

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

3 INDICTMENT NO: 0088 & 86//2015

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5
6 REGINA

7
8 v.

9
10 (1) AB

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12 (2) CD
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16 **Appearances:**

Mr. Scott Wainwright for the Crown

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18 Mr. Crister Brady for AB

19
20 Mr. Dennis Brady for CD
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22 **Before:**

The Hon. Mr. Justice Timothy Owen Q.C.

23 **Trial:**

27th & 28th July 2016; 1st – 4th August 2016

24 **Delivery of Verdict Decision:**

15th September 2016

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26 **HEADNOTE**

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28 *Criminal Law – Indecent Assault and Attempted Rape on a female minor –*
29 *Verdict Judgment. – Defendants are relatives of the subject minor*
30 *complainant. – Offences are alleged to have occurred over a protracted period*
31 *in the home environment. – The case is based on a single witness's*
32 *unsupported evidence against the adamant denials of two defendants. – The*
33 *complainant's case is undermined and affected by the features of delay and*
34 *incompetent investigation, which have hallmarked this case. – Verdict: Not*
35 *Guilty.*



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JUDGMENT

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INTRODUCTION AND LEGAL DIRECTIONS

4 1. The two defendants face an Indictment containing a total of 5 counts. In view of
5 the nature of the allegations and the clear need to afford protection by way of
6 anonymity to the single complainant in this case (who is still a child and a relative
7 of the two defendants), it was agreed by all parties at the outset of the trial that in
8 accordance with the provisions of s.12 Youth Justice Law (2005 Revision) there
9 should be no reporting of the names of the defendants, the complainant or anyone
10 else whose naming might by implication tend to confirm the complainant's true
11 identity Accordingly, in this Judgment the complainant will be referred to as "X",
12 the first defendant will be referred to as "AB" and the second defendant as "CD".
13 Any other witness the revelation of whose identity would tend to confirm X's real
14 name will be anonymised as indicated below.

15 2. The five counts on the Indictment are as follows:

16 *Count 1:* Attempted rape contrary to s.127 of the Penal Code (2010 Revision): The
17 particulars being that, AB on a date unknown between the 19th August 2011 and
18 11th November 2012 at an address in George Town, Grand Cayman, Cayman
19 Islands attempted to have unlawful sexual intercourse (vaginal) with X without her
20 consent.

21 *Count 2:* Attempted rape contrary to s.127 of the Penal Code (2010 Revision): The
22 particulars being that AB on a date unknown between the 19th August 2011 and
23 the 11th November 2012 at an address in George Town, Grand Cayman, Cayman
24 Islands attempted to have unlawful sexual intercourse (anal) with X without her
25 consent.

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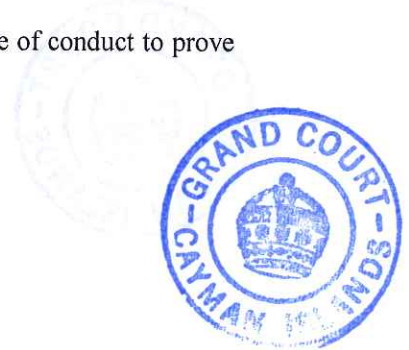
1 *Count 3:* Indecent assault contrary to s.132 (1) of the Penal Code (2010 Revision):
2 The particulars being that AB on a date unknown between the 19th August 2011
3 and the 11th November 2012 at an address in George Town, Grand Cayman,
4 Cayman Islands indecently assaulted X.

5 *Count 4:* Attempted rape contrary to s.127 of the Penal Code (2010 revision): The
6 particulars being that CD on a date unknown between the 19th August 2011 and
7 11th November 2012 at an address in George Town, Grand Cayman, Cayman
8 islands attempted to have unlawful sexual intercourse (vaginal) with X without her
9 consent.

10 *Count 5:* Indecent assault contrary to s.132 (1) of the Penal Code (2010 Revision):
11 The particulars being that CD on a date unknown between the 19th August 2011
12 and the 11th November 2012 at an address in George Town, Grand Cayman,
13 Cayman Islands indecently assaulted X.

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15 3. In opening the case, Mr Wainwright made clear that the Crown's position was that,
16 with the exception of count 2 (which was a single allegation of attempted anal rape
17 by AB), the charges were presented as specimen counts against a background of
18 the complainant alleging multiple occasions on dates unknown within the
19 Indictment period when she was the victim of either indecent assault or attempted
20 rape at the hands of one or other defendant. The effect of laying a specimen count
21 is to invite the tribunal of fact to conclude that the single offence of its type
22 charged against a defendant was committed during the period identified in that
23 count. The prosecution is thus relying on evidence of a course of conduct to prove
24 a single specimen offence.

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1 **TRIAL BY JUDGE ALONE**

2 4. The defendants elected trial by judge alone and I have reminded myself of the
3 approach to be taken by a judge in such cases as described by Quin J. in the case of
4 **R v. George Dexter Evans** Indictment No 18 of 2011 paragraphs 67 to 71.

5
6 *“The Defendant elected to be tried by a Judge Alone, rather than a Judge and*
7 *Jury, pursuant to s.129 of the Criminal Procedure Code of the Cayman*
8 *Islands.*

9 *Our Court of Appeal first dealt with the duties of a Judge in Judge Alone trials*
10 *in its judgment in **K. Richards v. R** 2001 CILR 496 when Justice Rowe stated:*

11
12 *“When a trial judge sitting alone has advised himself to the applicable*
13 *principles of law, and given himself any necessary warning, he must*
14 *indicate clearly in his judgment his reasons for acting as he did, in*
15 *order to demonstrate that he has acted with the requisite degree of*
16 *caution in mind and has therefore heeded his own warning. No specific*
17 *form of words is necessary for this demonstration, what is necessary is*
18 *that the Judge’s mind upon the matter should be clearly revealed.”*

19 *In **R. v. Dave Kennedy Whittaker** Cr. App. R. No. 14 of 2006, the Court of*
20 *Appeal gave some guidelines regarding the duties of a Judge in Judge Alone*
21 *trials. In the Judgment of Mottley J.A. he adopted the Judgment of the former*
22 *Lord Chief Justice of Northern Ireland Lord Lowry in **R v. Thompson** [1977]*
23 *NI 74 in which he stated at page 83:*

24 *“While on the subject I might say a word on the duty of the judge when*
25 *giving judgment in a trial under the 1973 Act. He has no jury to charge*
26 *and therefore will not err if he does not state every legal proposition*
27 *and review every fact and argument on either side. His duty is not as in*
28 *a jury trial to instruct laymen as to every relevant aspect of the law or*
29 *to give a full and balanced picture of the facts for decision by others.*
30 *His task is to reach conclusions and to give reasons to support his view*
31 *and, preferably, to notice any difficult or unusual points of law in*
32 *order that if there is an Appeal, it may be seen how his view of the law*
33 *informed his approach to the facts.”*

34 *More recently our Court of Appeal in **Randy Martin v. R** Crim. App. R. 2 of 2010*
35 *delivered their reasons for dismissing the Appeal on the 7th December 2010.*
36 *Mottley J.A. again adopting **R v. Thompson** [1977] NI 24 also adopted **R v. Thain***
37 *[1985] NI 457 where Lowry LCJ said at page 478:*

38 *“Where the trial is conducted and the factual conclusions are reached*
39 *by the same person, one need not expect every step in the reasoning to*
40 *be spelled out expressly, nor is the reasoning carried out in sealed*
41 *compartments with no inter-communication or overlapping, even if the*
42 *need to arrange a judgment in a logical order may give that*
43 *impression. It can safely be inferred that, when deliberating on a*
44 *question of fact with many aspects, even more certainly than when*
45 *tackling a series of connected legal points, a judge who is himself the*
46 *tribunal of fact will (a) recognize the issues and (b) view in its entirety*
47 *a case where one issue is interwoven with another.”*



1 *ELEMENTS OF THE OFFENCE AND THE ABSENCE OF ANY*

2 *REQUIREMENT FOR CORROBORATION*

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4 7. The law concerning the offences is straightforward and has not been the subject of
5 any dispute. The indecent assault counts allege that X was forced to perform oral
6 sex on one or other defendant over a period of 15 months when she was between
7 10 and 11 years of age. Plainly, any such conduct, if proved, would constitute
8 unlawful assaults of a sexual, indecent nature. The attempted rape allegations are
9 of forcible efforts to penetrate X's vagina or anus by the named defendant's penis
10 in circumstances which make clear that the act in question was done with intent
11 and was more than merely preparatory to the commission of the full offence. No
12 question of consent and *bona fide* belief as to X's age was raised by way of
13 defence.

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15 8. There is no requirement in Cayman Islands law for corroboration in cases
16 involving sexual offences and particularly cases involving children¹. Accordingly,
17 the fact that, in this case, there is no supporting evidence for X's allegations, does
18 not therefore mean that, as a matter of law, the prosecution is bound to fail. On the
19 other hand, the fact that there is no independent evidence capable of supporting X's
20 account is plainly something I must take into account when deciding whether or
21 not the prosecution has discharged the burden of proof in relation to each count.



¹ See s. 41(1) Evidence Law (2011 Revision)

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I have heard both about and from him and the circumstances in which the relevant allegations are made. CD is entitled to rely on the fact that although he has convictions for dishonesty he has none for violence or for sexual offences of any kind. To that extent it can fairly be said that the allegations made against him by X are out of character.

12. In closing submissions, the issue of character was discussed in view of the different position that each defendant is in on this aspect of the case. I indicated that my view was that AB's good character was obviously not in any way tainted by the fact that CD is a man of bad character and that CD was not positively assisted by the fact of AB's good character save that insofar as both men were denying X's allegations there was bound to be a degree of cross fertilization in terms of my overall assessment of whether the prosecution case was capable of making me sure of the guilt of each defendant. I did not understand any Counsel to dissent from this approach. In any event, as I will make clear when I explain my conclusions, this is not a case where the character of either defendant is decisive in my overall assessment of the proper verdicts.



DELAY

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13. The issue of delay arises in this case for three reasons. First, as will be clear from my summary of her evidence, X did not make her first complaint about the sexual abuse that she alleges against the defendants until at least 18 months (and possibly 5 years) had elapsed since the first alleged incident. Secondly, there was then a period of, as I find, inexcusable and wholly unexplained delay between the date of X's first complaint on 16th November 2012 and the arrest and interview of the defendants in July 2014. Thirdly, there was then a further lengthy and wholly unexplained delay before the defendants were charged on 30th October 2015 which meant that the case did not come on for trial in the Grand Court until July 2016.

14. The effect of this cumulative delay is that a period of almost 4 years elapsed between the date of X's first complaint to the police and the trial before me of these defendants on grave charges of sexual assault. The defendant is now aged 15 but she was describing events which took place a long time ago, possibly when she was as young as 6 or 7 (on one version of her evidence). It is obvious that the memory of witnesses fades with time and it is equally true that, as time passes, lines of inquiry may close down or, as happened in this case with the loss of the notes taken by DC Howell of X's first account to him of her allegations of sexual abuse, records can be lost which may significantly affect the fairness of the trial process. The truly lamentable quality of the police response to X's first account of grave sexual abuse meant that potential witnesses who lived in the very house where the abuse was alleged to have taken place over a lengthy period and who were (on X's own account) present in the house when the abuse was taking place were never approached to provide witness statements.



1 15. Of course, the mere fact of delay is not necessarily fatal to a successful prosecution
2 and it is frequently the case that courts are called upon to try cases where victims of
3 sexual abuse come forward years and sometimes decades after the alleged abuse
4 took place. However delay is always the enemy of fairness and justice and, as I will
5 make clear when I come to my findings, I find that the inexcusable, wholly
6 unexplained delay and grossly incompetent police response to X's first allegations
7 of abuse have caused prejudice to both X and the defendants and ultimately had a
8 significant impact on my ability to be sure of guilt in relation to both the accused.

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SUMMARY OF PROSECUTION’S EVIDENCE

The Complainant’s evidence

16. The Crown’s main witness was X. She was born on 19th August 2001 and thus was almost 15 years of age when she appeared before me as the Crown’s sole witness to the primary facts. The majority of her evidence in chief came in the form of video interviews conducted in purported compliance with the principles of Achieving Best Evidence (“ABE”) on Monday 19th November 2012 (when she was 11) together with a follow up ABE interview in May 2014.

17. Before the initial ABE interviews were recorded, she had first made allegations of sexual abuse to a person in authority in the course of a counselling session at her primary school on Friday 16th November 2012. These allegations against her uncle and cousin were made to Ms. RC who is a volunteer for the Cayman Outreach Association (Extended After School Program) and were soon after repeated to a Ms. AH who is a school counsellor. In light of the training they had received, neither Ms. RC nor Ms. AH sought to question X in detail about the allegations once they were made but, instead, drew them immediately to the attention of the Department of Children and Family Services (DCFS) in the form of an email to a Ms. CC timed at 2.17 p.m. on 16th November 2012. Ms. AH also made contact with X’s mother in order to inform her of what X had just told her concerning sexual abuse by her uncle and cousin and an email timed at 2.38 p.m. on 16th November 2012 sets out M. AH’s account of the conversation she had with X’s mother (who was not a witness before me). I will refer in more detail to the evidence of Ms. RC and Ms. AH later in my summary of the evidence.



1 18. To complete the sequence of events prior to the ABE interviews, X also made
2 allegations of abuse to Detective Dave Howell, an officer in the Family Support
3 unit of the Royal Cayman Islands Police Force (RCIPS), in the course of a meeting
4 at George Town police station on 17th November 2012. X had attended the police
5 station accompanied by her paternal grandmother and a female friend of the family,
6 in order to make a formal complaint of sexual abuse. That meeting, which lasted
7 “about an hour or so” according to DC Howell, was not video recorded but DC
8 Howell said that he took some two to two and a half pages of notes of the
9 discussion. But he went on to explain that, despite diligent searching, the notes
10 have now been lost and so there exists no contemporaneous record of the first
11 detailed account given by X to an investigating police officer of her allegations of
12 sexual abuse. I will deal with DC Howell’s evidence in greater detail when I come
13 to summarise his evidence.

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15 19. X’s ABE 2012 and 2014 interviews were played in court in full in the presence of
16 X. After they were completed, Mr Wainwright asked some supplementary
17 questions in chief before she was cross-examined by counsel for the accused.
18 Since the conclusion of the trial I have viewed the ABE interviews once again from
19 start to finish with the assistance of the transcripts. The interviews last
20 approximately 3.5 hours in all and for obvious reasons some of that time is taken
21 up with the interviewing officer attempting to put X at her ease and seeking
22 answers to questions that are not directly relevant to the allegations against the
23 defendants. What follows therefore is a brief summary of the essence of what X
24 alleged against the defendants and other matters which are of significance in the
25 context of assessing the reliability of her evidence as a whole.

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1 20. X told the RCIPS officer who conducted the ABE interview on 19th November
2 2012, Detective Elizabeth Berns, how she first came to tell Ms. RC that “*two boys*
3 *troubling me*”. She had been explaining that her mother treated her unfairly
4 compared to her siblings by making her clean the house while her sisters were
5 treated like a princess and her brothers were allowed to play games. She also
6 described how her mother was violent to her. When asked what she meant by boys
7 “*troubling her*” she replied “*they were assaulting me, sex harassment so I call it*”
8 and explained that by referring to “*the boys*” she was referring to her uncle, “AB”,
9 and her cousin “CD” and that “*both of them want me to suck their penis and they*
10 *will force me to do things that I don’t want to do*”. She said she had told Ms. AH
11 about this and also that she had told Ms. AH about the fact that, although her
12 parents no longer live in the same house, her father would sometimes visit and that
13 her parents would have sex “*lots of times*” in the same bed while she, X, was in the
14 same bed and while her brothers were in the same room albeit in a smaller bed.
15 She said this made her feel uncomfortable.

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17 21. X was asked about what had happened after her mother came to pick her up at
18 school following her discussion with Ms. AH. Her evidence was hard to follow on
19 this issue but in essence she described how her mother had become angry with her
20 as a result of discovering what she had told Ms. RC and Ms. AH – shouting at her
21 and telling her she had ruined everything. X said: “*she was saying that, she was*
22 *saying to me that she is the mother of me and I must protect you but then she*
23 *wasn’t protecting me she was keeping it to herself making them hurt me more is*
24 *how I think of it when she never told nobody nothing*”.

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1 On returning to their home to pick up clothes (because X was going to stay at her
2 paternal grandmother's house) X described how her mother hit her on the head
3 causing her ear to hit the wall and become numb. At the end of the first ABE
4 interview, Detective Berns asked X when was the last time that something
5 happened with AB or CD and X referred to an incident on the previous Thursday
6 when CD had lifted up the sheet while X was asleep and "*he touch my feet then he*
7 *was going up my leg to touch my bum and I told him to leave me alone he was*
8 *giving me money but I never took the money from him*". I understood her to be
9 suggesting that CD was offering her money in exchange for sexual favours.

10
11 22. In the second ABE interview on 19th November 2012, X told Detective Berns that
12 she had first told her mother about AB and CD's behaviour "*a long time ago*"
13 when she was 9 or 10 years old but when asked when the abuse had begun she said
14 "*a few months ago*". She said that when she told her mother about the abuse, her
15 mother did nothing. Detective Berns returned again to the question of what X
16 meant by the boys troubling her and X confirmed that she meant "*forcing me to*
17 *suck their penis always touching me in the way I don't want to be touch*". She
18 explained what she meant by forcing her, stating "*like when I try to run away they*
19 *catches me and they always hold me tight they never let go they hold my arm and*
20 *when I try to go away they asking keep saying please and I always say no they*
21 *won't let me go force me*". At pages 40-44 of the ABE transcripts, X gave a
22 specific example of an occasion when AB dragged her from the bathroom (where
23 she had gone from her grandmother's room) into his bedroom along the corridor
24 and how he then "*holds my head and he put my head to his penis then he start to*
25 *move my head then that is the part where he wants me to suck his penis. After he*
26 *leaves me alone I go to the bathroom and rinse out my mouth and go to bed.*"



1 23. On page 45, X was asked if any other part of AB's body was touching her and she
2 said "*Yes sometimes he be pull on my pants he would put his penis into my vagina*
3 *and my bum*" and when asked if that had happened "that time" (meaning on the
4 same occasion she had just described) she replied "*yes*". Between pages 46-49, X
5 answered further questions designed to get more detail about the nature of the
6 assaults by AB and, amongst other details, she explained that she washed her
7 mouth out because of the smell and when asked if anything else happened when
8 she sucked his penis, she said "*I always see the white thing come out....from the*
9 *hole in his penis*". She said "*its smelly and its sperm*". When asked how she knew
10 it was sperm, she replied "*because my brother have a teacher, teach him about it*".
11 Detective Berns concluded her questioning about AB's actions by asking X when
12 the assaults she described had happened. She said "*I don't know*" and when asked
13 how many times it had happened she said "*lots of times*". In relation to the specific
14 allegation that AB had put his penis in her vagina and bottom, X said she could not
15 remember when he did it but then said it happened "*this year*". She said it
16 happened in the house but could not say where. She said she told no one about it.
17 When asked when was the last time anything happened with AB, she said "*can't*
18 *remember, sometime around last year*".

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20 24. The ABE interview then moved to questions about CD, who is her cousin and
21 some 6 years older than her. She was reminded about the fact that she had said that
22 the previous Thursday CD had put his hand on her leg while she was in bed and
23 when asked how it was that CD had been troubling her apart from that incident she
24 said "*same thing as AB*".

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1 After initially appearing to be unwilling to say more about CD's actions, on p.54 of
2 the Transcript X describes an incident one night when CD grabbed her as she
3 walked away from the bathroom, pulled off her pants and tried to put "*his private*
4 *parts into mine but it hurt so I told him no...he stopped*".

5 She explained that by reference to her private parts she meant her vagina and that
6 when he tried to do this to her she was trying to get away from him but that he was
7 holding her tightly by her arms. She said she could not remember how old she was
8 when this incident happened and that she had told no one about it. She was asked
9 if AB and CD ever did things to her when they were both present and she said no.
10 She was then asked if these things ever happened with her brother or sister in the
11 same room. She said no but they did happen with her female cousin ("EF"). When
12 asked how she knew this, she said that on one occasion CD called her into his room
13 and EF was in the room. CD locked the door and she saw EF sucking CD's penis.
14 Detective Berns asked X if AB or CD had ever done anything to her brothers and
15 she replied "*I never saw anything but I know CD was forcing them*" because she
16 had asked them.

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18 25. On pages 61-62 Detective Berns is recorded as asking X about whether she had had
19 sex education at school and explained she had. In response to some basic human
20 anatomy questions designed to establish X's level of understanding, including
21 whether a woman has a penis, X referred to having seen an episode of Law and
22 Order where a little girl was found to have a small penis. I refer to this exchange
23 because Counsel for AB was to suggest that viewing this TV series had provided X
24 with ideas which she had used to create a false account against his client of sexual
25 abuse.

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1 When Detective Berns asked whether AB or CD “ever put anything in your
2 bottom” X responded by saying that only AB had done this but she could not
3 remember when he had done it. That concludes my summary of the ABE process
4 on 19th November 2012.

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6 26. More than a year was to pass before any apparent effort was made to progress the
7 police investigation into what were, on any view, very serious allegations of
8 prolonged sexual abuse of a young girl in her own home by her uncle and cousin.
9 AB was finally interviewed on 4th April 2014, some 17 months after X had given
10 her ABE account to the police, and a decision was then taken to interview X once
11 again on 13th May 2014. On this occasion, the interviewing officer was Detective
12 Howell. He explained that the sole purpose was to see if X could give further
13 details concerning dates and others matters to give to the DPP’s office and to
14 ensure what she was saying was the same as her account in November 2012. This
15 third interview lasted some 30 minutes and in what was, in my view, a poorly
16 conducted interview X in essence confirmed the basic allegations against both
17 defendants. She was unable to give any further help in terms of the dates when the
18 various assaults occurred but did say in relation to one incident when CD had asked
19 him to sit on his penis that at the time the house was occupied by her grandmother,
20 her two uncles, her mother, her brothers and her sister. She also confirmed her
21 belief that CD had forced his sister, EF, to suck his penis “ten or seven times” but,
22 contrary to her account on 19th November 2012, she said that this had not happened
23 in her presence. By contrast, on occasions when CD forced her, X, to suck his
24 penis EF would be present.

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1 27. After X's ABE interviews had been shown to the Court, Mr Wainwright asked
2 some further questions in chief – no doubt, bearing in mind that it was now almost
3 4 years since her first ABE account and the fact that she was now aged 15.
4 Beginning with AB, he asked how many times AB had made her suck his penis and
5 X said *"I can't remember but it was ...I can't remember"*. He then asked how long
6 it had been going on before he spoke to Ms. RC and her answer was *"maybe three
7 or four years"*. Pointing out that he had spoken to Ms. RC in 2012 when she was
8 eleven, Mr Wainwright asked how old she was when *"this first started"* and she
9 replied *"say six or seven"*. When asked whether there was any reason why she
10 didn't tell anyone before she had told Ms. RC, X said *"I'm not sure but at the time
11 I didn't know it was an abuse and it was a wrong thing"*. Mr Wainwright asked
12 when she found it was wrong and she said *"when I told my mom"* which she said
13 happened a couple of months before she spoke to Ms. RC. She said that she had
14 not told her mother about AB and CD trying to force their penis into her bum or
15 vagina explaining *"I'm not sure but when I speak I can't remember like, stuff at the
16 time, so I just told her what I can remember"*. She went on to explain that *"when I
17 told my mom that AB tried to force his penis into my behind that was like a couple
18 of months after I told her"*.

19 28. Later Mr Wainwright returned to the issue of what she had said AB had done,
20 asking *"you said in your video to the police that AB tried to put his penis in your
21 vagina once and your bottom once"* and she responded *"well I don't remember
22 that"*. When Mr Wainwright asked directly *"did AB ever try to put his penis in
23 your bottom?"* she said *"yes sir"*. In reply to questions about where in the house the
24 assaults would take place and who was present in the house at the time, X said they
25 were *"anywhere in the house"* and that her grandmother, her brothers and sisters
26 would be present there also.
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1 When asked whether there was any reason why she didn't go straightaway and tell
2 someone what was happening, she said "*No sir*". Finally, Mr Wainwright asked
3 questions about whether X had seen anything occur with CD and EF. X replied "*I*
4 *did see, that was once*" and said "*she was sucking his penis*" and that when this
5 happened she (X) was 8 or 9 years old. She also confirmed that her brothers had
6 told her that things had happened to them involving CD and that she was 8 or 9
7 when this happened.

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9 29. X was cross examined with appropriate restraint and moderation by Counsel for
10 AB and CD. While both Mr Crister Brady for AB and Mr Dennis Brady for CD
11 sought to test further various aspects of X's evidence in chief, in the end both of
12 them ultimately put to X that her allegations of sexual assault were simply untrue.
13 She denied this. In an attempt to explore reasons why X might have made up these
14 allegations against her uncle and cousin, it was suggested to her that as she grew up
15 she had watched a lot of TV including Law & Order and that "a lot of that had to
16 do with sexual offences". It was also suggested that she had told the police about
17 AB forcing her to suck his penis because she wanted some attention from her
18 mother. Mr Crister Brady spent some time exploring the fact that his client, AB,
19 worked during the day and the night with a view to implying, as I saw it, that there
20 would not have been any opportunity to assault her as she alleged. Mr Dennis
21 Brady for CD adopted a similar line, returning once again to the issue of the TV
22 series Law and Order and a particular episode where a young girl was molested by
23 men. He also cross examined X about the layout of the house where the assaults
24 were alleged to have occurred with a view to showing that it was impossible that
25 they could have happened without others in the house being aware of what was
26 going on.



1 To all the suggestions that she had either imagined being assaulted or made up the
2 allegations, X said this was not true. In anticipation of the fact that EF and one of
3 X's brothers were to be called as defence witnesses, Counsel for CD put to X that
4 what she had said about seeing EF giving oral sex to CD and her claim that her
5 brothers had told her that CD had forced them to suck his penis were all untrue.
6 She denied this. He put to her that she had made up the allegations of sexual abuse
7 because she was unhappy living in the house as a result of her mother's unfair
8 treatment of her ("you were treated like a Cinderella") and she wished to be
9 removed from the home environment.



11 *RECENT COMPLAINT*

12 30. The prosecution called three witnesses whose testimony was admitted (without
13 objection by the defence) on the basis it was evidence of recent complaint which
14 demonstrated consistency on the part of the complainant and which therefore
15 tended to strengthen her credibility.

16
17 31. Ms. RC, who is an accountant by training and a volunteer for the Cayman Outreach
18 Association (Extended After School programme), explained that since February
19 2012 she had been providing assistance at X's primary school in a programme
20 focused on children perceived to be at risk. X was one such child and she had
21 attended regularly at the sessions some 2-3 days a week. She described how at one
22 particular session (which it was clear had taken place on 15th November 2012)
23 called "About me", X initially complained about household chores and the fact that
24 her mother sometimes beat her if the chores were not done in a timely manner
25 before she became tearful and said that her Uncle had touched her on her "*butt and*
26 *breast*".

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Ms. RC did not probe the allegation further as she had been trained not to ask the “who/what/when/where/why” questions in such circumstances. She said she removed X from the group and described her as crying for about an hour. She explained that the next day she spoke to Ms. AH, the school counselor, and passed on what had happened.

32. Ms. AH, who is a licensed psychologist gave evidence and confirmed that after speaking to Ms. RC about what she had been told the previous day she spoke to X herself in a 30-minute meeting in her Counselling office. She took no notes during the meeting but, immediately after, she sent an email to Ms. CC at the DCFS, summarising what X had just told her. She produced a total of three emails sent at 2.17 p.m., 2.38 p.m. and 5.04 p.m. and the first of these said as follows:

“...X told me that her uncle AB (mother’s brother who lives in the same house as X, her mother and younger siblings) has been approaching her for some time (unclear of exactly how long) and asking her to touch his private parts and forcing her to suck his penis. She demonstrated how he would grab and pinch her cheeks with his hand. She thought that the last time that he did this was in the summer.

She also indicated that a cousin of hers, CD, visits the home frequently and does the same thing. She described CD as being around 18 years of age and using drugs. She is very bothered by CD’s approaches because they are more frequent and more recent than her Uncle....

X’s sense of the sequence of events was not very exact.”



1 33. The second email reported on the discussion that Ms. AH had had with X's mother
2 but as she was never called as a witness, the contents of the email are strictly
3 inadmissible and I will not summarise what was said – save to record the fact that
4 as a result of speaking to X's mother. Ms. AH understood that she intended to go to
5 the police to report X's complaints. Ms. AH explained that her role was not to
6 investigate the allegations but to protect the welfare of a child. She did not probe
7 the allegations made but she did speak to a Sergeant Scott of the Family Support
8 Unit (FSU) who confirmed that X's mother should go straight to the Central police
9 station in George Town. In the context of her observation that X had trouble
10 explaining the sequence of events, she confirmed that X was known to be a child
11 with learning difficulties – having been so diagnosed by an educational
12 psychologist. Under cross examination by Counsel for AB, Ms. AH also confirmed
13 that there had been several previous occasions when she had been involved with X,
14 explaining that X frequently had no food to eat at school and that her parents were
15 neglectful. She would feed X herself and on three or four occasions she had had
16 significant counseling sessions with her although she had not previously mentioned
17 anything about sexual abuse. She felt that X needed more attention from her
18 mother.

19
20 34. The third recent complaint witness was X's paternal grandmother, "GH". She
21 confirmed that X told her on Saturday 17th November 2012 that both defendants
22 had molested her. X said they forced her to suck their penises and "*they tried to*
23 *put their penis into her vagina and bottom*" but GH could not remember which one
24 had tried to penetrate her vagina and which tried to penetrate her bottom. GH
25 decided to go straight to the police station and took X with her and she was present
26 when X was interviewed by DC Howell.

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THE EVIDENCE OF ACTING DETECTIVE SERGEANT HOWELL

35. The sole police witness called by the prosecution was Acting Detective Sergeant Dave Howell who is currently attached to the Family Support Unit (FSU) and who was the officer (then a constable) who met X and her grandmother when they attended at George Town police station on the afternoon of Saturday 17th November 2012. He explained that as a result of GH relaying an allegation to him, he spoke to X *“who made several disclosures to me”*. The discussion with X on the second floor of the police station lasted an hour or so and although no recording was made he took two to two and a half pages of notes on an A4 size pad. When asked where the notes were, Detective Howell said that despite a diligent search for his notebook he has been unable to locate it. When asked whether he was able to recall the general nature of what X disclosed, he said that *“X reported that over a period of time two male relatives, AB and CD, being her uncle and cousin, had been forcing her to perform sexual acts on them, naming that they were forcing her to suck their penis and also that they tried to have sex with her vaginally and anally”*. He could not recall which one it was that was attempting to have vaginal sex and which one anal. He confirmed that he was present during the ABE interviews conducted by Detective Berns who had his notes with her. He said that DC Berns is still an officer with the RCIPS and he had spoken to her earlier in the day but that she did not have a copy of his notes.

Mr Wainwright asked Detective Sergeant Howell to explain what had been happening with the investigation between November 2012 and May 2014 and his answer was as follows:



1 *“The investigation was not – whilst I was the on call officer at the time in*
2 *November, the investigation was not actually assigned to an officer for it to*
3 *progress and I think inadvertently it stalled and until it was we realised the*
4 *error nothing was done of significance in terms of bringing the accused to be*
5 *interviewed.”*

6
7 36. I was concerned to explore this answer in greater detail myself after cross
8 examination had been completed and asked Detective Howell to explain how the
9 case had been allowed to go to sleep for some 18 months – bearing in mind that by
10 the end of the ABE interviews on 19th November 2012, the police had gathered
11 evidence of grave sexual assaults carried out by two adult men on a young child. I
12 asked Detective Howell whether he was in any doubt about the nature of the
13 allegations and he said that he was not. Bearing in mind he was then a constable, I
14 asked who the head of the FSU was at the time and who made decisions at the time
15 to assign a case to particular officers. He explained that the head was and is an
16 Inspector Burton and that decisions on allocation of cases were made by a
17 Detective Sergeant Morris. Both Officers Burton and Morris were aware of the
18 ABE interviews and he personally informed DS Morris about the evidence and the
19 allegations made by X. Detective Howell said that as far as he was aware, an
20 investigation should automatically have commenced based on the ABE materials.
21 On the basis that neither Inspector Burton nor DS Morris were to be called as
22 prosecution witnesses, I asked him whether he could help the court as to why the
23 case was dormant for some 18 months. His answer was *“each officer has, and I*
24 *think at the time it was not assigned to my case load and so I inadvertently*
25 *overlooked the investigation of the matter”*.



1 When I asked how he could “inadvertently” overlook such a serious allegation, his
2 answer was “*because during that time I dealt with other investigations and whilst*
3 *this one was not on the workload it went dormant*”. He said that when he left the
4 meeting with DS Morris after discussing X’s allegations he didn’t know whether
5 she was planning to assign the case to him. He could not recall what prompted the
6 case springing suddenly into life in April 2014 with the decision to arrest and
7 interview AB. He confirmed that he had retained his original notes of the first
8 interview with X until at least June 2015 as he had been asked for copies of notes
9 in another matter recorded in the same notebook and had access to the notebook
10 then. He went on to say that subsequently he had moved to a new office and the
11 notes had somehow disappeared.

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3 *THE TAPE RECORDED INTERVIEWS OF THE DEFENDANTS*

4 37. In the course of Detective Howell's evidence the tape recorded interviews under
5 caution of each defendant were played to the court.

6 38. The first to be interviewed on 4th April 2014 was AB. His interview lasted some
7 20 minutes and was conducted by Detective Howell. After he was told by
8 Detective Howell that he was investigating a report made in November 2012 that
9 he "*had put your penis in X's mouth asking her to perform oral sex sometime*
10 *before*" AB answered all questions put to him. He denied the allegation as he
11 denied trying to put his penis "in X's behind". Further questions were put about his
12 relationship with his sister (X's mother), why his sister moved out of the house,
13 whether his sister had ever asked him about X's allegation that he had forced her to
14 perform oral sex on him and whether he had ever been alone in a room with X. He
15 said his sister moved out "because of something between me and X" but said his
16 sister had never asked him about the allegation that he had forced X to perform oral
17 sex and he denied ever being in a room alone with X. When asked why X would
18 make up allegations of sexual abuse against him he replied "*I wouldn't know that*
19 *bro seriously*".

20 39. CD was interviewed for some 17 minutes by Detective Howell on 11th July 2014.
21 After asking background questions concerning various family members and who
22 was living in the house and in which rooms at the time when X was alleging she
23 had been abused by him and AB, Detective Howell put the allegation to him that he
24 had been troubling X sexually and forced her to suck his penis on several
25 occasions. CD replied:
26



1 *“..I remember that was going around my family about X had told her mommy*
2 *that I did that but I did not do that but I will admit something that her and her*
3 *older sister [AA], they are very weird girls they used to tell me that they like*
4 *me and they want to be my girlfriend and I tell them I can't do that because we*
5 *family so yeah stuff used to be like that...it's sort of a weird family.”*
6

7 40. When Detective Howell asked why he thought that X would say that he did these
8 things to her, CD said:

9
10 *“I have no idea why she is saying these things because she said that my uncle*
11 *AB did it too and I know my uncle wouldn't do anything like that. I don't know*
12 *maybe or not but she told these things on me and my uncle and obviously it*
13 *bothers the family. I have no idea what's going on with this little girl and its*
14 *been going on like that for years and I really want to get it over with because I*
15 *got into an argument with my girlfriend this morning because of the same*
16 *foolishness. My aunt she brought it up with my girlfriend and we got into a big*
17 *argument that I did this with my cousins.”*

18
19 41. In answer to the question whether there were any occasions when he was alone
20 with X, CD said:

21 *“there's never any occasions when I'm alone with X, there's always cousins*
22 *running around the house, family running around the house. Friends running*
23 *around the house, there probably was never a time that me and X was alone*
24 *for a good 2 minutes in that house and I barely be at that house because I used*
25 *to do a lot of activities. I used to do about 10 different sports, always had*
26 *homework, used to go over my friends and stuff so I didn't really see X much or*
27 *be around family. So there was not many times where me and her used to get*
28 *along and then with her and her family in their room. I really don't like to live*
29 *there. I don't go into their room or mess with them because it used to be a lot*
30 *of family problems where there was stealing going on around the house so*
31 *most of the family used to keep their corners and I never really used to hang*
32 *out much with the kids.”*
33



1 42. When specifically asked if he had ever forced X to suck his penis or tried to push
2 his penis into her behind or anything like that, he said “*I never tried to do nothing*
3 *sexual with X or any of my family or any of my cousins.*”

4 ***THE VIEW OF THE LOCUS IN QUO***

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6 43. At the invitation of Mr Dennis Brady on behalf of CD, I was invited to view the
7 house where X alleged all the sexual assaults had taken place. Accordingly, a view
8 of the house was organised and I was able to walk through the entire building and
9 view the lay out of the various bedrooms which were multi-occupied by three
10 generations of X’s family.

11 ***THE DEFENCE EVIDENCE IN SUMMARY***

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14 44. Both the defendants gave evidence. In dealing with their evidence in brief terms, I
15 make clear that this is not because I regarded their evidence as less worthy of
16 detailed scrutiny. Rather it is a reflection of the fact that, in light of the nature of
17 the prosecution evidence, neither their own Counsel nor Mr Wainwright had
18 anything specific and relevant which could be put to them beyond the bare
19 allegations of forcible oral sex and attempted anal and/or vaginal penetration of X
20 on unspecified occasions over a period of months or years – all of which
21 allegations were vehemently denied on the basis they simply never occurred.

22
23 45. AB, who was 38 at the date of trial and 34 when X made the allegations of sexual
24 abuse against him, explained his employment history, who lived in the house where
25 it is alleged the abuse occurred, the normal day to day routine in the house and his
26 observations on how his sister (X’s mother) treated X.

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In cross examination, Mr. Wainwright sought to explore whether AB had a girlfriend in 2012 when the allegations of abuse were made and, after some delay for thought, AB gave the name of an American woman who he claimed was his girlfriend until September 2012. He was challenged about his working hours in the two jobs he claimed to have been doing at the time on the basis that he was dishonestly minimising the opportunities he had to abuse X in the house where they both lived. He was also challenged about an answer he had given in examination in chief to the effect that he had installed a lock on his bedroom door to “keep the kids out” when he wanted to sleep in the afternoon and it was suggested that he had changed his answer about whether the lock was installed before or after X’s allegations were made because he realized that if he stuck with his answer “before” that would demonstrate that it was possible that he could have locked X into his bedroom in order to assault her sexually behind a locked door.

46. Having been asked in chief whether he had ever forced X to suck his penis or tried to penetrate her vaginally and denied both allegations, CD responded to questions about how many people were living in the house where the abuse allegedly occurred in 2012 and before – explaining that at any one time there were always at least 5 people present and sometimes 25. He said that he and his family had moved out of the house in April 2010 but that he would return there regularly. He confirmed his account in interview in 2014 that X and her sister had wanted to be his girlfriends “because I looked good and I’m funny and stuff like that”. CD would have been about 14 at the time and X would have been about 8. He said he told them “we cannot be girlfriend and boyfriend because we’re blood related. We’re family and that can’t happen.” When asked what their reaction to this was he said “they seemed to feel bad because I rejected them.”



1 47. Mr Dennis Brady asked CD a number of questions designed, it would seem, to
2 suggest that CD had no real opportunity to assault X as she had alleged. When I
3 intervened to suggest that in light of the nature of the allegations it was not
4 realistic, given the vast, unspecific time span when the assaults were alleged, to
5 suggest that CD had no opportunity to attack X, CD said the following:

6
7 *"I would be 100% honest. Living in that house if I wanted to rape X of course*
8 *there would be occasions. Of course there would be...but the problem would*
9 *be raping someone in that house would be getting away with it because there's*
10 *a lot of people in that house, that lives in that house"*

11
12 48. When it was put to him that X had said that she saw EF sucking his penis as well,
13 CD said:

14 *"I would say that's impossible. That would never happen. I would never do*
15 *that to my sister. I love my sister with all my heart."*

16
17 49. In response to the allegation that X had said that CD had forced her brothers to
18 suck his penis, CD said that the allegation made him feel horrible and especially so
19 because of all the times that he and his father had cooked food for X and her
20 brothers so they wouldn't go to sleep hungry *"because their Dad is a piece of shit*
21 *that rarely comes and brings them food"*. He also described how X's mother
22 would use extreme violence against X, slamming her against walls and striking her
23 hard. He said X was a girl who most of the time looked sad *"and it's because of*
24 *her parents"*.

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1 50. Before he began his cross examination of CD, Mr Wainwright applied to adduce
2 evidence of CD's bad character on the basis that CD had accused X of making up
3 false allegations against him. After initial objection, Mr Brady abandoned his
4 stance and so the Court learned that in 2012 CD was convicted of two counts of
5 burglary and one charge of theft, to all of which he pleaded guilty. In the course of
6 cross-examination one particular issue stands out. In anticipation that EF was to be
7 called as a defence witness, Mr Wainwright asked CD if he had ever been in a
8 locked room on his own with X in the house where she lived. He said he was very
9 sure that that had never happened and maintained that denial when Mr Wainwright
10 put to him that his own sister, EF, had caught him in a locked room with X. He
11 further maintained his denials that he had ever subjected X to systematic sexual
12 abuse, replying that "*I would rather rape my dog*". He also said that at the relevant
13 time he had several girlfriends and was sexually active, commenting "*It's all*
14 *because of the face...you don't need lyrics if you have a face like this.*"

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THE EVIDENCE OF EF

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51. CD's sister, EF, was called as a defence witness. The clear purpose of her evidence was to undermine the complainant's evidence to the effect that she had, on one occasion, seen EF performing oral sex on her own brother. EF is some 2 years older than X and thus 17 when she appeared before me. EF recalled that there was a time when she and CD all lived together in her grandmother's house with X and other family members. She said that she got on well with X and that they would hang out together. She said that she had heard from the police that X had alleged that CD had made her (X) suck his penis but that she had not heard that herself from X.



1 In examination in chief she said that she did not recall a time when she saw her
2 brother and X go into a locked bedroom together in the house nor an occasion
3 when she was with them in a room. She denied that CD had ever asked her to
4 perform oral sex on him commenting that it was “weird” that someone would say
5 such a thing and that “*I would never suck my brother*”.

6
7 52. In cross examination it was put to EF that she had signed a witness statement in the
8 presence of her mother on 16th September 2014 and that she understood that it was
9 important that the statement contained the truth. She agreed. In that statement she
10 had said that she had moved from her grandmother’s house about four years ago
11 (i.e. in 2010) but that when they were living there X had come to her one day and
12 said that “*CD had been troubling her and telling her to suck his penis and*
13 *things...I cannot remember if X told me that that she did it but I believed that CD*
14 *had been asking her to do it. I can’t explain why I believe that CD was doing it but*
15 *I did. X did not tell me that anyone else had troubled her.*” The statement also
16 included the following recollection:

17 “*I remember there was an occasion when I was at my grandmother’s home and*
18 *CD and X were also there. I saw CD and X got into my aunt’s room locked the*
19 *door. I went around the window of the bedroom where there is an AC unit to*
20 *see if I could see into the room to find out what was going on but I couldn’t get*
21 *the window open to see. I then went back into the house where I knocked on*
22 *the bedroom that X and CD were in in. I tried to open the door but it was*
23 *locked. I knocked again on the door and they still did not open the door. I had*
24 *to knock the door on the third occasion before one of them opened the door.*
25 *Both of them were fully clothed. X did not mention to me that anything had*
26 *happened. I ca not remember if this had happened before or after X had told*
27 *me that CD was troubling her.*”



1 53. The statement ended with the following:

2 *“No one from my family has ever touched me in a sexual way or asked me to do*
3 *any sexual favours to them.”*

4
5 54. EF explained that when she said that she believed that CD had been asking X to
6 suck his penis this was because *“I didn’t want to think she is lying”*. Nothing else,
7 she said, made her believe that what X had said was true. As for X’s allegation
8 that she, EF, had herself performed oral sex on her brother when X was present, EF
9 said that was not true.

10 ***THE EVIDENCE OF JJ***

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12 55. JJ is the younger brother of X and was 13 when he gave evidence. He recalled
13 being interviewed by the police in November 2012 and he confirmed that he had
14 sex education lessons at school and understood that *“men not supposed to be with*
15 *men and women with women”*. He said that his relationship with CD was good and
16 that he and his baby brother played a lot together with CD and had fun. He said he
17 couldn’t remember if CD ever touched him in a way he didn’t like, but, that if
18 anyone had ever asked him to suck their penis *“I’d defend myself. I’d fight him.”*
19 If CD had ever asked him to suck his penis *“I think I’d remember that.”*

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CLOSING SUBMISSIONS

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56. Written submissions were lodged by all parties at the conclusion of the evidence. Unsurprisingly in light of the extraordinary history of the proceedings and the absence of any supporting evidence for X’s allegations, closing submissions focused on the strength of the evidence, the impact of the delay and incompetent investigation on the fairness of the trial process and the basic credibility of the various witnesses’ accounts.
57. Mr. Wainwright conceded on behalf of the Crown that *“there had been unacceptable delays in the investigation of these alleged offences however notwithstanding such delays, the Court can be sure of the truthfulness of the account given by the complainant.”* He submitted that the complainant had been essentially consistent in the accounts she gave to the police and that what she told recent complaint witnesses was supporting evidence capable of bolstering her credibility. He relied on specific details in X’s ABE interviews as adding weight to her account and suggested that *“this level of detail could not be made up”*. As for the defendants, he submitted that *“the Court cannot place any reliance upon the evidence of either defendant”* and suggested that they had each attempted to limit, artificially, windows of opportunity to assault X as she had alleged. He relied on what he said were lies/evasions by both defendants which were hallmarks of dishonesty and which would require me to direct myself as to the impact of any lies told in accordance with the *Lucas* principles. He rejected the idea that the delay that had occurred had caused any real unfairness to the defence whereas he accepted that, as a child, X had suffered a significant disadvantage as a fourteen year old being asked to recall events when she was eleven and younger.

1 The ABE interviews, he said, meant that there was no loss of quality in terms of
2 her evidence as of 2012 although he agreed in oral argument that there was a
3 demonstrable loss of quality in X's evidence before me in comparison with her
4 2012 ABE interviews. Mr. Wainwright accepted that two adult witnesses – X's
5 other Uncle who also lived in the house throughout the time that the abuse was
6 allegedly occurring and indeed shared a room with AB together with X's
7 grandmother who lived in the house at all times and indeed was there all day as she
8 was bed ridden - should have been asked to provide witness statements. But he
9 denied that this failure meant that an acquittal was justified. He also referred me to
10 the English Court of Appeal ruling in *R v. JVG*² in which approval was given to a
11 direction given by a trial Judge in a sexual abuse case to the effect that when a
12 child is as young as 6 she may well not be able to see clearly or understand that
13 sexual activity is wrong or inappropriate, especially with an adult, but that when
14 the child is 12 or 13 and having learned more about the world, feelings that things
15 are wrong may well come to dominate and allegations may explode forth where
16 there was previously silence and no suspicion of them.

17
18 58. The defendants' closing submissions focused on weaknesses in X's evidence –
19 arguing that she was less than confident in some answers, forgetful and confused,
20 caused, no doubt, in part, by the passage of time. She was, it was argued, unsure
21 about crucial aspects of her evidence and examples were given of specific instances
22 where her evidence was inconsistent. Strong criticisms were made of the conduct
23 of the investigation and, in particular, of the fact that DC Howell's notes of his first
24 hour or more, interview with X had been lost. The implication was that the FSU's
25 conduct of the case was simply inexplicable and wholly unexplained to the court.

² [2015] EWCA Crim 1630



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In short it was submitted that the case for the Crown is “*littered with uncertainty*” so that the Court cannot feel sure of guilt. There is no reliable way, it was argued, that the Court could be sure whether any witness – including the defendants – was lying or just have poor recall. Counsel for CD also sought to persuade me that the evidence of any medical evidence showing that X had sustained physical trauma from the assaults was a significant factor in assessing the strength of the case (although I made clear that I regarded this as a weak point in circumstances where X’s evidence did not tend to suggest that any significant trauma would have been caused to her). Reliance was placed on the observations of Lord Woolf CJ in *R v. B*³ (an authority I had myself drawn to the attention of all Counsel) in which a conviction for sexual abuse alleged to have occurred some 30 years previously, was quashed, notwithstanding the Court of Appeal’s finding that the trial process itself could not be faulted.



³ [2003] 2 Cr App R 13

1 *MY CONCLUSIONS*

2
3 59. At the conclusion of the evidence, I was faced with a situation in which the sole
4 evidence capable of proving the Crown's case came from X in circumstances
5 where she had first made allegations of grave sexual abuse against two close family
6 members when she was 11 years of age in November 2012. Taking her evidence
7 both in her 2012 ABE interviews and before the court in July 2016 into account,
8 she has alleged that this abuse took place regularly over a period of at least 18
9 months and possibly as long as five years from when she was 6 years of age in a
10 relatively small 5 bedroom house, multi-occupied by three generations of the same
11 family who lived cheek by jowl. She was unable to be precise as to when the
12 assaults had taken place and, accordingly, the specimen charges were framed by
13 reference to an 18-month period between August 2011 and November 2012. She
14 explained that in addition to physical violence at the hands of her mother, her
15 mother and father (despite being separated) would often have sex in her presence
16 while she was in the same bed as them and while her younger brothers were also in
17 the bedroom. None of the adult occupants of the house during that period – X's
18 mother, her grandmother or the uncle who shared a bedroom with AB and against
19 whom no allegation of abuse has ever been made – gave evidence for the
20 prosecution either because they were never asked to provide witness statements or,
21 in the case of X's mother, because she herself was suspected of assaulting her
22 daughter and had been interviewed under caution in 2012. Nor was any prompt
23 effort made to take a witness statement from X's older sister, AA, despite the
24 obvious potential relevance of her testimony in light of CD's interview in July
25 2014.



1 60. Having recorded X's serious allegations of abuse in George Town police station in
2 November 2012, it is clear that no investigative action whatsoever was taken by the
3 Cayman Islands police force until, for no reason disclosed to the court, a decision
4 was taken to interview AB in a frankly desultory manner in April 2014. CD was
5 then interviewed for a mere 17 minutes under caution in July 2014. Even then,
6 obviously relevant witnesses were never approached to see if they were able to
7 assist the enquiry. Detective Sergeant Howell's explanation that the investigation
8 of this case "inadvertently stalled" for some 18 months is one that I find impossible
9 to understand albeit that I do accept that the decision on how to progress the
10 investigation was not one for Detective Howell but for his superiors. Neither
11 defendant sought to pursue an abuse-of-process submission on the basis of the
12 unexplained and inexcusable delay, and, the loss of Detective Howell's notes of
13 X's first detailed account to a police officer. Accordingly, no senior officer was
14 called before me to give evidence on the question of how it was that very grave
15 allegations of sexual abuse by two adults on a young child came to be
16 "*inadvertently stalled*" from November 2012 until April 2014 and then
17 investigated in a manner that failed to approach obviously relevant witnesses.

18
19 61. As I stated at the outset of this judgment, criminal courts are well used to trying
20 cases of what have become known as allegations of historic sexual abuse, meaning
21 allegations which are made many years, and sometimes decades, after the abuse
22 allegedly took place. And I have borne well in mind that any tribunal of fact –
23 jury or judge alone – must be alert to the fact that experience shows that people
24 react differently to the trauma of serious sexual assault. Some people complain
25 immediately while others feel shame and shock and do not complain for some time
26 – maybe years or decades.



1 Accordingly, the mere fact that a complaint of this nature is late, does not mean
2 that it is false. I also fully acknowledge that particular feelings of confusion,
3 shame, anxiety and embarrassment may arise where the abuse is being inflicted not
4 by a stranger but by a close family member (see the guidance in *R v. Miller*⁴). I am
5 particularly conscious of the guidance in the judgment in *R v. JVG* which I have
6 cited above.

7
8 62. The effect that any lapse of time has on the fairness of the trial process will always
9 depend on the facts of each case. The length of delay in any given case is nothing
10 more than a statement of fact. What matters is not how long it is since the alleged
11 offence but whether the delay has an effect on the fairness of the trial and the
12 ability of a court ultimately to be sure of guilt⁵. Delay can place a defendant at a
13 material disadvantage in challenging allegations arising out of events that occurred
14 many years before and this is especially so where the defence is, as in this case, a
15 simple denial of acting in the manner alleged. In this case, I accept that such delay
16 as has occurred between the making of the allegations by X in 2012 and the trial
17 before me cannot be said to have caused particular prejudice to either defendant in
18 terms of their own ability simply to deny X's allegations. Whether an adult male
19 has sexually abused his young female niece or cousin is not a matter which is liable
20 to be forgotten as time passes and in the end, whenever the allegation was put, the
21 defendants were going to utter simple denials that they had acted as alleged by X.
22 Absent any detail from the complainant as to when precisely the assaults occurred
23 – beyond unspecified times and dates over an 18 month period – no defendant
24 could advance a defence of alibi nor credibly seek to garner evidence from others
25 in the house who might be able to contradict what was being alleged at a particular
26 time or day.

⁴ [2010] EWCA Crim 1578

⁵ See the guidance in *R v. PS* [2013] EWCA Crim 992.



1 63. There is however one obvious prejudice to the defendants flowing from the delay
2 in this case and that is the loss of Detective Howell's notes of his interview with X
3 at George Town police station on the afternoon of 17th November 2012. While Mr
4 Howell claimed to recall in broad outline the allegations that X made in terms
5 which accorded with her eventual ABE interviews two days later, the fact remains
6 that, without access to the notes it was impossible for defence Counsel to examine
7 the extent to which X's account was consistent in potentially important respects in
8 terms of who was alleged to have done what to her and over what period of time
9 and in what circumstances. It is of course pure speculation whether access to the
10 notes would in fact have assisted the defence in their efforts to undermine X's
11 credibility. But just as the loss of a first description given by an identification
12 witness to a crime would always be regarded as creating unfairness to an accused
13 person (and undermine the reliability of the identification evidence as a whole) so
14 too is the loss of what were clearly reasonably detailed notes of what a person
15 alleging sexual abuse first said to an investigating police officer during an
16 interview lasting an hour or more.

17
18 64. When considering the central question of whether the prosecution has proved the
19 defendants' guilt, I have borne in mind the prejudice caused to them by the loss of
20 Detective Howell's notes as well as the generally incompetent quality of the
21 investigation into these grave allegations; which means that the case turns purely
22 and simply on X's unsupported evidence. Bearing in mind that X was alleging that
23 she had been sexually abused by, not one, but two male relatives, over a period
24 potentially as long as five years, and in a small house occupied by as many as 15
25 people at a time, the absence of any evidence from other adult occupants of the
26 house meant that X cut a lonely figure in the course of the trial process.

27



1 That reality did not itself mean that X's evidence was unreliable but it plainly
2 meant that the strength of the prosecution case depended on her and her alone.

3
4 65. I also find that the delay that has occurred, combined with the poor quality of the
5 police investigation has potentially harmed X and has done her an injustice. While
6 I accept that her account of sexual abuse at the hands of the defendants has been
7 broadly consistent – both in the ABE interviews and before me in evidence as well
8 as in the form of her accounts to the recent complaint witnesses - I was also struck
9 by the contrast between her evidence in the ABE interviews and her evidence
10 before me. In oral argument at the close of the evidence, I expressed the view that
11 it seemed to me that X's evidence on video in 2012 was better in quality than
12 before me and commented that there may be a number of reasons for this
13 (nervousness, public nature of the proceedings and so on) but that I was faced with
14 the difficulty that, for whatever reason, the quality of her evidence had clearly
15 diminished and there were contradictions in her accounts. I refer in particular to
16 the matters that emerged when Mr Wainwright asked questions in chief after the
17 ABE interviews and which I have summarised in paragraphs 27-28 above.

18
19 66. Mr Wainwright's response was to observe that there is a world of difference
20 between a girl, just approaching her 15th birthday at the trial stage, who is thinking
21 back to events when she was ten or eleven, as compared with a defendant such as
22 AB aged 38 being asked to think back to events when he was 34. Common sense,
23 according to Mr Wainwright, dictates that AB is much better placed to give
24 evidence to this court about events four years ago than is a 14 year old now.

25



1 An adult recalling events when he was already well into adulthood causes him less
2 difficulty than it would with a 14 year old girl being asked to recollect events when
3 she was eleven or possibly as young as 6.

4

5 67. I do not consider that Mr Wainwright's response properly meets the point I was
6 seeking to make in circumstances where the burden of proof is on the Crown to
7 make me sure of guilt and where the case depends solely on the evidence of a
8 single complainant the quality of whose evidence has, in my view, plainly been
9 affected by the passage of time and for reasons which the court simply cannot
10 assess with any degree of reliability.

11

12 68. I also must take into account the evidence of EF and JJ who were called as defence
13 witnesses and whose evidence plainly did undermine X in important respects
14 insofar as they denied that they had suffered any form of sexual abuse at the hands
15 of CD. Mr Wainwright's approach to EF's evidence was to rely heavily on the fact
16 that she gave a compelling account (which I accept as true) of an occasion when
17 she found X and her brother in a locked bedroom (albeit that she observed no
18 sexual contact between them) on the basis that this demonstrated CD to have lied
19 on a highly significant matter. But the fact remains that EF was clear both in her
20 original witness statement and in her evidence before me that at no time had her
21 brother ever forced her to perform oral sex on him notwithstanding X's evidence
22 that she had observed this happening. Unless I were to adopt reasoning to the effect
23 that EF would obviously be bound to deny in a public court that she had ever been
24 sexually abused by her brother, I consider that the impact of EF's evidence as a
25 whole does make it harder for me to be sure of guilt in circumstances where the
26 sole evidence for the prosecution comes from X.

27



1 69. As for my assessment of the defendants and the evidence they gave, there was a
2 stark difference between them. I find that AB was a man of low intelligence and
3 agree with Mr Wainwright that his account of his movements and working hours at
4 the time seemed to be artificially designed to restrict the opportunity he may have
5 had to assault X. I was unable however to be sure that his reason for seeking to
6 minimise his opportunity to assault X was because he was guilty as opposed to a
7 concern that any admission of an opportunity to assault X would be regarded as
8 proof of guilt. As I pointed out in the course of oral argument, bearing in mind the
9 unspecified nature of the charges and the long period during which the offences
10 were alleged to have taken place, it was plainly absurd to suggest that neither
11 defendant had any opportunity to commit sexual assaults on X if they were so
12 inclined. In the circumstances, I did not attach significant weight to AB's answers
13 on this aspect of the case.

14
15 70. CD struck me as an intelligent and arrogant young man who responded
16 aggressively to Mr Wainwright's forceful cross examination to the effect that he
17 was lying in his denials of persistent sexual assault on his young cousin. But as I
18 pointed out to Mr Wainwright at the time, this aggressive response in itself told me
19 little – bearing in mind the fact that being accused of a grave sexual assault when
20 one is innocent might be expected to produce an aggressive response. Accordingly
21 his demeanour in itself was of little assistance to my overall assessment of the
22 strength of the prosecution case. I find that CD did lie to me about whether the
23 “locked bedroom” incident involving him and X as described by EF ever took
24 place. But ultimately I was unable to be sure that this lie was consistent only with
25 CD's guilt, not least because EF herself observed no sexual contact between her
26 brother and X on this occasion.

27



1 As for CD's bad character, I was equally unable to be sure that the fact that CD has
2 a record for burglary and theft was in itself sufficiently relevant to my overall
3 assessment of the strength of the prosecution case as to tip the scales in favour of a
4 finding of guilt against CD. Ultimately my decision on the proper verdicts in this
5 case turned on my assessment of inherent weaknesses in the prosecution's evidence
6 rather than the credibility of the defendants.

7
8 71. In concluding that the verdict on all five counts must be one of Not Guilty, I wish
9 to make it absolutely clear that I do so not because I find as a fact that X has lied
10 either in her ABE interviews or in her evidence before me and I reject the
11 suggested motives advanced by the defence as to why X invented all the
12 allegations against them. Ultimately however, and for the reasons I have
13 endeavoured to explain above, I have concluded that the prosecution evidence as a
14 whole is simply not capable of satisfying me so that I can be sure of guilt. It is not
15 enough in my view to approach X's evidence simply by asking "well why would
16 she have made the allegations unless they were true?"

17
18 72. The exercise of being sure of guilt in a case such as this, where a single witness's
19 unsupported evidence is posed against the adamant denials of two defendants and
20 is undermined by the evidence of two defence witnesses, calls for a more careful
21 assessment of the evidence taken as a whole and affected, as it is, by the features of
22 delay and incompetent investigation which have hallmarked this case. In reaching
23 this conclusion I have borne heavily in mind the observations of Lord Woolf CJ in
24 *R v. B* where the Court of Appeal quashed the conviction of a step father for
25 sexually abusing his step daughter some 30 years before his trial notwithstanding
26 the Court's view that nothing had gone wrong with the trial process:



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“However there remains in this Court a residual discretion to set aside a conviction if we feel it is unsafe or unfair to allow it to stand. This is so even where the trial process itself cannot be faulted. It is a discretion which must be exercised in limited circumstances and with caution. When we exercise that discretion we must be conscious that we are not only involved in deciding where justice lies for the appellant. We must do justice to the prosecution whose task it is to see that the guilty are brought to justice. We must also do justice to the victim. If she is right, she was treated in a most disgraceful way by someone whom she should have been entitled to trust: her stepfather. For years, for understandable reasons, as we have already indicated, she felt unable to make public what happened. She is entitled to justice as well. But we also have to do justice to the appellant. At the heart of our criminal justice system is the principle that while it is important that justice is done to the prosecution and justice is done to the victim, in the final analysis the fact remains that it is even more important that an injustice is not done to the defendant. It is central to the way we administer justice in this country that although it may mean that some guilty people go unpunished, it is more important that the innocent are not wrongly convicted.”

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73. What Lord Woolf had to say was of course an explanation of the role of an appellate court in exercising the “lurking doubt” discretion when deciding whether a conviction is safe. But it seems to me that his approach is equally relevant to a first instance Judge sitting as the tribunal of fact in a case such as this one. This has been a very troubling case to try, not least because of the still unexplained conduct of the police investigation after X first made her allegations of abuse in November 2012. In the end, I have concluded that on each count alleged against AB and CD, the only proper verdict I can return is one of Not Guilty.

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Dated this the 15th day of September 2016



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**Honourable Mr. Justice Timothy Owen Q.C. (Actg.)
Acting Judge of the Grand Court**