

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

3
4 **INDICTMENT NO: 0044/2021**

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7
8 **THE QUEEN**



9
10 **v.**

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12 **KAJP**

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15 **Appearances:**

Mr. Kenneth Ferguson for the Crown

16
17 **Mr. Crister Brady of Brady Attorneys for**
18 **Defendant**

19
20 **Before:**

Justice Marva McDonald-Bishop (Actg.)

21 **Trial by Judge Alone:**

20 – 22 October 2021

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26 **HEADNOTE**

27 *Criminal Law – Indecent Assault on a Female*
28 *– Section 132(1) of the Penal Code (2019 Revision)*

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31
32 **VERDICT JUDGMENT**
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1. Section 12 of the *Youth Justice Act* (2019 Revision) states:

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

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

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

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

For the avoidance of doubt: An order pursuant to s.12(1)(a) and (b) above is herein made – with the consequences set out in s.12(2) to follow should there be a breach of this Order.

2. Section 31 of the *Criminal Procedure Code (CPC)* (2019 Revision) deals with the

“Anonymity of complainants in rape etc. cases and states:

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

For the avoidance of doubt: It is the Court’s view that the charge of Indecent Assault falls within this section of the Act by virtue of the use of the word “etc.” and therefore I herein make an order in the terms of the wording of s.31(1) of the *CPC* as above.

1 The name of the Defendant is also anonymized for this judgment in order to protect the
2 identity of the complainant.

3 3. The accused is charged on a single-count indictment with Indecent Assault, contrary to
4 s.132(1) of the **Penal Code** (2019 Revision). The complainant is his eldest daughter
5 and is referred to in the indictment as "Child A".

6 4. The particulars of the offence are that on 16 June 2021, at a disclosed address in Grand
7 Cayman, Cayman Islands, the defendant indecently assaulted "Child A", aged 11, by
8 touching her breast and vagina.

9 5. The accused pleaded not guilty to this charge.

10 6. He subsequently elected trial by judge alone, pursuant to s.129 (1) of the **Criminal**
11 **Procedure Code (CPC)** (2010 Revision). Therefore, the task is solely mine, having
12 heard all the evidence, to say whether the accused is guilty of the charge laid against
13 him.

14 7. In executing my task as the sole judge of law and fact, I am guided by the oft-cited
15 pronouncements of the Cayman Islands Court of Appeal (CICA) in **K. Richards v R¹**,
16 and **Randy Martin v R²**, regarding the approach that a trial judge sitting alone should
17 take in these trials.

18 8. In **Richards**, the Court stated:

19 *"When a trial judge sitting alone has advised himself of the applicable principles*
20 *of law and given himself any necessary warning, he must indicate clearly in his*
21 *judgment his reasons for acting as he did, in order to demonstrate that he has*
22 *acted with the requisite degree of caution in mind and has therefore heeded his*
23 *own warning. No specific form of words is necessary for this demonstration. "What*



¹ 2001 CILR 496 paragraph 32

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

1 *is necessary is that the judge's mind upon the matter be clearly revealed": see R v*
2 *Simpson (15) [1993] 3 LRC at 641, per Downer J.A.)."*
3

4 9. Similarly, the Court directed in **Randy Martin**:

5 *"A judge sitting in a criminal case without a jury, in rendering his decision and*
6 *giving his reasons for so concluding is not required to review every fact and to*
7 *detail each argument on which the prosecution and defence rely as if he was*
8 *summing up to a jury. The judge must set out the conclusion reached and make*
9 *clear the reasons for arriving at that conclusion. He is required to have regard to*
10 *any difficult or unusual points of law and to show how those points of law have in*
11 *any way impacted the conclusion that he has reached."*
12

13 10. Against this background, I have reviewed all the evidence that has been properly
14 adduced in accordance with the relevant principles governing my role as judge of the
15 fact. However, in demonstrating how I have arrived at my verdict, I have no intention
16 to detail all the evidence minutely and to decide every single point that has been raised.
17 Therefore, for the purposes of my analysis, only those salient facts that are
18 determinative of the question of whether the accused indecently assaulted the
19 complainant will be particularly highlighted.

20 11. The burden of proof rests on the prosecution, and that burden never shifted throughout
21 the trial. Therefore, the accused has nothing, at all, to prove. Before I may properly
22 convict him, the prosecution must prove all the elements of the offence to the extent
23 that I am sure of his guilt. Accordingly, I am duty-bound to give the accused the
24 benefit of any doubt I entertain on the evidence and to acquit him if I am not satisfied
25 to the extent that, I am sure. He has given sworn testimony in his defence, and I am
26 obliged to treat his evidence in the same manner, with the same respect and standard of
27 fairness that I have employed in treating with the evidence of the prosecution
28 witnesses.



1 12. Additionally, I have paid close attention to all relevant matters to show whether the
2 offence charged in the indictment is proved to have been committed in law and fact. I
3 have also taken into account those matters that go to the credibility, reliability, weight
4 and cogency of the evidence of each witness. These include, in the main,
5 contradictions or conflicts in the form of inconsistencies and discrepancies. I have also
6 taken into account omissions and inaccuracies. I have directed myself on the law
7 applicable to treating with these matters. This approach in the assessment of the
8 evidence applies to the case for the prosecution and the defence.

9 13. The evidence, in this case, was adduced by different means, which were:

10 i. the video recorded ABE interview of Child A;

11 ii. the video-recorded interview of the accused;



12 iii. the *viva voce* evidence adduced via video link and in open Court; and

13 iv. formal admissions. Each item and form of evidence has been treated in the manner
14 prescribed by law.

15 14. In this regard, the evidence given by video-recorded interview and by video link must
16 be treated as if the witness had appeared in open Court and given direct oral evidence.
17 The formal admissions are accepted as conclusive evidence of the facts admitted in
18 them. Accordingly, those facts are all taken into account in arriving at my conclusion,
19 even though I have not expressly repeated them verbatim.

20 15. In recognising that the case against the accused turns wholly on the credibility and
21 reliability of the virtual complainant, Child A, her evidence was subjected to

1 microscopic scrutiny and assessment. My observation and evaluation of her demeanour
2 were crucial in this exercise.

3 16. Finally, I have had due regard to the helpful submissions of Counsel for both the
4 prosecution and the defence. I have considered all they have urged on me, although
5 everything may not be expressly stated in my consideration of the review and analysis
6 of the evidence.

7 **THE CASE FOR THE PROSECUTION**

8 17. I will now begin my review of the evidence with a summary of the prominent aspects
9 of the prosecution's case.

10 18. The prosecution called three witnesses, Child A, her mother, and the lead investigator,
11 Detective Constable Adrian Savoury. The prosecution also adduced the accused's
12 video-recorded police interview and formal admissions made under s.34 of the
13 *Evidence Act*.



14 Child A

15 19. The complainant gave evidence in her ABE interview, which was permitted to stand as
16 her examination-in-chief. In summary, it was to this effect. At the time of the alleged
17 incident, on 16 June 2021, she resided with her parents and siblings at a two-bedroom
18 apartment in Grand Cayman. At some point, close to midnight, she was in her
19 bedroom that she was sharing with two of her siblings - an older and a younger
20 brother. Her two brothers were in the room with her. There were two sets of bunk beds
21 in the room. She was alone on one bunk while her brothers were together on the other
22 set of bunk beds. She was waiting for her brothers to go to sleep because she got in
23 trouble because of them when she was on her phone and not sleeping. They eventually

1 fell asleep. She could not sleep, and so, she was on her phone. She had a blanket over
2 the top bed that fell like a curtain over the bottom bed on which she was lying. The
3 blanket was used to block out the light as she could not sleep with the lights on. She
4 also used the blanket to prevent others from seeing her while she was lying on the bed.
5 There was a Christmas light (white bulb) on the side of her brother's bed that was on.

6 20. Whilst in her bed, the accused entered the room. He first checked if her brothers were
7 asleep. He then came over to her bed, and "then he opened the blanket" that fell like a
8 curtain from the top bed. He lifted the blanket "a bit" to see who was there. She was
9 pretending as if she was asleep, but she "peeked" at him through the corner of her eyes.
10 The accused did not know that she was awake because she was pretending to sleep. He
11 came over to her bed and lifted the blanket. He started touching her breasts and
12 vagina. The accused pushed his hand under the bottom of her shirt to touch her breast,
13 and he slid the shorts from the top, then moved his hand down and touched her vagina.
14 While he was doing so, she was moving to the side and then she turned, kicking his
15 hand, pushing him away and kicking him in his stomach. He tried not to get hit, but
16 she "always had [a] good aim". She punched him "right in the middle of the stomach".
17 They said nothing to each other during the encounter. The incident lasted for 30 to 40
18 minutes. It ended after she kicked "him a lot in the same spot", which she believed
19 might have hurt him, causing him to stop. He then left for his room.

20 21. The accused had turned off the light on her brothers' side of the room, but she could
21 not remember when he did so. She knew he was the person who entered the room
22 because she saw "a big fat figure" and the place was quiet. She had heard him in the
23 house before he entered the room.





1 22. On 17 June 2021, the following day, she made a report to a female counsellor at her
2 school. Apart from the school counsellor, she told no one else. She did not tell her
3 mother, but she does not remember the reason for not doing so.

4 23. She does not want to disclose if anything like that has happened before.

5 24. The complainant was cross-examined, and the following are the significant aspects of
6 the evidence elicited by counsel for the defence.

7 25. When she made the report to the police on 17 June 2021, that was not the first she was
8 reporting something to the police about the accused. In February 2021, she told the
9 police that he had been raping her since she was 7 or 8 years old. She does not want to
10 speak about what she said happened that she had reported in February.

11 26. She agreed that in February, when she spoke to the police about the accused, she was
12 caught at school sharpening a piece of a protractor. She knew she was not allowed to
13 have weapons at school and believed she would have been in trouble for having the
14 sharpened protractor. She was taken to the school counsellor, to whom she spoke about
15 what the accused had done to her. The school counsellor then took her to the police.
16 She told the police that she wanted the protractor to herd chickens, but that was not
17 true. She had sharpened the protractor because she was being bullied at school and
18 wanted it to defend herself.

19 27. She lived with her paternal grandaunt (regarded as her father's mother and her
20 grandmother) for a while after the report was made to the police in February. She
21 enjoyed living with her grandaunt but did not enjoy it more than living at her home.

22 28. She agreed that she told the school counsellor that she and another girl, who I will refer
23 to as "Child X", were intimate friends. She would spend a lot of time communicating



1 with Child X on her phone, and sometimes Child X would sleep at her house. When
2 her father discovered the relationship between Child X and her, he was not happy
3 about it. He took away her phone at some point.

4 29. In February, before she made the report to the police, she had an altercation with her
5 elder brother about a phone that she was sharing with him. The accused was upset with
6 them and yelled at both of them.

7 30. The second time she went to the counsellor in June and reported the current allegations
8 against her father, she was to have been in science class. Instead, she went to see the
9 counsellor to avoid attending science class.

10 31. She has had inappropriate conversations with boys, but she knew no one named
11 "Sense".

12 32. While staying with her grandaunt, no one was monitoring her phone, and she was able
13 to talk to Child X and boys without restriction.

14 33. She says she has not lied about the accused assaulting her because she wanted to be
15 away from him so that he could not monitor her phone. She disagrees that she was not
16 happy when her father was around because she wanted to be free to do whatever she
17 wanted to do on her phone. She denied that she had fabricated the allegations against
18 the accused because she was caught in school with a weapon and wanted to get out of
19 trouble.

20 34. She agreed that her father would come to the room to check on her phone at night. She
21 insisted that she spoke the truth when she stated that he touched her breasts and vagina.
22 She also spoke the truth about what the accused did when she told the police in
23 February.

1 35. She bit the accused on his arm when he was touching her on 16 June.

2 36. She had discussed the matter with Child X before she decided to say anything to
3 anyone. However, she cannot remember when she had those discussions with Child X.

4 Child A's mother

5 37. Child A's mother was called and primarily tendered for cross-examination. Her brief
6 evidence in chief and on cross-examination was, basically, to the following effect.
7 Child A is the eldest girl. She and the accused have been married for 13 years, and he
8 helps her a lot with the children. There is a good relationship amongst her children, the
9 accused and her. The accused does not treat his children differently. He is the one who
10 will make them do whatever they want to do. She is the stricter parent. Child A is the
11 hardest child to deal with in respect of her chores. She is, nevertheless, a nice girl who
12 they support with everything. She started to change, however, over time as she started
13 to associate with different classmates.

14 38. Child A was close to the accused when it came to any problem she had. She has not
15 had any experience with Child A not telling her the truth.

16 39. In February 2021, she learnt for the first time that Child A had alleged to the police
17 that the accused had been raping her since she was 7 or 8 years old. Those allegations
18 led to the separation of the family as Child A was taken to live elsewhere. She did not
19 have to come to Court regarding what was reported in February. On 17 June 2021, she
20 was made aware by the police of the allegations that are the subject of these
21 proceedings.

22





1 Detective Constable (DC) Andre Savoury

2 40. DC Savoury was the only police witness called by the prosecution. At all material
3 times, he was attached to the Family Support Unit of the RCIPS. He was the lead
4 investigator. On 17 June 2021, he spoke to the accused concerning the allegations
5 made by Child A. He arrested and charged the accused, who made no statement upon
6 being cautioned.

7 41. On 18 June 2021, he searched the accused and recovered some items from his person,
8 including two mobile phones - an iPhone8 and a Samsung. The accused gave him the
9 phone numbers but did not give him passwords for the phones at that time. The
10 accused subsequently gave him the passwords after the police interview was conducted
11 with the accused on 18 June 2021. DC Savoury also collected a phone from Child A's
12 guardian that belonged to Child A. The phones were later submitted for forensic
13 examination. He obtained reports for all three phones from the forensic examiner. The
14 reports were subsequently submitted to the Office of the Director of Public
15 Prosecutions.

16 42. He did not obtain a statement from the school counsellor as she declined to provide
17 one on the basis that she had resigned from her job at the school and was returning to
18 the United Kingdom.

19 43. DC Savoury was cross-examined. The material aspects of his evidence on cross-
20 examination were as follows: Child A had made a previous allegation against the
21 accused in February 2021, but no charges were laid against the accused.

22 44. Part of the complainant's allegations concerning the June incident was that she had
23 punched and kicked the accused. However, he did not observe any bruising, bite or

1 scratch marks on the accused. He did not look for those things. He did not see any
2 signs of violence when he saw the accused.

3 Formal admissions



4 45. These relevant facts were formally admitted:

5 i. The complainant made a report to the school counsellor about the alleged incident
6 on Thursday, 17 June 2021.

7 ii. DC Savoury recovered some items from the accused, including a red thumb drive,
8 a black iPhone8 and a black Samsung. The accused provided the telephone
9 numbers for the phones.

10 iii. DC Savoury subsequently obtained the complainant's mobile phone from her
11 grandaunt, with whom she resided since 17 June 2021.

12 iv. On 18 June 2021, police personnel and a social worker spoke to two siblings of the
13 complainant. No useful information was obtained from the children.

14 v. Upon analysis of the complainant's phone, no internet browser history or book-
15 marked websites were recovered. 152,945 images and videos were recovered from
16 her mobile phone, but none contained Child Sexual Abuse Material (CSAM).

17 vi. No extraction was obtained from the accused's iPhone8 because it was stuck in
18 recovery mode.

19 vii. No relevant material was recovered from the Samsung phone, and none of the
20 media viewed contained CSAM.

21



1 *The accused's police interview*

2 46. The prosecution admitted into evidence, without objection, the accused's videotaped
3 police interview and the transcript of it. In that interview, he gave an account for his
4 time at home after returning from work at about 9:30 p.m. on 16 June 2021 until he
5 departed for work the following morning.

6 47. In summary, the accused stated that after he got home and assisted his wife, at about
7 9:45 p.m., he checked on the children in the room where Child A was. The children
8 were asleep. He spent about 2-3 minutes in the room, but he did not touch or disturb
9 any of them. He later went to bed with his wife.

10 48. Child A is not speaking the truth when she said he touched her breasts and vagina
11 during that night.

12 49. He does not know what caused these allegations the second time because he was
13 helpful to the police the first time when allegations were made against him in February.
14 He was the one who had to follow up with the police for information regarding those
15 allegations and even suggested that the complainant consults with a psychologist.

16 50. He does not know if Child A is spiteful towards him because she has a "bit of a
17 vindictive attitude". However, he noted several matters that he says he wants to "put
18 out there" and which he seemingly believes could account for the complainant's
19 allegations against him. In summary, they are as follows:

- 20 i. A few days before the February report to the police, he had an argument with Child
21 A concerning a phone he had given her that she messed up. She started sharing a
22 phone with her brother, and they had constant fights over the phone. On one

1 occasion, he got frustrated and "basically exploded in a sense" and argued with
2 them. A day or two after that, she made the February report.

3 ii. His relationship with the complainant was excellent, and then her conduct
4 changed. She started to be rebellious. She started watching devil-type stuff and a
5 lot of anime videos, including pornographic anime. She started watching "dark side
6 things", like Gothic-type stuff on videos and Netflix. When he found out, he
7 limited her access to her devices.

8 iii. After the incident in February, he found out that Child A had a friend at school,
9 Child X, who is about 14-15 years old. He had concerns about Child X's
10 interaction with the complainant. He did not like her being close to his daughter
11 because she was involved in the same devil-like things that he saw the complainant
12 engaged in.

13 iv. Child X had also reported to him that her uncle raped her; she was bisexual and
14 was in a relationship with Child A. As a result, he stopped Child X from coming
15 over to his house, and he started to monitor the complainant's device.

16 v. He observed that the complainant has been doing sexual favours and sending
17 sexually explicit pictures to an adult male in the United States that he disapproved
18 of. The complainant deleted the messages from the phone.

19 vi. A week before she made the allegations in June, he opened her phone, and she
20 grabbed it from him and would not speak to him. He took the phone away for
21 about a week. Then, he returned the phone because he needed to communicate
22 with his children when they were on the road.



1 vii. He spoke to the complainant about what he saw and told her he did not like those
2 things happening.

3 viii. He monitors her phone and that of his eldest son two to three times a week.

4 ix. In the same week of June, in which Child A made the report, there was a big
5 family argument with his wife about the complainant and her devices and not
6 doing her chores around the house.

7 x. Only since Child X has "come into the picture" has the complainant started acting
8 this way. He believes Child A is echoing things told to her by Child X that had
9 happened to her. He believes Child X is influencing the complainant adversely and
10 is behind the ordeal he is experiencing.

11 51. The accused stated further that his wife told him about the February report to the
12 police. The police have not told him about the report. The complainant stayed with
13 her grandmother for weeks and then returned to their house on the advice of the Multi-
14 Agency Safeguarding Hub (MASH). After she moved back in, the relationship
15 between them got better. He did not hold what she did against her.

16 52. He is a family man who works hard for his children, and one of his fears is to lose
17 them.

18 **THE DEFENDANT'S CASE**



19 53. After an unsuccessful no-case submission made on his behalf, the accused elected to
20 give sworn evidence. He called no witnesses. He adopted the contents of his police
21 interview, although he repeated some of the matters contained in it in his examination-



1 in-chief. The following is a synopsis of the core components of his *viva voce* evidence
2 given in open Court.

3 54. The accused spoke to the emotional toll the allegations have had on him given the type
4 of person he says he is, one always providing for his family and helping everyone.

5 55. He testified that the relationship between the complainant and him was good until this
6 year. The complainant would always confide in him. He has had a good relationship
7 with all his children. He does not treat them differently and tries to be fair in his
8 treatment of them. A day or two before the first allegations were made against him in
9 February, there was an argument about a phone that the complainant and her elder
10 brother were sharing. They were quarrelling, and he yelled at them.

11 56. When the February allegations arose, the police did not speak to him about them. It
12 was his wife who told him about the allegations, and he visited the police to find out
13 what was happening. He was in shock, and they did not divulge anything to him even
14 though he asked for information. He was brought into MASH in February and told the
15 case was going to be closed. The police advised him to go home.

16 57. She subsequently came back home, and she was kind and loving because she wanted
17 something from him, which was for him to meet Child X. He gave in to her demands
18 and met Child X. Sometime later, he discovered the real nature of the friendship
19 between Child A and Child X. That brought everything into context. The complainant
20 started to show changes in her behaviour. She began to get into Gothic type stuff and
21 started watching 'demonic stuff'. When he discovered the nature of the friendship
22 between Child A and Child X, he stopped Child X from coming over to his house.
23 Child X kept messaging the complainant and telling her she hated him.

1 58. When the complainant was not living in the house with him, she had her phone, and
2 when it was taken for testing by the police, she told him that she was dying without her
3 phone.

4 59. At no time did he touch the complainant inappropriately, and it is "absolutely not true"
5 that he raped her or indecently assaulted her.

6 60. The accused was cross-examined. He testified that although he was aware of the
7 relationship between the complainant and Child X and that the complainant was
8 conversing with an adult male online and watching inappropriate material, he did not
9 report it to Social Services. Neither did he seek the intervention and advice of the priest
10 of the church his family attended. He only told his wife. He sought no professional
11 help to deal with the issues regarding Child A because he felt he could handle the
12 situation in the family. He disagreed with the suggestion that because he was aware of
13 the complainant's "proclivities", he indecently assaulted her.

14 61. Upon re-examination, he stated that Child A and Child X had admitted to him that their
15 relationship had started sometime before the report of the first incident in February.

16 **SUBMISSIONS**



17 *The Prosecution*

18 62. Mr Ferguson's submissions for the prosecution may be summarised as follows.

19 63. The central issues are the credibility and reliability of Child A. There is no other
20 evidence for the prosecution except that of the complainant. The accused's evidence
21 must be weighed in the balance.

1 64. The complainant's interview was not destroyed by cross-examination except in one
2 principal area – the absence of evidence that the accused had physical interaction with
3 her. Within 12 hours from the time of the alleged assault, the accused was seen by the
4 police, who were aware of the allegations of Child A. However, they did not consider
5 it necessary to inspect the accused closely. The Court will have to take that into
6 account in assessing Child A's credibility.

7 65. It should not be alarming that Child A did not confide in her mother regarding the
8 incident because, as the Court is aware, different victims react differently in sexual
9 offence cases.

10 66. The defence presented by the accused can be looked at in different ways. First, a
11 reasonable jury, noting the type of relationship between the accused and his children,
12 including Child A, would ask why she would seek to make such serious allegations of
13 this nature to get out of the house. Secondly, as a father of an 11-year-old child, why
14 did he not seek professional intervention when he discovered that she was making
15 decisions that she was not at an age to make, such as having a relationship with Child
16 X and inappropriate contact with an adult male in the USA. Even though the accused
17 appears to be a loving father and provider, his attitude towards Child A's alleged
18 conduct, having regard to her age, defies logic. A rational, productive, loving parent,
19 having been aware of the matters he told the Court of, would have acted more
20 responsibly. It is suggested that he knew Child X's proclivities and sought to take
21 advantage of them.

22 *The Defence*



23 67. Mr Brady's submissions, in response, were in these terms.



1 68. This case is about credibility. For the second time, Child A has made very serious
2 allegations against her father. The first allegation was most serious – made against a
3 parent who, on the evidence, plays an active role in the lives of his children. What the
4 complainant has said is troubling as there is nothing to prevent her from making further
5 allegations. The police concluded their investigations in the first allegation, and there
6 were no charges against the accused. Therefore, the police must have believed there
7 was no basis on which to charge the accused.

8 69. The Court must consider what the complainant's motive is. The question is whether she
9 wants to be away from monitoring and supervision of the accused so she can pursue an
10 inappropriate friendship and other activities not appropriate for her age. Could it be
11 that making a report of sexual molestation against her father might be the way to avoid
12 supervision? The Court has to consider this in the absence of evidence that supports
13 her allegation, especially against the background of the accused having given evidence
14 and exposed himself to cross-examination. In addition, the demeanour of both parties
15 must be looked at.

16 70. The Court cannot be sure that these proceedings are not the vehicle through which the
17 complainant is seeking to be separated from her father's supervision.. Even though she
18 is a brilliant child, she may not be fully aware of the consequences that could flow
19 from making such serious allegations.

20 71. Furthermore, there is an absence of evidence of physical contact. There is no evidence
21 before the Court that the sort of violence reported by the complainant took place. Even
22 though the law requires no corroboration, the Court, wearing its jury hat, must look to
23 what the complainant said in evidence regarding the touching that she said lasted for
24 30 to 40 minutes.

1 72. The police would have been aware of the ABE interview and, given the complexion of
2 the accused, the police would have noticed if there were injuries. If the complainant is
3 to be believed, there must be some evidence of trauma that would be apparent at the
4 interview. There was nothing.

5 73. The accused had not been shaken in cross-examination. In all the circumstances, the
6 Court cannot be sure. The account given is such that this Court would have a cause for
7 pause. Child A's account is not sufficient to make the Court feel sure. Therefore, the
8 proper verdict should be not guilty.



9 **THE APPLICABLE LAW**

10 74. In establishing the offence of Indecent Assault as a matter of law, the prosecution must
11 prove each element of the offence to the requisite standard. The elements to be proved
12 are:

- 13 i. The accused intentionally assaulted the complainant;
- 14 ii. The assault or the circumstances accompanying it are capable of being considered
15 by right-minded persons as indecent; and
- 16 iii. The accused intended to commit such an assault.

17 75. There is no dispute in this case that the allegations, if true, would satisfy the
18 requirements of the law as it relates to proof of the constituent elements of the offence
19 of indecent assault. There is no question that the alleged touching of the breasts and
20 vagina of the complainant, if true, is an assault capable of being considered by right-
21 minded persons as indecent. There would also be no question that such touching as
22 described by the complainant would have been intentional. Furthermore, consent

1 would not be a material consideration given the complainant's age, although no such
2 defence is raised. Accordingly, all the constituent elements of the offence would be
3 proved on the evidence as a matter of law.

4 76. The only issue for the Court's determination is whether, as a matter of fact, the accused
5 touched the complainant on her breasts and vagina on 16 June 2021 in the
6 circumstances she described.

7 77. As already noted, this critical issue can only be resolved on the Court's view of the
8 credibility and reliability of the virtual complainant and the accused. As already
9 established, the prosecution must satisfy me to the extent I am sure of the accused's
10 guilt. Therefore, even if I do not believe the accused, I cannot convict him simply
11 because I do not believe him. I am duty-bound, having considered his evidence, to look
12 back at the prosecution's case to ascertain whether, on the totality of the evidence
13 adduced by the prosecution, having taken into account the evidence of the accused, I
14 am satisfied to the extent that I am sure that the accused committed the offence
15 charged.

16 78. In my assessment of the prosecution's case, I have taken particular note of the
17 complainant's age as my starting point. In assessing her reliability and credibility
18 against the background of her age and level of maturity, I am guided by the
19 enlightening statements of Lord Chief Justice of England and Wales in *R. v B*³. The
20 case involved the sexual assault on a three-year-old child. The Court addressed what it
21 regarded as the essential point in the appeal, which was "the principles which apply
22 nowadays when young children give evidence in criminal trials".

³ [2010] EWCA Crim 4





1 79. By referencing some older authorities, the Lord Chief Justice observed at paragraphs
2 33 and 36:

3 "33. Many accreted suspicions and misunderstandings about children and their
4 capacity to understand the nature and purpose of an oath and to give
5 truthful and accurate evidence at a trial have been swept away.

6 36. The result of a complex legislative process is that the old misconceptions
7 no longer apply and have no relevance in England and Wales. The
8 principles are encompassed in and governed by statute."

9 80. After referencing s.53 of the **Youth Justice and Criminal Evidence Act** 1999, the Lord
10 Chief Justice continued at paragraph 40 of the judgment:

11 *"We emphasise that in our collective experience the age of a witness is not*
12 *determinative on his or her ability to give truthful and accurate evidence. Like*
13 *adults some children will provide truthful and accurate testimony, and some will*
14 *not. However, children are not miniature adults, but children, and to be treated*
15 *and judged for what they are, and not what they will, in years, grow to be.*
16 *Therefore, although due allowance must be made in the trial process for the fact*
17 *that they are children with, for example, shorter attention span than most adults,*
18 *none of the characteristics of childhood, and none of the special measures which*
19 *apply to the evidence of children carry with them the implicit stigma that children*
20 *should be deemed in advance to be somehow less reliable than adults. The purpose*
21 *of the trial process is to identify the evidence which is reliable and that which is*
22 *not, whether it comes from an adult or a child. If competent, as defined by the*
23 *statutory criteria, in the context of credibility in the forensic process, the child*
24 *witness starts off on the basis of equality before with every other witness. In trial*
25 *by jury, his or her credibility is to be assessed by the jury, taking into account*
26 *every specific personal characteristic which may bear on the issue of credibility,*
27 *along with the rest of the available evidence."*

28
29 81. Following this guidance, I have also had regard to s.41 of the **Evidence Act**. The focus
30 on this statutory provision arises because the complainant's evidence stands
31 unsupported in its truth by independent evidence. In a nutshell, s. 41 of the **Evidence**
32 **Act** provides that the Court is no longer obliged to give a corroboration warning
33 regarding the uncorroborated evidence of the complainant merely because she is a
34 young child and a complainant in a sexual offence. The section has therefore



1 abrogated, in one sweep, what was traditionally called the 'young person warning' and
2 the 'complainant in sexual offences warning'.

3 82. Despite the change in judicial attitude towards the evidence of children as highlighted
4 in **R v B**, and the abrogation by statute of the mandatory requirement for the
5 corroboration warning in cases such as this, I am, nevertheless, guided by Lord Taylor
6 CJ's seminal pronouncements in **Makanjuola**⁴. **Makanjuola** has established, among
7 other things, that it is now in the discretion of a trial judge to consider whether a
8 warning to the jury to exercise caution before accepting the uncorroborated evidence of
9 a witness in a sexual offence case is required. Lord Taylor CJ, on behalf of the English
10 Court of Appeal, provided the necessary guidance as follows:

11 *"(1) Section 32(1) abrogates the requirement to give a corroboration direction*
12 *in respect of an alleged accomplice or a complainant of a sexual offence*
13 *simply because a witness falls into one of those categories.*

14 *(2) It is a matter for the judge's discretion what, if any, warning he considers*
15 *appropriate in respect of such a witness, as indeed in respect of any other*
16 *witness in whatever type of case. Whether he chooses to give a warning*
17 *and in what terms will depend on the circumstances of the case, the issues*
18 *raised and the content and quality of the witness's evidence.*

19 *(3) In some cases, it may be appropriate for the judge to warn the jury to*
20 *exercise caution before acting upon the unsupported evidence of a witness.*
21 *This will not be so simply because the witness is a complainant of a sexual*
22 *offence nor will it necessarily be so because a witness is alleged to be an*
23 *accomplice. There will need be an evidential basis for suggesting that the*
24 *evidence of the witness may be unreliable. An evidential basis does not*
25 *include mere suggestions by cross-examining counsel.*

26 *(4) If any question arises as to whether the judge should give a special*
27 *warning in respect of a witness, it is desirable that the question be*
28 *resolved by discussion with counsel in the absence of the jury before final*
29 *speeches.*

30 *(5) Where the judge does decide to give some warning in respect of a witness,*
31 *it will be appropriate to do so as part of the judge's review of the evidence*
32 *and his comments as to how the jury should evaluate it rather than as a set*
33 *piece of legal direction.*

⁴ [1995] 3 All ER 370



1 (6) *Where some warning is required, it will be for the judge to decide the*
2 *strength and terms of the warning. It does not have to be invested with the*
3 *whole florid regime of the old corroboration rules.*

4 (7) *Attempts to re-impose the straitjacket of the old corroboration rules are*
5 *strongly to be deprecated.*

6 (8) *The Court will be disinclined to interfere with a trial judge's exercise of*
7 *his discretion unless it is unreasonable in the Wednesbury sense."*

8 83. At the same time, Lord Taylor CJ also indicated some circumstances in which a
9 warning should be given. He stated:

10 *"The judge will often consider that no special warning is required at all. Where,*
11 *however, the witness has been shown to be unreliable, he or she may consider it*
12 *necessary to urge caution. In a more extreme case, if the witness is shown to have*
13 *lied, to have made previous false complaints, or to bear the accused some grudge,*
14 *a stronger warning may be thought appropriate and the judge may suggest it*
15 *would be wise to look for some supporting material before acting on the impugned*
16 *witness's evidence. We stress that these observations are merely illustrative of*
17 *some, not all, of the factors which the judges may take into account in measuring*
18 *where a witness stands in the scale of reliability and what response they should*
19 *make at that level in their directions to the jury."*

20
21 84. Additionally, the learned editors of *Blackstone's Criminal Practice 2020*, at para F.
22 5.16, have noted that despite the reform relating to the evidence of children, the
23 evidence of some children may remain unreliable in some cases. This unreliability may
24 be due to childish imagination, suggestibility or fallibility of memory. The learned
25 editors pointed out that in the earlier case of *Pryce*⁵, it was held that it was not
26 necessary to give a direction to treat the evidence of a six-year-old with caution
27 because, in effect, that would be to reintroduce an abrogated rule. They opined,
28 however, that after *Makanjuola*, whether a direction is given, and if so, the terms of
29 the direction, are matters of judicial discretion turning on the circumstances of the case
30 (see *L* [1999] Crim LR 489 and *R v B* [2010] EWCA Crim 4).

⁵ [1991] Crim LR 379



1 85. In looking at the circumstances of this case and in assessing Child A's evidence, I have
2 borne in mind the following matters that judicial experience has established apply to
3 child witnesses (see paragraph 10-29 of the *Crown Court Compendium, Part 1*, 2021).

4 i. Children do not have the same experience, degree of maturity, logic, perception or
5 understanding as an adult.

6 ii. They may be tempted to agree with questions asked by adults who they perceive to
7 be in authority.

8 iii. Their perception of the passage of time may be different from an adult.

9 iv. They may suffer from faulty recollection, and so their memory of when and in
10 what order events occurred may not be accurate.

11 v. They may not be able to explain the context in which events occurred and may
12 have particular difficulty answering questions about how they felt at a given point
13 in time or why they did not take a particular course of action.

14 86. According to the authorities, the preceding matters go to the child's level of
15 understanding rather than merely the child's credibility. I find in my consideration of
16 the prosecution's case that some of these features are present to varying degrees in the
17 evidence of Child X. Therefore, I am mindful that I have to be careful not to judge her
18 by the same standards as I would an adult witness. I am conscious that those matters
19 may reflect her level of understanding rather than her credibility. But notwithstanding
20 that, I have to assess her reliability by reference to her personal characteristics against
21 the background of all the evidence in the case.

22



1 **DISCUSSION AND FINDINGS**

2 87. It is against the background of the applicable principles of law, and the submissions of
3 both counsel, that I have considered the complainant's evidence. I note that her
4 evidence is not supported in its truth by any independent evidence implicating the
5 accused. Having closely examined the circumstances of the case, I find that there is an
6 evidentiary basis for me to exercise caution in placing reliance on her evidence to
7 convict the accused. This need for caution on my part is not merely because the
8 complainant is a child or a complainant in a sexual offence case. This recognition of
9 the need for caution is triggered by the fact that the complainant had made a previous
10 and more serious allegation against the accused just a couple of months before this
11 alleged event, which did not lead to the laying of any charges against him.
12 Furthermore, although the complainant was removed from her family home, she was
13 permitted by the police to return to live with the accused following those allegations.
14 Then, within a few months of her return, these new accusations were made against the
15 accused.

16 88. The reasons that led to the outcome of the initial report are not known to the Court.
17 Therefore, I cannot speculate about the contents of the February report and why it did
18 not lead to the arrest of the accused. However, what is evident is that no evidence has
19 established or suggested that the complainant had made up false allegations against the
20 accused. Equally, there is no evidence to show that the allegations were, in fact, true.
21 What I am mindful of, therefore, is that this is not the first time that the complainant
22 has raised allegations of sexual misconduct on the part of the accused and that the first
23 allegation did not result in his arrest. At worst, the report stands as an unsubstantiated
24 or unverified allegation.



1 89. In the circumstances, this evidence regarding the February report cannot be used
2 against the accused to determine his guilt. He was never charged. Therefore, the Court
3 has to start on the premise that he is presumed by law to be innocent of any allegation
4 made against him until the contrary is proved. As for the charge on this indictment, he
5 is still clothed with the presumption of innocence unless and until he is found to be
6 otherwise. Therefore, the February report is not relevant to any question regarding the
7 guilt of the accused except to the limited extent as it relates to the need for caution in
8 placing reliance on the complainant's evidence to convict him. It is a matter to be
9 taken as part of the narrative leading up to these proceedings. Potentially, it
10 overshadows the complainant's reliability and credibility in these proceedings as
11 advanced by the defence.

12 90. Another observation that has heightened my concerns for the need for caution in
13 considering the complainant's evidence is that both sets of allegations were disclosed at
14 school in circumstances where on the evidence, the complainant had other reasons for
15 speaking to the school counsellor. The first allegation came when the complainant was
16 brought to the counsellor, having been found with a prohibited article at school. The
17 second allegation came on a day when, according to her, she should have been in
18 science class, but she did not want to go to class. She, however, denied suggestions
19 put to her by defence counsel that she was led to make false accusations against the
20 accused because of those occurrences at school. I have, nevertheless, taken this
21 evidence into account in determining whether she may have acted from an improper
22 motive in making the complaint against the accused in June.

23 91. Based on all the special features in the case that I have identified above, I find it
24 necessary to warn myself to exercise caution in acting on the complainant's evidence



1 that stands unsupported. In my opinion, her evidence stands in that special category of
2 cases highlighted by Lord Taylor CJ in *Makanjuola* that necessitates a care warning.

3 92. On the other hand, I am mindful that it is open to me to convict the accused if, having
4 warned myself of the need for caution, I am convinced the complainant spoke the truth.
5 Therefore, the critical and ultimate question for me is whether her evidence is reliable
6 and truthful, having regard to all the circumstances of the case, to the extent that I am
7 sure the accused is guilty.

8 93. In assessing the complainant's credibility, I have noted that one salient fact accepted by
9 the accused and, therefore, stands as undisputed is that on the night of the alleged
10 incident, he did go into the room in which the complainant was sleeping. Regarding the
11 occurrences in the room during his visit, the prosecution and the defence case diverged.

12 94. The complainant's evidence is that the accused did not come into the room and only
13 checked on them as he has professed. Instead, he checked on her brothers and
14 proceeded to touch her while she lay in her bed pretending to be asleep. The
15 immediate question to be resolved is: Did the accused touch the breasts and vagina of
16 the complainant in the circumstances described by her. She gave specific details of
17 what she alleged transpired during the alleged incident and in its aftermath.

18 95. In determining whether the complainant spoke the truth in this regard, I have dissected
19 her evidence regarding what occurred in the room. There are some inconsistencies,
20 which are, at least, indicative of faulty recollection as well as suggestibility. There is
21 also evidence that her perception of time may not be reliable. These matters do have a
22 bearing on her reliability and credibility and are, therefore, analysed within the context
23 of the totality of the evidence.



1 Faulty recollection and inconsistencies

2 96. A part of the complainant's evidence pointing to faulty recollection concerns what she
3 was wearing on the night in question. Although she had stated in her ABE interview
4 that she usually wears her "PJs" which would consist of "shirt pants and T-shirt", she
5 could not remember what exactly she was wearing at the material time until the
6 interviewing officer asked her whether they were long trousers or shorts. She then
7 stated that she was wearing "shorts and a T-shirt."

8 97. The second example of faulty recollection concerns her reported action when she said
9 the accused was touching her. She indicated at one point that the accused used both
10 hands to touch both breasts. Shortly after saying that, she was then asked if she
11 remembered how the accused touched her. She responded that she did not remember.
12 Then she gave an account of how he touched her. She stated how he managed to do so
13 by lifting the bottom of her t-shirt, and then he put his hands at the top of her shorts to
14 touch her vagina.

15 98. In her interview, the complainant also stated that she was "moving to the side and then
16 turning and kicking his hand, pushing him away" and "kicking him in his stomach". He
17 was not trying to get hit, but she "always have [sic] good aim". Then she was asked if
18 she hit him anywhere; she indicated she did not. In response to the interviewer's
19 question, she then stated that she was trying to hit and kick him. Then the following
20 dialogue took place:

21 *"SD: Just for the last two (2) what did you do to his stomach?"*

22 *[Child A]: I punched him right in the middle."*



1 99. Having given that as the sequence of events in the interview, which was not entirely
2 clear, she was asked, in cross-examination, if she had also bitten the accused. She
3 responded in the affirmative, and when asked where she bit him, she indicated that she
4 had bitten him on his arm. This was never stated in her interview and was agreed to
5 only after the idea was included in the question asked. This omission from her
6 interview resulted in an inconsistency between her interview and evidence in Court,
7 which was not explained. It has rendered her evidence in this regard unreliable.

8 100. In the ABE interview, the complainant also stated that her counsellor was the only
9 person she had told about the incident. Yet, in cross-examination, she answered yes
10 when asked if she had discussed what had happened with Child X before saying
11 anything to anyone. However, she could not remember when she spoke to Child X.
12 This question relating to any discussion she might have had with Child X is important
13 because of the defence regarding Child X's possible influence over her.

14 101. In her interview, the complainant also stated that after the accused left the room, she
15 went on her phone. However, under cross-examination, she insisted that she did not go
16 on her phone but instead to the bathroom. She denied that she told the police that she
17 went on her phone. There were other matters that the complainant stated she could not
18 remember, such as her reason for not shouting in the room when the accused was
19 touching her; why she was afraid to tell her mother about the incident; and the reason
20 she went to the counsellor when she made the second report about the accused other
21 than to avoid science class.

22 *Risk of suggestibility*

23 102. Apart from what appears to be evidence of faulty recollection, the Court also noted
24 what appears to be an appreciable risk of suggestibility detected in the complainant's



1 responses in her interview and under cross-examination. This could well be due to how
2 the questions were put to her and her understanding as a child. There are several
3 instances during the interview when the complainant furnished answers only after the
4 interviewer presented options of possible responses. I will highlight one of significance
5 by way of example. After the complainant had indicated that she did not remember
6 where on her vagina she was touched, the interviewer then asked if it was to the front
7 or between her legs. The complainant then said the accused only touched the front of
8 her vagina. However, even with that response, the interviewer persisted with her
9 inquiry as to whether the accused had put his hands between the complainant's legs.
10 Upon being asked whether the accused put his hands between her legs, the complainant
11 responded affirmatively. I note that this bit of evidence did not come from her
12 spontaneously, but after the police provided the idea in what can only be regarded as a
13 leading question. This approach by the complainant in her response to questions posed
14 is also seen in her cross-examination. She, similarly, gave an affirmative answer to Mr
15 Brady's question regarding whether she had also bitten the accused. There are other
16 instances, which standing alone, would appear innocuous, but the cumulative effect
17 indicates a marked tendency on the part of the complainant to accept things said to her
18 by others. This observation lends credence to the documented experience of the courts
19 noted above at paragraph 85(ii) that children may be tempted to agree with questions
20 asked by adults who they perceive to be in authority. This is certainly a tendency that
21 affects their reliability and veracity, especially in a case such as this in which the
22 suggestion is made that the complainant is acting under the influence of an older child
23 with whom she is closely connected.

24 103. The risk of suggestibility, undoubtedly, impacts the reliability of the complainant's
25 evidence as it relates to critical aspects of the case. Her account of how the incident

1 occurred must put it beyond doubt that the accused did what she said he did. However,
2 once her account is seemingly assisted by suggestions made to her, which she
3 accepted, the Court must be cautious about accepting her as a reliable witness of truth.

4 Perception of the passage of time

5 104. I have noted, too, that the complainant's perception of the passage of time is not
6 reliable. She stated that the accused touched her for a few minutes, but when asked
7 how long he was in the room, she said between 30-40 minutes. I do not believe that her
8 perception of time is fully developed to provide an accurate time. On an objective
9 evaluation of what she stated was happening, it is doubtful that it would have lasted as
10 long as 30 to 40 minutes. This, however, would not detract from her credibility in any
11 material way because the time the incident lasted is not material, and it is accepted that
12 even adults' perception of time often differs. Therefore, I would not use what I have
13 regarded as her inability to estimate time to say that she cannot be believed.

14 Unsupported evidence of the complainant's confrontation with the accused

15 105. As was urged on me by the defence, the next item of evidence I have considered is the
16 complainant's evidence that she punched and bit the accused. No sign of bodily injury
17 was observed on the body of the accused. Det Cons Savoury stated he was not looking
18 for signs of violence, and he had observed none, although he had the benefit of the
19 ABE interview in which the complainant indicated hitting and possibly hurting the
20 accused. There is, therefore, nothing to support the complainant's evidence that she
21 defended herself from the alleged assault by physically confronting the accused in the
22 manner she said she did.





1 The Defence

2 106. Whether the complainant should be believed in the light of the foregoing matters,
3 which have been highlighted as some inherent weaknesses in her evidence, must also
4 be examined by reference to the case for the accused. The materiality of the
5 shortcomings of her evidence must be assessed by reference to the issue to be resolved
6 and the totality of the evidence. The accused has given sworn evidence, and I bear in
7 mind that it can have three possible effects on my deliberations. It may convince me of
8 the truth of the complainant's testimony, convince me that she is not speaking the truth
9 or cause me to entertain a reasonable doubt as to whether she is telling the truth.
10 Against this background, I have considered the defence, which I am obliged to do in
11 the interests of justice. It is a simple denial with suggestions as to possible motives for
12 lying on the part of the complainant.

13 107. As already established, the prosecution and defence have agreed that the accused went
14 into the room the complainant was in that night. There is no doubt that the accused had
15 the opportunity to touch the complainant. Furthermore, the complainant was feigning
16 sleep, so it is highly likely that he could have touched her in the belief that he would
17 not have been detected because she was asleep. This is, indeed, a possibility. However,
18 the question for me is not whether it was possible but whether I am sure it happened.

19 108. This question takes me back to the first report, and the response of the accused to it,
20 which I cannot ignore. The evidence of his interview, which is never disputed, is that
21 when he became aware of the first report through his wife, he voluntarily attended
22 upon MASH seeking answers. He was going back and forth to MASH to find out what
23 the report was about. No one wanted to divulge anything to him. he willingly



1 cooperated with the police and was supportive of his daughter. He said he suggested to
2 MASH that she should get professional help to see what was going on with her.

3 109. Furthermore, the complainant was taken from the home upon the first allegations and
4 returned by the authorities. I have had serious concerns regarding the alleged conduct
5 of the accused so soon after the first report to the school counsellor and to the police. It
6 seems very strange and hard to believe that the accused would have conducted himself
7 in the manner alleged, having known that the complainant had just made a complaint
8 about him to the authorities, which led to a police investigation.

9 110. Furthermore, the complainant was taken from the family home upon the first
10 allegations and returned by the authorities. There is no explanation for this, and once
11 again, the Court cannot speculate. However, the Court is faced with some troubling
12 questions to which there are no answers. A serious offence -rape- had been alleged, but
13 the investigations were closed, according to DC Savoury. It resulted in no arrest, and
14 the complainant was permitted to return home to resume living with the accused.

15 111. Indeed, it is very hard to imagine and, therefore, not readily accepted that the accused
16 would have been so barefaced - so bold- to continue the alleged offending towards his
17 daughter, knowing that she had already made a report about him to the school and
18 police.

19 112. Another cause for concern is that I have also recognised that the complainant has not
20 been willing to disclose anything about whether or not there had been any previous
21 incident in the light of her previous allegations. Her reluctance to shed light on
22 anything that may or may not have happened in the past came out in her ABE
23 interview as well as her evidence in Court. She is selective in what she chooses to
24 disclose to the authorities, which is a serious cause for concern in assessing her



1 reliability. Furthermore, her stance at being selective at what she considers necessary
2 to disclose to the Court is a cause for concern as to whether she has manipulated the
3 narrative to now attempt to make out a case against the accused, knowing that in
4 February, the accused was not charged for whatever reason. All the Court has is her
5 word against the accused in these unusual circumstances.

6 113. The complainant's conduct in being opportunistic in relation to the timing of her
7 reports cannot be ignored within a context where the counsellor to whom the report
8 was made has not supplied a statement or participated in the trial. Evidence of the
9 circumstances that these allegations came to light and how they were disclosed to the
10 counsellor would have been imperative in this case, given the complainant's previous
11 report when she thought she was in trouble at school. The second was made on a day
12 when she had examinations at school and went to the counsellor at the time she did to
13 avoid science class.

14 114. The defence's case is that she may be susceptible to third party influence or be acting
15 from improper motives because of her exposure to an inappropriate interaction with
16 Child X and others and the accused effort to stop it.

17 115. Indeed, I must indicate within this context that aspects of the accused evidence do not
18 ring entirely true, particularly as it relates to the complainant's online and phone
19 activities. His evidence that she has been involved in questionable association and
20 behaviour on her devices, especially with this adult male, called Sense, is not borne
21 out by the examination of her phone that the forensic examiner conducted. The
22 formally admitted evidence shows that of the over 150,000.00 images found on her
23 phone, none was child abuse material. Therefore, the evidence regarding the

1 complainant's telephone has undermined the veracity of the accused's evidence and
2 casts a shadow on his credibility.

3 116. However, the Court is mindful that the fact that he may be lying does not necessarily
4 mean he is guilty of the offence charged. I am aware that he could have lied to bolster a
5 genuine defence or do so out of shame and embarrassment even though innocent. This
6 case is likely to evoke shame and embarrassment given the nature of the allegations
7 and the close familial connection between the complainant and the accused. So, I must
8 be careful before concluding that he is lying to cover his guilt rather than anything else.

9 117. While the accused may not have been entirely truthful to the Court regarding the
10 complainant's behaviour, the burden of proof is not on him to prove his innocence. So,
11 even if I do not believe him, I cannot convict him because I do not believe him. I have
12 to go back to the prosecution's case and assess it in the light of the defence, and only
13 then can I convict him if, on the totality of the evidence, I am sure he is guilty of the
14 offence charged.

15 **CONCLUSIONS ON THE COMPLAINANT'S RELIABILITY**



16 118. Given the incidence of the burden of proof, I have reverted to the prosecution's case. I
17 have found it somewhat mind-boggling. It has caused me many anxious moments. On
18 the one hand, it seems hard to believe that a child would seek to make such serious
19 allegations against her own father, with whom she has had a close relationship over the
20 years and who, from all indications, takes care of his family. But, on the other hand, I
21 had considered the evidence of the accused being a good father and family man who
22 cooperated with the authorities when the first report was made.

1 119. Having looked at the complainant's evidence against the background of the totality of
2 the evidence, I have a lurking doubt as to whether the accused, having acted the way he
3 did with the first report, would have acted in the manner alleged so soon after that or at
4 all. The fact of the closed investigation following the first report to the police has cast a
5 gloom over the case for the prosecution. It has left unanswered questions concerning
6 the complainant's motives and serve to undermine the reliability and veracity of her
7 latest allegations.

8 120. The complainant may well be speaking the truth, but based on the outcome of her prior
9 report, coupled with her selective approach in making her report to the police, I am not
10 sure what to accept. This uncertainty is compounded by the high risk of suggestibility,
11 which has also been demonstrated in the complainant's testimony. Consequently, it
12 renders it even more unsafe to convict the accused on her evidence alone. Even though
13 I have found the complainant to be a bright and promising child, and a part of me may
14 well suspect that she could be speaking the truth, at the bottom line, I am not sure
15 about this alleged incident. The 'ghost' of the earlier report has haunted the
16 prosecution's case in these proceedings. I dare say, the case is reminiscent of the well-
17 known story, "*The Little Boy Who Cried, Wolf*".

18 121. I am obliged to give the benefit of the doubt I entertain to the accused, having warned
19 myself of the need for caution before I may convict him. In the premises, the
20 prosecution has failed to prove the case to the extent I am sure of the accused's guilt.
21 Accordingly, I am mandated by law to acquit him.



1 **VERDICT**

2 122. The verdict is not guilty.

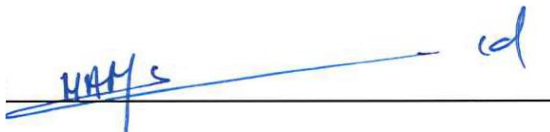
3 123. The accused is discharged.

4 **RECOMMENDATION**

5 124. I would strongly recommend that the family undergo counselling to heal the fracture
6 that will undoubtedly result from these proceedings. In addition, the complainant
7 should be afforded psychological assistance, if necessary, to assist her in coming to
8 terms with the outcome of these proceedings.

9 125. The defendant is discharged on both counts.

10
11 **Dated this the 17th November 2021**

12 

13 **McDonald-Bishop J**
14 **Acting Judge of the Grand Court**