs of the home of the Defendant were received into evidence as exhibits.

26
27 **EVIDENCE AT TRIAL - THE CASE FOR THE DEFENCE**



28
29 84. The Defendant gave evidence on oath and he called one witness, his son “D”. I approach the
30 defence witnesses applying the same fair standards as I do to all witnesses.

31
32 85. The Defendant is of good character. I remind myself that this is not a defence to the charges
33 but it is relevant in two ways. Firstly he gave evidence and his good character is a positive
34 feature which I take into account in his favour when considering whether I accept what he
35 said. Secondly, the fact that he has not offended in the past may make it less likely that he
36 acted as the Prosecution alleges in this case. The importance which I attach to his good
37 character and the extent to which it assists on the facts of this particular case are for me, as

1 the tribunal of fact, to decide. In making that assessment I may take account of everything
2 that I have heard about him.



3
4 **EVIDENCE OF THE DEFENDANT**

5
6 86. The Defendant testified that the Complainant is his niece and her mother is his sister. He said
7 that on the 11th November 2020 he did not pull TG onto the bed in his room and did not pull
8 down her shorts and underwear. He did not use his hand to rub the outside or inside of her
9 vagina. On a date before the 11th November, he did not try to grab her and pull her to his bed
10 or hold her down and try to take her clothes off.

11
12 87. On the 11th November he received a call from TG. She called and asked if he could pick her
13 up from school. After receiving that call, he telephoned his sister about it. She told him that
14 if he had the time he could go and pick them up. He went and picked up TG and her other
15 two sisters. After he picked them up, he went back to his house. At the time he did not have
16 a car so he took the bus. He arrived back at his house at about 3:30pm. He does not remember
17 the exact time.

18
19 88. This was not the first time that he had collected them from school and taken them back to
20 his house. On this occasion there was no set agreed time that his sister would be coming to
21 collect them. They would not usually be there too long on a school day. She would pick them
22 up early but on that day her back was hurting and she said that she would come up there after
23 he picked them up. She usually tried to avoid the traffic and usually picked them up before
24 the traffic came down. Any time after five, there is traffic so she would try to beat the traffic
25 most times. He anticipated that she would be there before 5pm.

1 89. When he arrived back home, his son “D” was there as well. He was watching television. He
2 (the Defendant) has a television in his bedroom room and one in the living room area. He
3 (the Defendant) went straight back to his room and tried to get some rest. This was because
4 he had come off work in the morning and had to go to work at 12 midnight. He is usually up
5 until after 2pm during the day. Then he tries to get some rest. His usual hours are from 12
6 midnight to 8 or 9am in the morning. It all depends on how much work there is to be done.

7
8 90. He had to change his clothes because when TG called him the first time, he was sleeping and
9 had to get dressed. When he got back home he took his clothes off because he always sleeps
10 in his underwear. When he picked up his nieces he was wearing a jeans pants and a shirt.
11 When he returned he did not remain in these clothes. He went back to bed in his underpants.
12 He is a person that does not like wearing clothes because he gets hot easily. It is right that
13 there was air conditioning in his bedroom. It was working on the 11th November. There is
14 no air conditioning in the kitchen/living room area where his son sleeps. When he went back
15 into his room, the air conditioning was on and the television was also on. He usually leaves
16 it on, even when he left it was on. He went back in and was dozing on and off.

17
18 91. He identified photographs showing his premises and the interior thereof including his room
19 and bed, the door to his room and the television in his room. He pointed out on the
20 photograph numbered page 95 where his head would have been on the bed towards the top
21 where the headboard is. He said that the photograph numbered page 103 shows the portable
22 charger to charge phones on the floor of the room. He did not know where it was when he
23 went into the bedroom after picking the children up.





1 92. The children usually play. They were making a lot of noise so he told them to keep it down.
2 He included his son in that. Usually his son is a quiet person. The only time he will make
3 noise is if someone bothers him. On the 11th November, he (the Defendant) could not be
4 aware of what the children were doing because his door was closed.

5
6 93. Before his sister arrived he did not leave the bedroom. TG came into the bedroom and asked
7 if she could get cereal. In response he said yes you can go ahead but share it with your sisters.
8 After that she went outside and got the cereal, then he dozed off. She closed the door after
9 asking for the cereal. It is normally closed. That is because out in the living room area the
10 windows are always open. More electricity is used when the air conditioning is on so he
11 usually keeps the door closed.

12
13 94. He said that TG is always a playful person. He is always talking to her to say less playing.
14 This is because especially with older people, she likes playing around with phones and stuff
15 like that. From what he observed she is always nagging "D" - playing around with him,
16 hiding his stuff. It is usually good-natured playing. Sometimes she takes it a little bit too far.
17 She hits "D" too hard so he gets upset with her. That is the reason why he keeps telling her
18 to watch how she is playing around. She is always trying to pick on her younger siblings. He
19 talks to her about that as well. He tells her not to pick on them, because they are young. She
20 has a mobile phone. She also has a tablet. Her mother has placed restrictions on these. She
21 does use his phone because her things are restricted. She cannot get to watch things like
22 TikTok so she borrows his phone whenever she sees it. Her phone cannot download TikTok.
23 She is the one who downloaded TikTok on to his phone. She does not always ask his
24 permission to use his phone. She takes it behind his back. When he is aware of that he asks

1 for it back. Sometimes she hides it and does not want to give it back to him. When she sees
2 that he is getting serious she laughs it off and gives it back to him.

3
4 95. He said also that she was the only one who came into his room. She came in a second time
5 with a bowl of cereal. He heard spoons. He woke up and told her to come out of the room
6 with the cereal. She put it down and lay by the side of the bed. He did not say anything to
7 her. He started to doze off. At one point he felt like she was pushing up on him. He did not
8 know if she was cold. He felt her pushing up at the same time he told her to stop. She was
9 laying down. As far as he was aware she was facing the television and watching it. She was
10 pushing up on him backwards. He pushed her, like tried to push her away and told her to
11 stop. She did not say anything in response. When he pushed her she went further out and
12 moved herself. He kind of dozed off. She was there laying down. Shortly after, there was a
13 knock on his door and she jumped up with his phone and tried to run off.

14
15 96. He said that his phone was right there on the bed. He kind of sleeps there with it at the pillow
16 so she knows all of that. It is usually on the bed so that he can hear it ring. He heard a knock
17 on the door, he was on his side facing the door. TG jumped off the bed and tried to run with
18 his phone. He tried to grab, reach out and pull her back because he knew that she would go
19 out and play with it. He reached out with his right hand. He was just trying to grab her out
20 of reflex. He was startled like, seeing her move, he tried to hold her. That is when he grabbed
21 her clothes in the back. He grabbed her clothes, grabbed everything and pulled her back so
22 her clothes went down. She was running. She was moving. The clothing which came down
23 were her tights and her underwear.





- 1 97. He said that when he says tights, it is what cyclists wear but he is not sure of the proper name
2 for it. It is not tight on her because she has had them for a while so it was kind of stretched
3 out. It is like a little loose. He indicated with his hand that the clothes came down to just
4 above the knee. He said that when he pulled it, her tights with her underwear came down to
5 about right at her butt cheeks. When he grabbed at her and tried pulling her back, her mom
6 opened the door that is when he realised it was her mom knocking. He let her go because he
7 did not want her mother to start assuming anything. So when he let her go, he lay back in the
8 bed. He still had the sheet over him and was still in bed lying down. When his sister came
9 in, his attention was then drawn to her. He dropped back down, lay back down. She started
10 saying “*what are you doing Bro?*”
- 11
- 12 98. TG’s clothing ended up just below the bottom of her buttocks. His hand was still out. He
13 said that he was at a lower angle than TG so that is the reason that the clothing was pulling
14 downwards.
- 15
- 16 99. His sister jumped on top of him and was hitting him and there was an altercation. After that
17 finished his sister told all of them to get into the car. She left and went out to the car with
18 them. He does not know if TG said anything to her mother after her mother jumped on him
19 and hit him.
- 20
- 21 100. He got up and put on his shorts and he went outside to try talk to his sister to explain that he
22 was not doing anything, that he was simply trying to get his phone from TG but she did not
23 want to hear anything from him. She was in the car on the phone and he does not know who
24 she was talking to. The window was up. He could not hear anything that was being said and
25 he was at a little distance from her.
- 26

1 101. He said that on the 11th November his television had access to *Netflix*. *Netflix* was not
2 working on his son's television.



3
4 **CROSS- EXAMINATION**

5
6 102. In cross-examination, he said that he is happy to help out his sister because he is an uncle
7 and the girls are his nieces. He said that this is not the first time that he had picked them up
8 from school. TG had been to his house more than once. When she is there she might watch
9 television or play games. She likes to play around, being a kid. She likes to overdo. If she is
10 hungry, she might get something to eat, sometimes without even asking. Also when she is
11 there, he would talk to her.

12
13 103. He denied the alleged incident before the 11th November and the allegation of the 11th
14 November. He said that TG never asked him about her school socks on that day.

15
16 104. In response to questions from the Court he showed in photographs where he had been on the
17 bed, the Complainant's position beside him and the distance between the bed and the door.

18
19 **EVIDENCE OF "D"**

20
21 105. D gave evidence in chief by way of his ABE interview given on the 12th November 2020.
22 He was not cross-examined by the Prosecution neither was his evidence challenged in any
23 way.

24
25 106. He said that he came home from school on a bus around 3:30pm and went inside the house.
26 As he opened the door he saw his father who was getting ready to go to pick up his cousins.

1 “D” took off his clothes and went to take a bath. After he took the bath he came out of the
2 bathroom and went on his phone to look on some stuff. He put on his headphones and they
3 came (his three cousins). They put their stuff down and went to watch television. He went to
4 wash the plates.

5
6 107. He said TG changed her clothes, took a merino out of his drawer and went back to sit down
7 to watch television. He was washing the plates so he did not have time to look at them.

8
9 108. He saw when TG went into the bedroom and she came out *‘after some minutes [ago]’* and
10 came to make some cereal in the kitchen. He was still washing the plates. She made the
11 cereal and went back into the bedroom with it even though she is not supposed to eat in the
12 room. He finished washing the plates and went outside to feed the cats *“because there is a*
13 *cat that always comes and [there is] the dog outside’*.

14
15 109. He went back inside to drink some water and the two little girls were still watching television.
16 He went back outside to ride his bicycle. He rode up the road, and round the road about two
17 times and came back and saw their mother pulling up in her car. She spoke to him. She
18 parked the car and walked into the house. When she walked in he was still outside. He was
19 changing the music on his phone. He looked in the window and saw the two little girls and
20 after that he heard them screaming and saying, *“Mommy, Mommy”* so he ran inside and saw
21 his father and his aunt fighting. The two little girls were crying and TG was standing in front
22 of the door. His aunt was fighting his Dad and asking him why he did that. His Dad was
23 saying *“Stop Sis, it is not what it looks like”*.





1 110. After that they came out and his aunt went out to the car with the children. Dad had his
2 underpants on, so he put on his shorts and went outside to the car and told her “*Stop*”. His
3 aunt drove off and stopped at the part to go out the road. His Dad jumped over the fence and
4 told her “*Stop, don’t do this.*” He went out there to look and his Dad said “*You believe this?*”
5 His aunt drove off and they walked back inside. He said that he and his Dad were talking
6 and his Dad said that TG was in the room and she had his phone and her mother came into
7 the room and TG ran off and he grabbed her pants and it fell down and her mother said that
8 he was molesting her.

9
10 111. He gave further details as to what happened after his aunt fought with his father. He said that
11 his Dad put on his shirt and shoes and went back outside. His aunt came back, grabbed a
12 knife from the kitchen and wanted to stab his Dad. He held onto her hand and she left, and
13 threw the knife on the wall. He said that his father took up the same knife and said to his
14 aunt “*Kill me and done*”. His aunt threw a bottle at his father, they were cursing each other.
15 After some minutes his Dad got onto a bicycle and told him that he is not a bad person.

16
17 112. “D” said he was inside the house for a while and other persons came there, the father of TG,
18 and another person. That person approached him and punched him in his face. TG’s father
19 had a machete which he used to chop the windows of the house. After that he (“D”) went
20 inside and got some things and went over to his neighbour’s house.

21
22 113. He said that his Dad normally picks up his cousins from school because his aunt would ask
23 him to do so. When they come they would normally eat, play games, and watch television
24 until their mother comes for them. He said that when they came that day, they sat down on
25 the couch and watched television. That is the two little ones.

1 114. He said that TG does not want to watch what they watch so she goes into the other room to
2 watch television. She always takes his father’s phone to watch TikTok or look at something
3 but she has a phone for herself. She likes to play and give trouble, like hit him and her sisters.
4 She was in the other room watching television, like four minutes or so.

5
6 115. Before that when she was on the couch, she was playing with a balloon that one of the other
7 girls had and she burst it and the child started crying and his father came out and told them
8 to stop. Then she was in the room, she came out and made cereal and went back into the
9 room. This was the room that his Dad and stepmother sleep in. He said that his Dad was in
10 the same room with TG. He did not know what his Dad was doing. Normally he would say
11 don’t eat in his room but he did not know why his Dad did not say that yesterday. He said
12 his Dad never said. His stepmother did not like TG being in the room. TG does not really
13 listen to his Dad when he talks.

14
15 116. He heard his aunt say to his Dad, “*Why you never push her out the room if you did not want*
16 *her in the room.*”

17
18 117. He said that TG was wearing a grey or black shorts and the merino which she got out of his
19 drawer. She had on pants under her uniform.

20
21 118. When his Dad got back from picking them up, he was wearing shorts and shoes that he wears
22 to work, He said that his Dad had his underpants on, he always has his underpants on in the
23 room because the air conditioning is always on. When he is in there alone, he does not wear
24 a shirt. When he is sleeping he is in his underpants.





1 119. He said that TG and his dad are not normally in the room alone. When she goes in the room
2 she comes out *“like some seconds ago and to eat cause she likes to eat and stuff.”* His Dad
3 buys candy which they have when they visit.

4
5 120. If TG wants to go in the room she goes and sometimes she comes out and plays games. She
6 fights the others for the control. When they were in the room yesterday the door was closed
7 because the air conditioning was on. Normally his Dad or TG closes the door.

8
9 121. TG likes to run inside and lock the door when his father is out or in the bathroom. She runs
10 and locks the door because she likes to play and takes his phone up and plays with it. Because
11 the air conditioning is on they would close the door. He has heard his father say to her that
12 he does not like her playing with his phone. She does not say anything. She still plays with
13 it. His father does not really hit her. Sometimes his father grabs his phone from her and
14 sometimes she would give it back to him.

15
16 122. The younger ones don’t normally go in the room with his father just TG. He said he guessed
17 that the reason is because he (his father) does not want them to mess up the place. TG does
18 not listen when you talk to her, the others would listen.

19
20 123. He said that sometimes the younger ones would knock on the door and complain and ask for
21 something to eat and his Dad would tell him to give them something or fix something for
22 them.

23
24 124. He said that he did not know what was happening that afternoon. He was traumatized.
25 Everything that happened made him feel bad, because he felt like he was in the midst of this.
26 The guy punched him in his face and he does not know why.

27

1 125. His Dad was saying “*why would [I] do that?*” His Dad said that he grabbed TG by her pants
2 and her pants came off. His Dad said that TG likes to lie about some stuff. D said he feels
3 that this is true because sometimes TG has told a lie on him. He was asked to tell about that
4 experience when she told a lie on him. There was a long pause before he said he could not
5 remember. He then said that TG likes to do some stupid things, one time she threw a rock at
6 him, at his head.

7
8 126. D said that when he was leaving to go for a ride on his bike, he did not tell his Dad that he
9 was going for a ride. He does not normally tell him when he is going for a ride because he is
10 not going far.

11
12 127. When his Dad came out of the room, when TG popped the balloon, he was wearing his
13 shorts. He did not see him again before he went to ride his bike. His father normally wears
14 his shorts when his cousins come over. When he is in the room, he always wears his
15 underpants. When he comes out of the room in the area where his nieces are watching
16 television, he is not really in his underpants around them.

17
18 128. He said he remembered that after they had left, his father told him what happened and that
19 his father said that he is not a bad person. He also remembers him saying “*why would [I] do*
20 *that?*”

21
22 **CLOSING SUBMISSIONS**



23
24 ***The Prosecution***

25 129. The Prosecution submitted that the apparent inconsistencies are inconsequential and are not
26 such as to cause this Court to have a reasonable doubt in relation to the guilt of the Defendant.
27 It is said that the critical substance of TG’s evidence is unshaken.

1 130. In response to the submission that it would be wholly unrealistic to suggest that the
2 Defendant would act as alleged at a time when there were other children present in a very
3 small house whilst the bedroom door was unlocked with such a high possibility of detection,
4 the Prosecution's submission is that this is exactly what happened, and the mother opened
5 the door and walked in.

6
7 131. The Prosecution submits further that there are four reasons which would cause the Court to
8 be sure that the alleged activity took place:

9 i. TG's evidence was credible and reliable and there is no persuasive evidence
10 of any reason for her to make a false allegation against her uncle.

11 ii. The mother saw TG in the bedroom in a state of undress immediately after
12 the alleged sexual activity.

13 iii. TG told her mother what happened very soon after it happened and the
14 evidence of this previous complaint is evidence of the truth of the complaint.

15 iv. The Defendant's explanation as to what happened in the bedroom including
16 his denial of any wrongdoing is false and unbelievable and should be
17 rejected.

18 132. The Court was invited to say, having seen and heard TG that she was honest and forthright
19 in her answers and that she is a witness of truth. TG did not seek to embellish her account as
20 to what happened, when telling her mother. The Prosecution also point to the fact that there
21 is no evidence of any conflict between uncle and niece and that the indications are that they
22 had a good relationship.



23
24 133. It is argued that the timing and nature of the mother's observations are significant and that
25 these are as close as one can possibly get to being caught in the act.

1 134. It is also submitted that the account of the Defendant is unbelievable. Firstly, that he claims
2 that the Complainant rubbed her body on his penis and his response was to push her off and
3 doze off to sleep. Secondly, his suggestion that while holding her clothes and pulling her
4 back he managed to pull down her underwear almost down to her knees is not plausible or
5 believable.



6
7 ***The Defence***

8 135. The Defence submitted that the accounts of both “D” and the mother contradict TG’s account
9 in material ways and that there is independent medical evidence which also contradicts TG’s
10 account.

11
12 136. It is said that the account given by the Defendant in his interview has been supported by
13 evidence from the mother – which evidence he did not have the power to influence and could
14 have had no knowledge that it would have been given. The mother’s evidence is that upon
15 entering, the Defendant’s hand was outstretched towards the Complainant as if he was
16 grabbing at or had just grabbed at her.

17
18 137. It is further said that the mother’s account that when she entered the room she saw the
19 Defendant’s hand outstretched as if he was grabbing at TG is inconsistent with someone
20 engaged in the alleged activity who would wish to distance himself, upon someone entering
21 the room.

22
23 138. Counsel questioned why the Defendant would distance himself to give the false impression
24 that nothing was happening but then try to pull off the Complainant’s clothes in the
25 knowledge that a witness was entering the room. Counsel submitted:

- 1 iv. There would have been three children within meters of the bedroom door.
2 v. The door was closed and not locked.
3 vi. There was no attempt to muffle TG or silence her, nothing was said or done
4 to confirm or ensure that she would not make a noise.

5
6 143. Counsel submitted that while nothing is impossible, with witnesses close by, two of some
7 age and understanding, the mother shortly to arrive, the door closed but not locked, in
8 circumstances where the slightest noise raised from the bedroom would have been heard in
9 the tiny apartment it would be an affront to common sense that the Defendant would do such
10 a thing.



11
12 **ASSESSMENT**

13
14 144. I remind myself that the burden of proof is on the Prosecution to prove the case so that I am
15 sure of guilt before there can be a conviction for any offence. In coming to a decision I have
16 reviewed all of the evidence and taken it into account together with all the submissions made.

17
18 145. There are aspects of the evidence which are not in dispute. These include the following:

- 19
20 i. The age of the Defendant. He is 43 years old.
21 ii. The age of the Complainant. TG was twelve years old at the material time.
22 iii. The family relationships between the parties. The Defendant is the uncle of
23 the Complainant.
24 iv. On the afternoon of the 11th November 2020, the request to be picked up
25 and to go the home of the Defendant came from the Complainant TG.



- 1 v. While she was at the home of the Defendant, there came a point in time
2 when she was alone with the Defendant in his bedroom and the bedroom
3 door was closed but not locked. The reason for the entry is disputed. On the
4 Prosecution's case it was to ask about school socks. On the Defence case, it
5 was to eat her cereal and watch television in that room.
- 6 vi. The Complainant's mother arrived at the premises. Her arrival led to a knock
7 on that bedroom door.
- 8 vii. No one answered the knock.
- 9 viii. Mother opened the door of the bedroom.
- 10 ix. When the door was opened, the lower half of the Complainant's clothing
11 was pulled down. On the Defendant's case, it was just below her bottom.
12 On the mother's evidence, it was to just above her knee.
- 13 x. The Defendant was lying in bed covered with a sheet or blanket with one
14 hand outstretched towards the Complainant.

15
16 146. There are no eye witnesses to what occurred in the bedroom. The primary issue in this case
17 is the credibility of the Complainant. If I accept her evidence, the Prosecution submits that
18 the case is made out. The Defence submits that her evidence should not be accepted for a
19 number of reasons including inconsistencies in the evidence.

20
21 147. An important factual question for determination is why was her clothing down? Was it
22 because the Defendant had pulled down her clothing and touched her or was it because, as
23 he says, he had held on to her as she was running away from his bed with his phone.
24

1 148. I bear in mind with respect to the drawing of inferences that a tribunal of fact is entitled to
2 draw inferences from the facts as it finds them to be. Inferences are common sense
3 conclusions based upon the evidence which is accepted. The tribunal of fact is entitled to,
4 and should, draw inferences if it thinks that it is a reasonable, proper and common sense
5 thing to do. If the inference which is about to be drawn is adverse to a defendant, the tribunal
6 must be sure that that inference is the only correct one. If from a given set of facts, more than
7 one inference is possible, the tribunal must draw the inference which is more favourable to
8 the defendant.



9
10 **INCONSISTENCIES**

11
12 149. A number of inconsistencies in the evidence have been highlighted in this case. I remind
13 myself of the approach to be taken with respect to inconsistencies. In identifying an
14 inconsistency, the Court has to consider whether it is of significance or not and what
15 explanation, if any, is given for the inconsistency. The more significant or material the
16 inconsistency without a credible explanation, the less likely that the evidence will be
17 accepted. It may affect in an adverse way the view of the reliability of the evidence of the
18 witness. If an inconsistency is insignificant and explainable it will not have such serious
19 consequences.

20
21 150. It is for the tribunal of fact to decide what weight should be given to the evidence. The Court
22 can accept or reject all the evidence of a witness or may accept a part of what a witness says
23 and reject another part if it is considered that this is a reasonable thing to do.

24
25 151. It is accepted that there are a number of inconsistencies in the evidence in this case. These
26 are internal to the evidence of witnesses and between witnesses. They include the following.



1 152. TG gave evidence in her ABE interview that the Defendant touched her for some five
2 minutes. At another point in the same interview, she said that it was two minutes.

3
4 I do not consider this inconsistency to be of significance. Given the possible traumatic nature
5 of the incident and the age of the witness, I do not consider that differences in time are
6 material.

7
8 153. A second Inconsistency was that TG gave evidence that she went into the bedroom only once.
9 “D’s evidence is that TG went into the bedroom twice, the second time with her cereal. TG
10 said that she did not go into the bedroom with her cereal, she ate it at the dining table. “D”
11 said that TG eats in the room even though she is not supposed to. “D’s” account supports
12 that of the Defendant that TG came into the room with cereal. I shall discuss this
13 Inconsistency along with the third Inconsistency further below.

14
15 154. A third Inconsistency is that TG denied going into the room to watch television on occasion.
16 Both the Defendant and “D” said that TG does go into the room to watch television, because
17 she does not want to watch the same programmes as her younger sisters. The Defendant’s
18 evidence is that *Netflix* was not working on the television in the living room on that day.
19 Again, I shall discuss this Inconsistency below.

20
21 155. While the Prosecution did not seek to challenge “D” on any aspect of his evidence. Both
22 witnesses, “D” and TG cannot be correct. One is either mistaken or untruthful as to the
23 matters raised.

24
25 156. I do consider the significance of these inconsistencies in the evidence and how, if at all, they
26 affect my view of the honesty and reliability of TG. It is correct as Defence Counsel submits



1 that this will have a bearing on the central issues in dispute. The important question is not
2 only whether TG is or may be mistaken, it is whether she is lying about these because she
3 knows that eating cereal in the room or taking her uncle’s phone, were things that she should
4 not do and that she is scolded for doing them. This may also be a basis for her denying
5 regularly watching television in the room. These matters relate directly to the reason for her
6 being in the room and on the Defendant’s account as to the use of his phone, the reason for
7 her clothes being disarranged.

8
9 157. Counsel for the Defendant urged the Court to accept the evidence of “D”. Counsel submitted
10 that his evidence has the ring of truth and that a 16 year old would not have the sophistication
11 to know that entering the room more than once or commenting that TG regularly watched
12 television in the room could be relevant at any later trial. My own assessment of “D” and his
13 evidence was not all accepting. It is noted that his evidence was given after what he describes
14 as the traumatic events of the day before, and the aftermath of these events which he had
15 witnessed. He would have been alive to the serious allegations being made against his father.
16 It also followed on from his being told by his father what the father says happened in the
17 room. In my view, having assessed “D”, he would have realised that the reason for TG’s
18 entry into the room and the use of his father’s phone were important matters to his father.

19
20 158. Throughout his account, “D” appeared to me to be at pains to paint a picture of TG. He spoke
21 of her giving trouble, not listening to adults and taking his father’s phone on multiple
22 occasions. He spoke of her watching television in the room yet at another stage he said that
23 TG and his father are not normally alone in the room together. He speaks of TG usually only
24 spending “*some seconds [ago]*” in the room and that she comes out to eat. These answers
25 seemed inconsistent with TG regularly watching television in that room for any length of



1 time. Additionally, while he does give evidence which appears to be in some detail and
2 sequence, he speaks of the Complainant coming out of the room, getting her cereal and going
3 back into the room. There is no mention on his account of the other two girls. The
4 Complainant says that when permission was given to have the cereal, she shared it with her
5 sisters. This detail which he omitted is one which I accept as a truthful account from the
6 Complainant. The sharing could only have taken place in the kitchen/living room area where
7 “D” was. I am not confident that D’s evidence is entirely accurate and reliable. I am also not
8 confident, having assessed him, that D’s evidence is not coloured by a desire to help his
9 father, however unwittingly this may be.

10
11 159. “D’s” evidence, other than with respect to the entry into the room with the cereal, was general
12 as to what sometimes occurs. He cannot and does not purport to say what happened in the
13 room on this particular occasion, that is, whether TG was in fact watching television or not
14 or whether she had in fact taken up his father’s phone on that day.

15
16 160. TG readily answered yes to the Police that her uncle has a cellphone, that she had used it
17 before to watch TikTok and that it was on the bed beside him when she went into the room.
18 Similarly in cross-examination she agreed to the use of his phone in the past. It was striking
19 that there was no attempt by her to deny doing something (even in the past) which she knows
20 is discouraged by her mother. She maintained that she had not used his phone that day and
21 had not been eating her cereal or watching television in the room.

22
23 Overall, I found TG to be a forthright and honest witness. Where her evidence differs from
24 “D’s”, in respect of the reason for her entry into the room on that day, I accept TG’s evidence
25 over that of “D’s”.

1 161. A fourth Inconsistency is one I also find to be of some significance. It is the inconsistency
2 between TG and her mother as to when and where TG told her what occurred.

3
4 162. TG said that she had told her mother what happened while in the car. Mother said that TG
5 told her what happened while in the room.

6
7 163. The import of this is that if TG recounted what happened after they had left the room and
8 they were in the car; This would have been after mother expressed to the Defendant and
9 various family members by telephone her belief that the Complainant had been sexually
10 assaulted. Thus giving rise to the possibility that TG may have been influenced by what she
11 heard her mother say before she made the complaint.

12
13 164. At the start of the trial, I ruled that this evidence was admissible despite the identified
14 inconsistency. I did not find, as the Defence suggested, that the circumstances and reasoning
15 in the case of *R. v. Avery*⁶ were applicable. In that case there were a number of different
16 incidents and the child was denying telling the witness about one as distinct from the other.
17 In this case the child was asked about what happened in the bedroom. This was a single
18 incident, a single complaint and a single person told. As I said in that ruling I considered the
19 matter one of an inconsistency to be explored during the trial.

20
21 165. In assessing how this inconsistency is to be weighed it is noted that it was only shortly before
22 trial in April 2021, some five months after the incident that in a third ABE interview, the
23 Complainant was first asked about where and when she told her mother what had occurred.
24 This is regrettable. I have to consider that this is the memory of a 12 year old child and the



⁶ 2007 EWCA Crim 1830

1 possibility that some months on, her memory as to when and in what order events occurred
2 may not be accurate. She may be mistaken as to the location of the making of the complaint.

3
4 166. In the course of the trial the mother's evidence was clear that she was told by the child what
5 had happened while she was inside the house at the bedroom door and before she made calls
6 to other relatives.

7
8 *I do prefer the evidence of the mother as being more reliable over that of the child on this*
9 *aspect.*

10
11 167. The Defence have invited me to give no weight to this complaint because of the significance
12 of the inconsistency. I do not propose to give it any weight, more so for a separate reason. I
13 have in mind the usual principle, that while the statutory criteria may be met for
14 admissibility, the evidence of the complaint does not come from an independent source⁷.

15
16 **RELIABILITY AND CREDIBILITY OF THE COMPLAINANT**

17
18 168. In this case it is the reliability and credibility of the Complainant as to what took place in the
19 bedroom which is the critical question. Is she being truthful about this? In this regard, the
20 surrounding circumstances need to be examined with some care. I have to consider whether
21 the Complainant may have a motive to lie about what happened, because she had been in the
22 room eating cereal something that she was told not to do. Further if she had been playing
23 with the Defendant's phone, this again was something she had been told not to do and,
24 moreover, something that she would have been doing because of her mother's restrictions



⁷ See *R. v. AA* [2007] EWCA Crim. 1779



1 placed on her own phone. Is she telling lies to deflect attention from what she herself had
2 done wrong?

3
4 169. I consider also whether her account was suggested directly or indirectly by the mother
5 reaching conclusions upon entry into the room, that she had been sexually assaulted and even
6 after her complaint, repeatedly telling others about this in her presence. In other words even
7 at an earlier stage, did the behaviour and attitude of the mother impact or influence the child
8 and was this re-enforced thereafter.

9
10 170. In considering these questions, note is taken of the level of detail in TG's recounting of what
11 occurred. She said that:

12
13 - When she went into the room, Uncle Francis was not sleeping on the bed. He was
14 watching a movie.

15
16 - She asked him about the socks. He got up and sat at the end of the bed first.

17
18 - Then he closed the door.

19
20 - He was close to the door so he leaned over and pushed it closed. He did not stand up
21 to close it.

22
23 - After he closed the door, he then said that he had not seen them.

24
25 171. She then described how she came to be on the bed, how her clothing came to be down and
26 how she moved her legs to try to get away from him.

1 172. TG was firm as to the extent of what occurred. The mother gave evidence that she asked a
2 series of questions, was there penetration, did he ask you to touch him? TG replied no to
3 all these questions. The mother's questions which were repeated did not lead her to add to
4 what she had already said.

5
6 173. I was able to observe TG closely during her ABE interviews and in the course of cross-
7 examination. She was cross-examined in an age-appropriate but, nevertheless, probing way.
8 The case for the Defence was fully put to her. She engaged in the process and evidently
9 understood what she was being asked and the import of the questions and answers. Her
10 answers were clear and unequivocal. There is no evidence that TG is a suggestible child.

11
12 174. The Defence quite rightly highlight her behaviour before the alleged incident on the 11th
13 November. It is said that this is questionable. It is TG's evidence that the Defendant had
14 previously held her down and tried to remove her clothing. The date is unknown but at a
15 time when she was twelve years old, thus between April 2020 and November 2020. She
16 made no report as to this incident. No reason was given for her failure to do so.

17
18 175. Following this incident, she it was, who initiated contact with the Defendant on the 11th
19 November 2020 and asked if he could pick them up from school. She said that she was scared
20 of what he would do to her. Why would she have initiated contact to go to his house after
21 the first incident had occurred? Even if she did go to his house, in the company of her sisters,
22 on her own account she went into his room alone she says to ask about socks. It is correct as
23 the Defence submit that there is nothing in the evidence as to the events of that day which
24 suggests reticence around the Defendant.





1 176. I remind myself to be cautious about drawing assumptions as to how people should behave
2 and of the applicable directions as set out in Chapter 20 of the *Crown Court Compendium*
3 *Part 1* (July 2020) as follows:

4 *“Different people react to situations in different ways. Some people may tell*
5 *someone about it straight away. But others may not feel able to do so. This can be*
6 *out of shame, shock, confusion or fear of getting into trouble, not being believed, or*
7 *breaking up the family.*

8 ...
9 *A late complaint does not render the allegation untrue. Similarly, an allegation is*
10 *not necessarily true just because complaint was made about it immediately.”*
11

12 177. In this case, this is a 12 year old child in a family situation where, by all accounts, Uncle
13 loves his nieces and treated them well. He bought and kept sweets at his home for them and
14 was less strict than their mother. He usually had a brand of cereal at his home that TG liked.

15
16 178. Some insight into TG’s thinking came from her response to the further question from
17 Defence Counsel. She was reminded that she had said she was scared of the Defendant and
18 asked why it is that she was not scared to ‘wiggle’ to try to get him off her. She said that she
19 was not afraid to ‘wiggle’ because

20
21 *“If I wiggle nobody would hear but if I shouted out somebody would hear*
22 *it.”*
23

24 179. As I understand it, in her mind raising an alarm is what she should not do. It is the
25 consequence arising from her raising an alarm which made her scared of him.

26
27 180. It is said that the circumstances were such that it defies common sense that the Defendant
28 would have done as alleged. Firstly as to the timing that it was known that mother would be
29 arriving very soon to pick up the children. Secondly that as can be seen from the photographs

1 this is a very small house and there were three children in close proximity, two of whom
2 were older, aged 8 years and 16 years and likely to understand.

3
4 181. I have considered this aspect carefully. I do not take the view that this defies common sense
5 at all. The mother's arrival while being proximate, was not specific as to time or positively
6 imminent. On the Defendant's account, he arrived back home at about 3:30pm. He is not
7 certain of the time. He anticipated that his sister would be there to pick them up he says
8 before 5pm. Even if it was closer to 4pm that he arrived home, this is not an anticipated
9 arrival within a matter of minutes. I have also considered the circumstances detailed by
10 Counsel in light of:

- 11
12 i. The evidence of "D" and the Mother;
13 ii. The evidence as to the previous incident.



14
15 182. "D's" evidence was that:

- 16
17 i. The room door was usually closed because of the air conditioning.
18
19 ii. The younger children would not normally go into the room. If they were
20 hungry or needed something they would knock on the door. (Mother's
21 evidence is that on her arrival, it was one of the younger children who
22 knocked on the door.)
23
24 iii. It was TG who would usually go into the room.

25
26
27 183. In summary, on "D's" evidence, it appears that TG going into the room was not unusual but
28 would be unusual for the younger children. Additionally the younger children were occupied
29 in watching television and "D" in doing his chores. There is nothing to suggest that their

1 entry into the room would be immediate or more importantly that it would be unannounced.
2 While the Defendant said that he could not know what the other children were doing as he
3 had been in the room, on his own account, he had come out once when they were making
4 noise after the balloon popped.

5
6 184. Significantly, firstly, “D” also said that his father would normally tell TG to leave the room
7 with the cereal and that he does not know why he did not do so on this occasion. He said that
8 TG and his Dad are not normally in the room alone and that when she goes in the room she
9 comes out “*like some seconds ago*”. Yet with reference to this occasion he said that TG was
10 in the other room watching TV like some four minutes or so. It is not unreasonable to
11 conclude that on aspects of “D’s” evidence there was something different about this day.

12
13 185. Secondly, if the Complainant is truthful, the Defendant had pulled her down on the bed
14 previously and attempted to remove her clothing. The Defendant had faced no consequences
15 from, or inquiry about this, because she had made no complaint. If true, the reasonable and
16 inescapable inference is that he would be aware that she had made no alarm. Put another
17 way, the repeat nature of the conduct and the increased boldness of it would not be surprising
18 following on from the absence of previous complaint.

19
20 186. It was submitted that the mother’s evidence as to what she was told by TG supported the
21 Defendant’s’ version of events, i.e., that her clothing was pulled when she was trying to get
22 out of the bed and thus at the point when mother entered.



1 187. The mother's evidence was that TG said that when she was trying to get away from the bed
2 is when he grabbed hold of her pants, and, it must be, her underwear and everything at the
3 same time, and started to pull her clothes off when she was trying to get out of the bed so "*I*
4 *figure more or less that's the time I walked in.*"

5
6 188. It is clear from this evidence that the mother had placed her own interpretation on TG's
7 complaint, as to the timing of the removal of the clothing. The evidence of TG is that after
8 he pulled her clothes down he touched her. Thus on her evidence, her clothes were already
9 pulled down when the knock on the door came.

10
11
12 189. The outstretched arm of the Defendant as seen by the mother is also said to support the
13 Defendant's account. Mother agreed to the suggestion that the arm was extended as if he was
14 grabbing towards her or had just grabbed towards her. Again this was a question of her own
15 interpretation. In my view the outstretched arm is not inconsistent with the escape from the
16 Defendant as described by the Complainant. He had just come off her, he had been holding
17 her down and the knock on the door made him let her go.

18
19 190. It is also of note that no one answered the knock.



20
21 191. Defence Counsel referred to the agreed medical evidence that the examination's findings can
22 be used to exclude recent vaginal penetration in contrast to the Complainant's account that
23 he was rubbing both the outside and the inside of the vagina. Counsel submitted that there
24 was no clarification from the Complainant by use of a body diagram for her to describe what
25 she meant by inside. However the medical evidence was also that:

- 1 i. *The presence of recent genital injury is not required to validate evidence*
2 *of sexual assault as described by (T) (his hand touching her in her private*
3 *area); and*
4
5 ii. *The examination findings can be used to exclude recent vaginal*
6 *penetration.”*

7 192. There is specific reference to the account given by the Complainant and to “*touching her in*
8 *her private area*”. The doctor appears to draw a distinction between hand touching and
9 penetration. Consequently I do not find the medical evidence to be inconsistent with the
10 Complainant’s account such as to cast doubt on it. It is not inconsistent with touching in the
11 genital area. The Complainant is clear that penetration did not take place.

12
13 **ASSESSMENT OF THE DEFENDANT’S EVIDENCE**



14
15 193. While there is no burden on the Defendant to prove anything, he chose to give an account in
16 interview and in evidence on oath. If I accept his account as truthful or consider that it may
17 be true, in particular as to how her shorts and underwear came to be down, that would be the
18 end of the matter and the verdict would be not guilty.

19
20 194. While bearing in mind his good character and the effect thereof as stated above, I have
21 considered the whole of what he said in interview, the incriminating and exculpatory parts
22 of it in deciding what weight should be given to it and the whole of his evidence. I have
23 considered the consistency of the account given in interview with respect to his evidence on
24 oath. There were subtle differences in the account of the Defendant given in interview and
25 that in his evidence on oath. He said in his interview that after the Complainant started
26 rubbing herself on him, he pushed her off. When he pushed her off, she grabbed his phone
27 and ran off with it. He then grabbed her.



1 195. In evidence in chief he said that when he pushed her, she went further out and moved herself.
2 He kind of dozed off. She was there laying down. Shortly thereafter there was the knock on
3 the door and she jumped up with his phone and tried to run off.

4
5 196. In the interview there was no mention of his dozing off and the knock on the door came after
6 he grabbed her and her clothing was down. In his evidence he said that the knock on the
7 door came before TG jumped off the bed and tried to run with his phone. In summary in his
8 interview, his pushing her was what occurred immediately before she grabbed his phone.

9
10
11 197. More significantly, it appeared to me that he was alive to the fact that his explanation as to
12 how her clothing came to go down, rather than to be pulled across if he was pulling her back
13 towards him, required clarification. He spoke about the looseness of the shorts or pants, that
14 the Complainant had it for a while. He said that he was at a lower angle so that is the reason
15 that the clothing went downwards. He appeared to be at pains to say that he pulled while
16 lying on the bed, perhaps to ensure that this lower angle explanation was maintained. Yet in
17 the course of his giving evidence he spoke of laying back down when his sister entered the
18 room, indicating that there had been some movement upwards which depending on the
19 sequence of it would be inconsistent with his being at a lower angle.

20
21 198. In his evidence in chief he said:-

22 Q.: *How far, as you recall, how far did they come down*
23 *...*

24 A.: *Yes, about – when I pull it, it came down to about*
25 *right here at her butt cheeks. (Demonstrates)*

26 Q.: *As that occurs, what else was happening?*

27 A.: *Well, when I grab at her and I tried pulling her*
28 *back, her mom open the door, so when she open the*

1 door, that's when I realize that it was her mom
2 knocking, so I let her go because I didn't want she
3 start assuming which, when I let her go, I like lay
4 back in the bed. I still had the sheet over me
5 because I got up, I didn't get out of the bed any at
6 all I was still in the bed laying down.

7 Q. Pause there. As your sister comes in, is your
8 attention drawn to her or did it stay on your niece?

9 A. It was drawn to her because when she came in, as
10 what I say I drop back down. I lay back down and
11 she started saying, wey you doing bro, wey you
12 doing bro,

13 ...

14 A. Well her tights was still right here (demonstrates)
15 like as weh me say right here because I pull on it,
16 pull on her shorts and it – because I laying down
17 and she up.

18 The Court: So he is demonstrating just below—

19 Mr. Grimwood: What I saw was just below, towards the bottom of
20 the buttocks.”

21
22 199. It appears entirely inconsistent with the urgency of the moment of the attempt to retrieve his
23 phone that he would remain lying on the bed without some upward movement or without
24 lifting any other part of his body other than his hand.

25
26 200. Even if all these matters are put aside as minor matters or matters in respect of which he is
27 given the benefit of the doubt, there is the core element of his account to be considered, i.e.
28 the alleged manner of the displacement of the clothing.





1 201. I have noted the nature of the clothing and the built of the Complainant. She is not a lean
2 person. Even if it is accepted as within the range of probabilities that the under garment as
3 well as the outer loose fitting garment would be displaced by his action in grabbing on to her
4 from a lower angle as he said, how is it that in then pulling her backwards towards him, the
5 garments go in the opposite direction, downwards and further with these garments being
6 pants rather than for example a skirt, that both are dislodged from the waist not only in the
7 rear, but also from the front of her body and that they are also dislodged from between her
8 legs while she is in forward motion.

9
10 202. Put simply the stated manner of displacement of her clothing is impractical and does not
11 make sense.

12
13 203. The timing and sequence also seem unusual. If the Defendant is truthful, the Complainant
14 would have been beside him on the bed for some time. He was asleep. The Complainant
15 could have tried to quietly leave the room with his phone, while he slept. (This would have
16 been more consistent with her described conduct in the past, which is taking his phone while
17 he is out of the room or in the bathroom.) Instead on his account it is not until he is awakened
18 by a knock on the door that she attempts to leave the room with his phone.

19
20 204. His evidence as to the Complainant rubbing herself on his penis is surprising not least
21 because of his limited reaction to it. It struck me as having the clear ring of a falsehood
22 designed to explain away any physical contact between them and to blame the child. In his
23 interview he spoke of the child at 10 years old always coming into the bathroom on him
24 when he is bathing and his having to talk to her about it. He said that he did not tell her
25 mother because he did not want to get her into trouble and that he loves his niece and tries
26 to counsel her. All of this appeared to me to be evidence designed to paint a particular and



1 unsavory picture of the child in circumstances where he on his own account does not appear
2 to have acted with much decisiveness and adult authority.

3
4 205. Having considered the whole of his evidence, I did not find him to be a credible witness. In
5 particular I did not find him to be a credible witness on the critical issues as to what the
6 Complainant did in the room and how her pants or shorts and underwear came to be down.
7 His explanation appeared to me to be implausible in the circumstances described. Having
8 observed and assessed him carefully as he gave evidence, I was of the view that his
9 explanation was contrived. I did not believe him and reject his account as being untrue.

10
11 206. I am mindful that even if he gives an account which is untrue that does not mean that he is
12 guilty of the offences. He may have told untruths or embellishments for entirely innocent
13 reasons. I go back to the Prosecution's case. It is on this case that I must consider whether I
14 am satisfied so that I am sure.

15
16 207. Having assessed TC, the mother of TG, I find her to be an honest and reliable witness. I
17 accept her evidence while noting that at times as detailed above, she has placed her own
18 interpretation on what she has seen and heard. In particular I find her to be an honest and
19 reliable witness in respect of her evidence that on entry into the room, the clothing of TG
20 was almost to her knees and not to just below her bottom as the Defendant stated.

21
22 208. Having assessed TG and considered all of the evidence and circumstances I find her to be an
23 honest and reliable witness. In doing so I have taken note of her demeanour, this while
24 bearing in mind the need for caution in such matters. I have also taken note of the level of
25 detail which she provided in respect of each incident and the explanations which she gave. I
26 found her to be unreliable in respect only of timings as outlined above.

1 209. “D” said that he had been told by the Defendant that TG tells lies. He was asked whether
2 that is true and he said yes. He was asked to give any experience of that. He said that he
3 could not. He then spoke about TG doing stupid things such as hitting him in his head. The
4 picture of her which emerges even from “D’s” evidence is of a playful and active child not
5 of someone who tells lies.

6
7 210. It is admitted that further investigative inquiries were conducted at her school and behaviour
8 records obtained. There is nothing from this. While absence does not prove a positive, i.e.
9 the absence of signs of deceit is not evidence of the truth, there is nothing in the evidence to
10 suggest that the Complainant has lied in the past such as would detract from my own view
11 of her as a truthful and honest witness.

12
13 211. Where her evidence is inconsistent with that of “D”, I accept her evidence over that of “D”.
14 I find that she is not mistaken or lying when she says that the reason for entry into the room
15 on that particular day was to ask about her school socks for which she had been getting into
16 trouble at school. “D” cannot and does not purport to say what happened in the room. I accept
17 her evidence that she did on entry ask the Defendant about her school socks.

18

19 **CONCLUSION**

20
21 212. The conclusions are these.



22
23 213. In respect of the incident on the 11th November 2020, I accept TG as a witness of truth. I am
24 satisfied so that I am sure that she is telling the truth that she went into the Defendant’s room
25 to ask him about her socks, that she was not eating cereal in the room or watching television
26 that she was not playing with the Defendant’s phone or attempting to run off with it on that



1 particular day. While not decisive of the point, it is noted that mother saw nothing in her
2 hands on entry. She was seen using both hands to pull up her clothing.

3
4 214. I am satisfied so that I am sure that TG is telling the truth about what the Defendant did to
5 her, that he pushed her on to the bed, pulled down her clothing and touched her on her vagina.

6
7 215. I note the circumstances, the closed room in which they were together alone, this afforded
8 privacy, the Defendant was in bed, the sudden movements on the knocking of the door, the
9 fact that the underwear and pants of the Complainant were both off and the position of that
10 clothing as seen by the mother, which was to just above the knee. I find that the circumstance
11 of the position of the Complainant's clothing constitutes supporting evidence for the account
12 given by her. This was the Defendant almost being caught 'red-handed'.

13
14 216. I find that the touching of the Complainant's vagina constituted an activity which was sexual
15 in nature and that all the elements of the offence of Abuse of Trust as outlined above, have
16 been proven so that I am sure. These are that:

- 17
18 i. The Defendant was over the age of 18 years;
19 ii. He was in a position of trust towards the Complainant;
20 iii. The Complainant was under seventeen years old at the material time;
21 iv. The Defendant engaged with the Complainant in an activity that is sexual in
22 nature;
23 v. That he intentionally did so.
24 vi. For the avoidance of doubt (should it be necessary) I indicate that I also find
25 that given the response of the Complainant, she did not consent to the

1 activity and that the Defendant could not have and did not honestly or
2 reasonably believe that she was consenting to the activity.

3
4 217. I give separate consideration to the allegation as to the prior incident. In respect of this
5 incident TG said that her sisters were outside playing, she had hurt her foot and did not go
6 outside with them as they wanted to play football. I find that the Complainant has not made
7 this up whether on her own or as a result of anything suggested by her Mother. I accept her
8 account as a truthful one. The inescapable inference is that the Defendant seized an
9 opportunity to engage in activity with the Complainant while the other children were outside.
10 I am satisfied so that I am sure that the activity occurred at the place and in the manner
11 described by the Complainant.

12
13 218. I have considered whether the activity was sexual in nature. TG's evidence is that he placed
14 her on the bed. He went on top of her and was holding her down. He started to take off her
15 clothes. Although the United Kingdom statutory regime for defining activity of a sexual
16 nature with respect to the offence of Abuse of Trust is different in some respects, I have
17 considered the references made thereto in the *Archbold* as above stated and in *Blackstone's*
18 *Criminal Practice 2021*, paragraph B 3.57. This is as to the approach when determining that
19 an activity is sexual in nature. In this case I consider firstly that the nature of the activity,
20 attempting to remove her clothing may be sexual in nature. Secondly I consider the
21 circumstances of the attempted removal, in a bed, holding the Complainant down and what
22 must have been the clear purpose of the Defendant in endeavouring to remove that clothing.



1 219. I find when all these matters are taken together that the activity was in fact sexual in nature.
2 I am therefore satisfied so that I am sure that all the elements of the offence of Abuse of
3 Trust have been made out i.e. the formal elements listed above, and that the Defendant
4 engaged with the Complainant in an activity that is sexual in nature and that he intentionally
5 did so.

6
7 220. Again for the avoidance of doubt I indicate that I also find that given the response of the
8 Complainant, she did not consent to the activity and the Defendant could not have and did
9 not honestly or reasonably believe that she was consenting to the activity.

10
11 221. I conclude in respect of Counts 1 and 2 of the Indictment that the Defendant is therefore
12 guilty as charged and I so find.

13
14 **Dated this the 7th day of July 2021**



15
16 **Honourable Justice Cheryll Richards Q.C.**
17 **Judge of the Grand Court**

18
19
20
21
22