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APPEARANCES:

For the CROWN:

Mr. S. Wilson

For the defendant:

Mr. L. Adolff

\*\*\*\*\*

day of February 2004, at George Town, Grand Cayman.

THE HONOURABLE JUSTICE SMITH on the 20th

REASONS FOR SENTENCE delivered by

*[Handwritten signature]*

\*\*\*\*\*

KENNY WHITTAKER

- VS -

REGINA



IND. NO. 25 OF 2003 - Criminal

HOLDEN IN GEORGE TOWN, GRAND CAYMAN

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAYMAN ISLANDS  
LEGAL DEPARTMENT  
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ORIGINAL

20.2.04

Criminal

2  
3 The accused, Kenny Roger Whittaker, is  
4 charged on indictment containing two counts.  
5 The first charges him with rape, contrary to  
6 Section 125 of the Penal Code (1995  
7 Revision). And the particulars of that  
8 offence are that he, Kenny Roger Whittaker,  
9 on the 12<sup>th</sup> day of October 2002, at East End,  
10 Grand Cayman, had carnal knowledge of Alicia  
11 Watkins without her consent. The second  
12 count charges him with indecent assault,  
13 contrary to Section 130(1) of the Penal Code  
14 (1995 Revision). And the particulars of that  
15 offence are that he, Kenny Roger Whittaker,  
16 on the same day, that is the 12<sup>th</sup> day of  
17 October 2002, at East End, Grand Cayman,  
18 unlawfully and indecently assaulted Alicia  
19 Watkins.

20  
21 The accused person has pleaded not guilty to  
22 this indictment and, as in all criminal  
23 cases, the burden is on the prosecution to  
24 adduce evidence to satisfy the Court so that  
25 the Court is sure of his guilt before the

REASONS FOR JUDGMENT

1 Court may return a verdict adverse to him.

2 This burden never shifts. So even though the

3 accused person gave evidence, he was not

4 assuming any burden to prove his innocence.

5 It is for the prosecution to satisfy me, so

6 that I am sure of his guilt, before I can, by

7 my verdict, find him guilty.

8

9 Now, rape, if I might define it thus, a man

10 commits rape if he has sexual intercourse

11 with a woman who, at the time of the

12 intercourse, does not consent to it. And

13 also that, at the time he knows that the

14 woman does not consent to the intercourse or

15 is reckless as to whether she consents or

16 not. And as regards the second count - well,

17 I need not define indecent assault. Judge

18 alone, I don't think I have to go there. If

19 it were a jury, perhaps I would.

20

21 I must remind myself that in sexual cases it

22 is always the case that the judge looks for

23 corroboration, and the Court is aware of the

24 need for caution in dealing with sexual

25 cases, and I therefore remind myself that it

REASONS FOR JUDGMENT

1 is dangerous to convict in reliance on the  
2 uncorroborated evidence of a complainant --  
3 or of the complainant, in this case Alicia  
4 Watkins. However, I also remind myself that  
5 even if there is no corroboration, if,  
6 however, I am convinced that Alicia speaks  
7 the truth, then, in spite of the lack of  
8 corroboration, I may convict in reliance on  
9 her evidence. I must also remind myself that  
10 recent complaint does not constitute  
11 corroboration, because corroboration, of  
12 course, is some independent evidence which  
13 supports the evidence of Alicia in some  
14 material particular, not only that the  
15 offence of rape was committed, but that it  
16 was the accused person who committed it. And  
17 in this case where the issue of consent is  
18 raised, it is important that I remember here  
19 that recent complaint is not and does not  
20 constitute corroboration.  
21  
22 I think it was the witness Charon Whittaker  
23 who gave evidence as to recent complaint.  
24 And let me just state the law here that that  
25 evidence is relevant, not merely as

REASONS FOR JUDGMENT

1 negating consent, but also as being

2 consistent with the sworn evidence of the

3 complainant. So that is what I have to look

4 at in particular. There is also evidence

5 from Mr. Whittaker, Charron Whittaker, as to

6 the distress of Alicia, since she was crying

7 and seemed upset, but I will not attach any

8 weight to the evidence of distress by itself.

9 I will look at it as part and parcel of the

10 recent complaint. So looking at the recent

11 complaint, I will consider his evidence that

12 she was crying and that she was upset and his

13 description of the little, I think mark, or

14 whatever he described it as, that he saw

15 under her chin. Let's see if there is any

16 other aspect of the law that I should mention

17 at this stage. I will come back to

18 corroboration when dealing with the

19 submission of Crown counsel that the lies,

20 if the Court should find that there were

21 lies -- and in fact I think the accused

22 person admitted that he had lied -- to see

23 whether those lies may constitute

24 corroboration, but we will get to that anon.

25

REASONS FOR JUDGMENT

1 I will look through briefly the evidence on

2 which the prosecution relies and also, of

3 course, the evidence given by the accused

4 person in his own behalf.

6 The prosecution evidence comes mainly from

7 Alicia Watkins, now 16 years of age, but at

8 the time she was under 16, and that is not in

9 dispute. She testified that in October 2002,

10 whilst her mother, Mrs. Edith Isabella

11 Phillips, was off the island, she went to the

12 wedding of the accused person's brother at

13 the East End Civic Centre. She told us that

14 she was with her cousin Elaine, who she said

15 was like a sister to her. She told the court

16 that she had known the accused person for

17 about three years and that the accused

18 person's girlfriend, Nelesa Connelly, was her

19 best friend. She told us that at the

20 reception she saw the accused, Kenny, and

21 that he called her, asked her to take food to

22 his girlfriend Nelesa. She agreed to do so,

23 but inquired why he did not do that himself,

24 and he told her that he and Nelesa were not

25 talking. She went on to say that whilst at

REASONS FOR JUDGMENT

1 the reception -- I think at this stage she  
2 said Kenny was holding a baby -- and asked  
3 her to pick up something that had dropped to  
4 the bottom of his pants -- she said pants'  
5 leg. She did so and the object she picked up  
6 felt like a knife, because she could have  
7 felt the wooden part and also the metallic  
8 part, but she told the Court she did not look  
9 at it. She held it behind her, and of course  
10 sometime after when Kenny stood beside her  
11 she passed the knife to him.  
12  
13 She told us that at the end of the  
14 reception, when the reception was over,  
15 Elaine asked a friend, one Junior Smith, to  
16 take them to the Eastern Bar. Others were in  
17 the car with herself and, of course, the  
18 driver. I think she mentioned Jeff and some  
19 other persons. And on the way they picked up  
20 Kenny, that is the accused person, and they  
21 all drove to the bar, the Eastern Bar.  
22  
23 At the bar she, according to her evidence,  
24 felt somewhat uncomfortable. She went by the  
25 door, she said, and people were looking at

REASONS FOR JUDGMENT

1 her, and also she went on to say that her  
2 cousin was not paying her much attention.  
3 She left the bar and she went onto the beach  
4 and she sat on a bench, I think she said, and  
5 there she was for about ten minutes when  
6 Kenny joined her. He asked her what  
7 happened. They spoke. Then he said he would  
8 keep her company. He started to tell her  
9 about Nelesa and himself. Because of the  
10 loud music, Kenny invited her to walk along  
11 the beach. Then there, I think they got to a  
12 swing, she said, and he invited her to sit.  
13 She did so. They talked. And mainly  
14 about -- well, mainly Kenny telling her about  
15 his relationship with Nelesa. Whilst they  
16 talked, the cell phone -- that is, Elena's  
17 cell phone, because she had had Elena's cell  
18 phone and also the keys to Elena's house.  
19 Elena called her on the phone, they spoke,  
20 and she told Elena that she would be with her  
21 in five minutes. She told us that the phone  
22 rang another time. It was again Elena.  
23 After this, she said Kenny asked her to show  
24 him how to turn off the phone. She did and  
25 he turned it off. Then she said she just

REASONS FOR JUDGMENT

1 laughed at that. She started to walk off, as

2 if she was leaving perhaps, and the accused

3 grabbed her - that is, Kenny grabbed her and

4 put his right hand over her mouth, he put a

5 knife to her throat. She said it was a

6 black-handled knife. And she identified this

7 knife in court, which was received in

8 evidence as Exhibit 1. And I have to come

9 back to this because much has been said about

10 this knife, and as both counsel agree, both

11 counsel are adamant that this case turns on

12 the issue of credibility. Whom do I believe?

13 And that really is what I have to grapple

14 with, bearing in mind, of course, the burden

15 and standard of proof.

16  
17 She told the Court that she managed to pull

18 his hand from her mouth and she told him to

19 let her go. He refused, pulled her to a

20 fence. There he ordered her to take off her

21 clothes and threatened to cut her throat if

22 she did not. She did as she was ordered and

23 he told her to lie on the sand. She did. He

24 knelt on the sand. Then he dropped the knife

25 on the sand, she said, but the knife was

REASONS FOR JUDGMENT

1 still within his reach. Then he touched her  
2 vagina - that is, put his hand on her vagina.  
3 She said she did not want him to do that. He  
4 unbuckled his pants, took out his penis and  
5 inserted it into her vagina. She pushed him,  
6 and he said if she pushed him again he would  
7 cut her throat. She said it was painful when  
8 he penetrated her vagina. She cried and told  
9 him it was painful. He said he was not going  
10 to stop until his penis started to hurt. He  
11 moved up and down on top of her for some time  
12 and after he got off her she put on her  
13 clothes, she said, and then he told her to  
14 suck his penis. She told him she wouldn't do  
15 such a thing, or she didn't do that sort of  
16 thing, and he threatened to cut her throat if  
17 she did not. She was kneeling, she said, and  
18 he was standing, and he warned her not to  
19 bite him and threatened that he would cut her  
20 if she did. She said she sucked his penis  
21 because he forced her to. After she put on  
22 her clothes, picked up the phone and the  
23 keys.  
24  
25 She was heading in one direction when he

1 told her that she should go in a particular  
2 way, a particular direction, and they both  
3 went in that direction. That is, I think,  
4 she said the direction of the library.  
5 He told her that he was going to kill himself  
6 and after that they went in different  
7 directions. She said eventually she walked  
8 home. She went to the bathroom and she  
9 noticed that there was slight bleeding to her  
10 vagina. On Tuesday - that is the Tuesday  
11 following. This happened on Saturday. So on  
12 Tuesday, that is about two to three days  
13 after, she told Charron Whittaker what had  
14 taken place. And in answer to Crown counsel,  
15 she insisted that she did not consent to the  
16 accused having sex with her and that she was  
17 forced to suck his penis.  
18  
19 Alicia was cross-examined by counsel for the  
20 defense who, with great skill, sought to  
21 challenge her, tested her credibility, and at  
22 the same time, of course, put his case, or  
23 the case of the defendant, to her. Under  
24 cross-examination I am just going to mention  
25 a few things.

1 She said that her mother was strict and  
2 would impose a time curfew on her whenever  
3 she goes out or whenever she went out, and  
4 that if she breached the curfew her mother  
5 would beat her. She told us that she got  
6 permission from her mother before her mother  
7 left for her to go to the wedding and to the  
8 reception and the mother did not impose a  
9 curfew time, but I think she did tell counsel  
10 that her uncle gave a curfew time, if I  
11 remember, 10:00, 10:00 p.m. She admitted to  
12 counsel that she had had sexual intercourse  
13 with one Aaron before and that her mother had  
14 beaten her and that she was told not to have  
15 anything to do with Aaron again - or not to  
16 see him at all after school, and she told  
17 counsel that she did not continue the  
18 relationship with Aaron. She denied telling  
19 the police in her statement that she did not  
20 see the knife and counsel taxed her on this  
21 aspect of her evidence, and she was shown her  
22 statement, or part of her statement, where it  
23 is written "I did not see the knife" and she  
24 said that she did tell the police. She  
25

REASONS FOR JUDGMENT

1 insisted she did tell the police that she saw  
2 the knife and she said she described the  
3 knife. One must remember here, though, that  
4 there were two incidents when knives were  
5 mentioned. First, when the knife had fallen  
6 from the side of the defendant's pant to the  
7 bottom of the pant or the foot of the pant,  
8 if one might so describe it, and in that  
9 particular incident she said she did not see  
10 it, but she concluded it was a knife because  
11 of what she felt. The other occasion, of  
12 course, is at the beach when she alleged that  
13 she was raped. I must confess some  
14 difficulty in accepting fully the evidence of  
15 the police that she made no mention at all  
16 about the knife, because here we have  
17 Constable Best, who said he was assisting  
18 Mrs. Bernard, who was in charge of the  
19 investigation, but he showed her knives and  
20 asked her if she can say anything about  
21 these, well, with a view to her identifying  
22 these knives or any of them. And it would  
23 pass strange - well, how should I put it?  
24 Let me put it this way. Something does not  
25 ring true with the evidence of Constable

REASONS FOR JUDGMENT

1 Best, or Sergeant Best, and also that of

2 Woman Detective Bernard that she mentioned

3 nothing about seeing any of the knives. It

4 is difficult to see the police putting a

5 knife to her if she had mentioned nothing of

6 it. I am inclined to accept her evidence

7 that she did describe one of the knives, that

8 is, the one at the beach. In her evidence

9 in-chief she said it was a black-handled

10 knife and it was not the same knife which she

11 had earlier picked up. It was not a short

12 knife. It was like a kitchen knife, she

13 said, and she described how it came to a

14 point and so on. I accept that aspect of her

15 evidence. And, as I said before, one must

16 remember that she spoke of two knives, two

17 different incidents.

18  
19 Under further cross-examination she said she

20 did not scream because the accused had

21 threatened her. She did not tell anyone at

22 East End because they talk too much and she

23 did not tell the police because he had

24 threatened to kill her if she did, and she

25 said she did in fact tell Charron Whittaker.

REASONS FOR JUDGMENT

1 that she did not want to tell the police  
2 because of his threats. Of course, as  
3 counsel quite correctly admitted, Charron  
4 said she told him that she was afraid to tell  
5 the police because she did not want her  
6 mother to find out and that she was not  
7 supposed to be out, but of course the mother  
8 did say that she had given her daughter  
9 permission to be out, or at least to go to  
10 the wedding. One has to look at the evidence  
11 in its entirety and see what one makes of  
12 this. I remind myself that we do have  
13 discrepancies, or contradictions if you wish,  
14 in almost every case. It is for the Court to  
15 ask itself whether this discrepancy, or  
16 whether the discrepancies or inconsistencies,  
17 whether they are material or slight, material  
18 or immaterial. If, of course, they are  
19 immaterial, then the Court is entitled to  
20 ignore them. If, on the other hand, they are  
21 material discrepancies, inconsistencies, and  
22 there is no acceptable explanation, then the  
23 Court will have to consider whether that  
24 discrepancy or those discrepancies, whether  
25 they taint the entire evidence of the witness

REASONS FOR JUDGMENT

1 so that the Court would say it is not safe to  
2 accept any aspect of that witness's evidence,  
3 or whether they only affect that aspect to  
4 which they relate. And as such, the Court  
5 may say I will accept other aspects of the  
6 witness's evidence, but reject that  
7 particular aspect. It is for me, as tribunal  
8 of fact, to say what I make of it, and the  
9 Court will determine this by looking at the  
10 evidence in its entirety, because quite  
11 often, as to what view the Court takes of a  
12 particular bit of evidence, quite often that  
13 depends on what view the Court takes of  
14 another bit of evidence. So I will bear all  
15 of these in mind, and of course I will bear  
16 the submissions of both counsel in mind as I  
17 consider discrepancies and inconsistencies.  
18  
19 We will continue with her evidence. Under  
20 cross-examination she said that after she  
21 made the report - that is, after she made the  
22 report to the police - I gather that she was  
23 confronted by Nelesa in the presence of  
24 Kenny - that is, Kenny and Nelesa Connolly  
25 confronted her - and Nelesa asked her to tell

REASONS FOR JUDGMENT

1 the truth in front of Kenny, and Nelesa

2 further asked if Kenny really did that. She

3 said, yes, he did, and she said that Kenny

4 did not say anything, he just smiled. Of

5 course, the accused, Kenny, in his evidence

6 said that he denied it. A matter here for me

7 to say whom do I believe. She said he made

8 no response, he just smiled. And if I accept

9 that, what do I make of it? Can I say that

10 quiescence is acquiescence? In other words,

11 that by his silence he was adopting what she

12 said? On the other hand, if I reject her

13 evidence, and he denied it of course, nothing

14 can be made of that. She also, in answer to

15 counsel for the defense, said that one Jeff

16 asked her what happened to her because he had

17 seen sand on her, perhaps that led him to

18 ask, and she told him nothing. So we see

19 here that it is clear that Alicia was very

20 reluctant then to speak to anyone about the

21 incident because she did not say we were on

22 the beach and we had sex, but she said

23 nothing happened. That is briefly the

24 essence of Alicia's evidence.

25

REASONS FOR JUDGMENT

1 Heath Christian was called by the Crown, and  
2 I am not going to go through his evidence in  
3 detail. I will keep it in mind, of course.  
4 Basically, he said that he had lent a knife  
5 to Kenny, and he identified Exhibit 2, which  
6 was a ratchet knife, as the one that he had  
7 lent.  
8  
9 We had Mrs. Phillips, Edith Phillips, the  
10 mother of Alicia, who told us that Alicia was  
11 born the 19<sup>th</sup> of March '87, and she told us  
12 that after she returned to the island she  
13 went with Alicia to the police, made a  
14 report, and subsequently she accompanied her  
15 to the doctor who had examined her. She, in  
16 cross-examination, told counsel that she  
17 punished Alicia when she had found out  
18 sometime before that she had had a sexual  
19 relationship with one Aaron and that she  
20 forbade her to see him after school hours.  
21  
22 Elena also gave evidence. As I said  
23 before, she had gone to the wedding and  
24 reception with Alicia, and she mentioned  
25 about going into the bar. I will not go into

REASONS FOR JUDGMENT

1 that in detail because I do not think, in my

2 own mind, that will help me in determining

3 whether or not sexual intercourse was

4 consensual.

5  
6 In mentioning Charron Whittaker and his

7 evidence, of course the Crown was relying on

8 that evidence of recent complaint as showing

9 consistency, and also too the Crown is

10 relying on the evidence of recent complaint

11 as negating consent. So two aspects to

12 that evidence. I am not going into detail

13 about his address and so on. He told us that

14 he was at the bar drinking when Alicia came

15 and asked him if she could talk to him.

16 Well, he said he was not really inside the

17 bar, he was outside. He finished and then he

18 went across the road with her and she told

19 him that Kenny held her up with a knife a

20 couple nights before, made her suck him - and

21 I think the word he used - and he grind her.

22 Counsel asked what that meant, and he said

23 that meant had sex with her. He told the

24 Court that Alicia was crying and asked him to

25 tell Kenny to stay away from her. He also

REASONS FOR JUDGMENT

1 mentioned that she was trembling, as well,  
2 and that she showed him a mark under her chin  
3 which she said the knife had caused. He  
4 looked at it and it was a sort of scrape, he  
5 described it. So that is his evidence.  
6  
7 In that light, I should just read into  
8 evidence the admission by both counsel that  
9 the following facts admitted by the  
10 prosecution and defense. On the 25<sup>th</sup> of  
11 October 2002 Alicia Watkins was examined by  
12 Dr. Robertson at George Town Hospital. There  
13 were no signs of any injury noted to the face  
14 or neck of Alicia Watkins and she did not  
15 report any injury to those areas. This, of  
16 course, on the 25<sup>th</sup> of October, and I think  
17 Charron had seen her about the 15<sup>th</sup>. That is  
18 over a week away, so bear that in mind, too.  
19  
20 Then we come now to consider Sergeant  
21 Charles Best, who at that time was attached  
22 to, I think he said, the CIB. And he  
23 recalled that on the 24<sup>th</sup> of October 2002,  
24 Mrs. Edith Phillips brought her daughter  
25 Alicia and a report was made by Alicia

REASONS FOR JUDGMENT

1 against the defendant, Mr. Kenny Whittaker.

2 He visited the scene, he said, of the alleged

3 offence. On the 31<sup>st</sup> of October, WDC Watler

4 and himself went to the home of the accused.

5 He was not there then, but they subsequently

6 saw him. He identified himself to the

7 accused and told him of the report he had and

8 that he was investigating it. He cautioned

9 him and he said that is a lie. That is when

10 he had told him of the report that Alicia had

11 made about the rape and so on. He said that

12 is a lie. He arrested him on suspicion of

13 rape and he said nothing, just shook his

14 head. He was taken to Central Police Station

15 where he was booked.

17 On the second of November 2002 the accused

18 was taken to the Bodden Town police station

19 and statements were shown to him. First, the

20 cautioned statement was shown to him and he

21 identified it as a cautioned statement that

22 he took from the accused, and that was

23 received as Exhibit 3. Also, questions and

24 answers were read into evidence and they were

25 received - that is, the document containing

REASONS FOR JUDGMENT

1 the question and answers. That was received

2 in evidence as Exhibit 4, and I am not going

3 to read through all of this. Later on I

4 might mention one or two aspects of it. He

5 also identified the knife that was received

6 from Nelesa Connelly on the second of

7 November, mentioned other items, which I do

8 not think are of any moment at all, such as a

9 T-shirt and so on.

10  
11 In cross-examination he said that he had

12 read the statement before he had asked

13 Alicia, that he had read Alicia's statement

14 before he had asked her to identify the

15 knife, and he said he remembered her

16 statement when he showed her the knife and

17 she said that she would now be able to

18 identify the knife. I have made comments on

19 that already, so I will not repeat myself

20 there.

21  
22 We also have the evidence of Andrea Watler

23 Bernard. She was the investigating officer

24 and she told us of her investigation which

25 ultimately led to the arrest and charge of

REASONS FOR JUDGMENT

1 the accused person. He was charged, of  
2 course, with rape and indecent assault. In  
3 answer to counsel for the defense, she said  
4 that she took the statement from Alicia  
5 Watkins and she wrote down what Alicia told  
6 her, and she said that if Alicia had told  
7 her, had described the knife, she would have  
8 written it down. So her evidence is that  
9 Alicia did not tell her that she had seen the  
10 knife and she could not remember if she had  
11 described any knife. Well, if she had not  
12 seen any knife, she, of course, could not  
13 describe it. So that was her evidence.  
14  
15 And we have also the statement of  
16 Dr. Robertson, which was read into evidence,  
17 and this examination was done on the 25th, as  
18 I said, sometime after the incident. She  
19 said that on examination there were no signs  
20 of injury to the torso or limbs. On  
21 examination of the external genitalia there  
22 was no recent injury or vaginal discharge.  
23 The hymenal ring was not intact with a tear  
24 at the seven o'clock position. So that is  
25 the gist of what she said.

1 So that is the evidence adduced by the  
2 Crown, in brief. And I must say this, that  
3 in reviewing the evidence, of course I have  
4 not gone through all, but in my consideration  
5 of the crucial or the vital issues here,  
6 especially one of whether or not there was  
7 consent, because that is the main issue  
8 indeed, I bear in mind all the evidence that  
9 will assist in coming to a decision on that.  
10 The accused person gave evidence, and of  
11 course he had a right to stay there and say  
12 nothing where nobody could ask him questions.  
13 He gave evidence and of course exposed  
14 himself to cross-examination. Gave his name  
15 as Kenny Roger Whittaker, 26 years old. He  
16 told us that Alicia Watkins was his  
17 girlfriend's best friend, Nelsa Connolly.  
18 He told us about interruptions in their  
19 relationship, that being the relationship  
20 between himself and his girlfriend Nelsa. I  
21 am not going into the different aspects of  
22 the interruptions as he mentioned. But as to  
23 Alicia, he said that Alicia was not really

REASONS FOR JUDGMENT

1 his friend, Alicia was really his  
2 girlfriend's friend. He did not like her  
3 more than a friend, but he told us that  
4 Alicia said that she liked him more than a  
5 friend, and this was before October 2002 - he  
6 said a couple of months, I think he said,  
7 before. Then he mentioned an occasion when  
8 he was in the park listening to music and  
9 that Alicia approached him there, asking how  
10 he was there listening music by himself, and  
11 he told her that he did not feel like being  
12 around anybody else. He told her that his  
13 girlfriend, that is Alicia's friend, had just  
14 broken up with him. Alicia asked him why and  
15 he told her why. Then, according to him,  
16 Alicia told him that he needed to move on  
17 with someone else, and he asked her with  
18 whom, and she said it could even be her.  
19 Somehow, as I looked at Mr. Whittaker as he  
20 gave his evidence, this just did not ring  
21 true to me. You know, sometimes watching a  
22 witness as he gives evidence -- I do not know  
23 if that sort of a smirk on his face is  
24 something that is indicative of anything, but  
25 he has a smirk on his face -- and the

REASONS FOR JUDGMENT

1 demeanour of a witness sometimes goes a far  
2 way in assisting a judge who has to evaluate  
3 the evidence and to assess the veracity of a  
4 witness, helps the judge to come to some  
5 conclusion as to whether this witness is  
6 credible, whether the witness is speaking the  
7 truth, whether the witness was making up some  
8 things as he or she goes on giving evidence,  
9 and therefore the witness switches from one  
10 thing to the next and so on. A Court is able  
11 to pick up these things.  
12  
13 As I said, as Mr. Whittaker gave evidence  
14 here about this aspect of his case he was not  
15 being cross-examined here. Counsel was quite  
16 gentle as he elicited this evidence from him,  
17 and I must say that Mr. Whittaker did not  
18 impress me here at all as a witness of truth  
19 as I watched his demeanour as he testified.  
20 He went on to say that he told her that he  
21 could not do that because of Nelsa. So this  
22 is a person who is saying that he could not  
23 do what Alicia suggested because of Nelsa.  
24 He was telling her at this stage, too,  
25 that they had broken up, but he could not

REASONS FOR JUDGMENT

1 consider accepting her friendship because of  
2 Nelesa. And a little after we have him,  
3 according to his own evidence, having  
4 consensual sex with Alicia. Somehow this  
5 does not ring true. He said that when he  
6 told her so she did not seem upset. She  
7 stayed a while and they talked. Then, before  
8 they left, she asked him if he was going to  
9 tell Nelesa and he told her no. And he said  
10 up until October the 12<sup>th</sup> he had no further  
11 conversation with Alicia about her liking  
12 him. He told the Court that he told Nelesa  
13 what she had said. Then a couple days after  
14 he said that he had reconciled with Nelesa.  
15  
16 Then he went on to speak again about Alicia.  
17 He said that sometime in East End, at  
18 someplace I think he called Maria's, a house  
19 he called Maria's - apparently it is a place  
20 where people go and drink and so on - he saw  
21 Alicia there and he saw her hugging Aaron,  
22 and that was a couple of weeks before  
23 October. So this is Alicia who was offering  
24 her friendship to him, and a couple of weeks  
25 before October he had seen her hugging Aaron.

1 On the 11<sup>th</sup> of October he said he was still  
2 in a good relationship with Nelesa. And even  
3 the following day, the 12<sup>th</sup> of October -  
4 that's the day of this incident - that he was  
5 in good relationship up until 4:30. He said  
6 4:30 that afternoon he was still in good  
7 relationship with her, but apparently around  
8 4:30 they had an argument. He felt depressed  
9 after the argument. He said he had never  
10 been in love before. He was in love with  
11 Nelesa. Although he felt depressed, he said  
12 he had to go to the wedding because it was  
13 his brother's wedding. He had promised him  
14 to be there. At the wedding, he saw Alicia.  
15 At some points his evidence is more or less  
16 consistent with Alicia - might be slight  
17 variation, but essentially the same - asking  
18 her - the knife had slipped from his waist  
19 down to the trouser's foot and he ask her to  
20 pick it up, and so on and so forth. I am not  
21 going to go into detail there. He said that  
22 he had this knife because he was going to do  
23 something with himself. He was planning to  
24 kill himself and he had planned to do this

REASONS FOR JUDGMENT

1 after the argument with his girlfriend  
2 Nelesa. He got the knife from a friend and  
3 then he related a past incident in which he  
4 slit his wrist or cut his wrist and so on.  
5 He recalled, too, the incident about asking  
6 Alicia to take food to Nelesa and so on. I  
7 am not going go into detail there because I  
8 do not think he is contradicting Alicia's  
9 evidence in that regard, but he told us that  
10 he went to Nelesa and he told Nelesa that he  
11 was planning to kill himself and that he was  
12 serious about it. He had told us about  
13 getting a knife, as I said, from a friend,  
14 and he got one from Nelesa - took it from  
15 Nelesa's house, too - and he said the knife  
16 he got from Nelesa, he left it at home, and  
17 the one he got from his friend - that is,  
18 from Heath - he left it at a friend's house,  
19 and this friend, later on he said, was a  
20 girlfriend Denise. He said he left the knife  
21 there because he did not want to get in  
22 trouble. His state of mind, he said, was  
23 pretty much the same. And I recall his  
24 evidence here when he was cross-examined as  
25 to the knife, why he said he did not have the

REASONS FOR JUDGMENT

1 knife at the time when he went to Nelesa's  
2 house. He had Heath's knife then, if his  
3 evidence was true, and here he admitted that  
4 he lied as to the knives. I will come back  
5 to that later on, but I will go now to the  
6 incident or what took place on the beach.  
7  
8 His evidence coincides with Alicia's  
9 evidence that she was sitting on a bench by  
10 the beach and he approached her and asked her  
11 how come she was by herself, and she said she  
12 was there because her friend was not paying  
13 her any mind and she did not sound happy, but  
14 he could not say she was really upset. She  
15 said she did not want to be around the bar  
16 because people were staring at her. They  
17 talked, he said, and they walked off the  
18 beach, and he said he guessed they moved off  
19 because of the noise. They continued  
20 talking. He continued telling her about his  
21 girlfriend and she told him, he said, that he  
22 might as well give up. He said they  
23 continued talking and she seemed quite  
24 friendly. He said she was quite friendly and  
25 then they went to a little cabana - that is,

REASONS FOR JUDGMENT

1 they moved from the swing. From the swing to  
2 the cabana, about 15, 20 feet from where  
3 the swing was. They could sit there. They  
4 both sat and they continued talking. He said  
5 that there was no street light nearby. And  
6 he told us that Alicia told him, or continued  
7 to tell him that he needed to forget Nelesa  
8 and move on. Then she told him that she  
9 liked him from the time she had met him.  
10 They started to kiss. She kissed him, he  
11 said, and then he kissed her back. They  
12 started petting, then he said he felt her up  
13 - that is, he put his hand between her legs.  
14 She took off her pants. He said he started  
15 to have sex with her - that is, he put his  
16 penis in her vagina - and he said he stopped  
17 for two reasons, and he gave us those  
18 reasons. One, that she told him that it was  
19 hurting her and the other reason, he said,  
20 was because of conscience, conscience about  
21 his girlfriend because he still had a strong  
22 feeling for her. He denied asking or forcing  
23 Alicia to have oral sex with him. Indeed, he  
24 denied that there was any act of oral sex.  
25 He denied having a knife with him at that

REASONS FOR JUDGMENT

1 time and he said he did not threaten her at

2 all. In other words, what he was saying is

3 that it was consensual sex.

4

5 Before she left he said that she asked him

6 if he was going to kill himself and he told

7 her yes. This perhaps is somewhat strange.

8 Perhaps not very strange, but he had,

9 according to his evidence, the knife with him

10 because he intended to kill himself. But at

11 the beach where they had sex he said he had

12 left the knife, but yet he said he still

13 intended to kill himself in answer to

14 Alicia's question.

15

16 He was shown or asked about the question and

17 answer and question 37 was put to him. The

18 question is "What caused you to stop the

19 sexual act with Alicia? I never had any in

20 the first place." And other questions, too,

21 which I need not refer to. So here in this

22 statement he denied having sex with Alicia,

23 and he admitted that he was telling the

24 police lies, and then he went on to give

25 explanations. He said Nelesa was more

REASONS FOR JUDGMENT

1 important to him than telling the truth. I  
2 think if Nelesa found out she would break up  
3 with me again.  
4  
5 He went on to say that after parting ways  
6 with Alicia on the 12<sup>th</sup> of October, he headed  
7 home. He stayed there for a while and then  
8 he went to Nelesa's house and made up with  
9 her that night. Then, about three to four  
10 days after that, his girlfriend came to him  
11 about certain allegations or perhaps rumours  
12 that she had heard. He said he did not go to  
13 the police, but about two weeks thereafter  
14 they confronted Alicia at the primary school.  
15 I have already made mention of that.  
16  
17 He also was cross-examined by counsel for  
18 the Crown. Counsel asked him about his  
19 drinking habits and the split that he had  
20 taken, and so he told counsel that he had  
21 certain number of drinks and he was drunk.  
22 Now, intoxication laws of these Islands:  
23 Intoxication shall not constitute a defence  
24 to a criminal charge save as provided by  
25 Section 11 of the Penal Code, and the

REASONS FOR JUDGMENT

1 circumstances under which intoxication would

2 provide a defence, they would not exist in

3 this case, so I will not say more about that.

4

5 Counsel questioned him about the lies he

6 told and he accepted that he lied to the

7 police. He accepted that he lied, yes, when

8 he said he did not have sex with the girl at

9 all, and so on. Then he was questioned about

10 the knives, too, and he agreed with counsel,

11 too, that he lied about the knives at the

12 time when he said that he did not have a

13 knife, not that he did not have the knives

14 when he left one at Nelesa's home and then

15 left one at the friend's home. I am not

16 going into detail, but just the fact of the

17 lie there as to the knife is something that I

18 would have to look at because he has admitted

19 that and both counsel addressed me on that.

20 So I will look at that now as to the lie and,

21 in particular, the knife.

22

23 Counsel for the prosecution asked the Court

24 to say that the lie in the circumstances

25 would constitute corroboration of Alicia's

REASONS FOR JUDGMENT

1 evidence. And, of course, counsel for the  
2 defense asked the Court to say that the lies  
3 as to the knife - I am not thinking of any  
4 immaterial lies because the lie must be in  
5 respect of a material fact, and the knife is  
6 important because Alicia is saying that he  
7 had a knife at the beach which he put at her  
8 throat, and he is saying no such thing. I  
9 had no knife at the beach.  
10  
11 Well, following the *Lucas* principle, a lie  
12 told by a defendant can only strengthen or  
13 support the evidence against the defendant if  
14 the Court is satisfied that (A) the lie was  
15 deliberate (B) it relates to a material issue  
16 and (C) there is no innocent reason for it.  
17 And in considering this, the Court must  
18 remember that sometimes lies - for example, a  
19 person lies, for example, in an attempt to  
20 bolster up a just cause or out of shame or  
21 out of a wish to conceal disgraceful  
22 behaviour. So the Court must bear this in  
23 mind that a person might lie for any of these  
24 reasons. And the Court can only really act  
25 on the lie when clearly the lie indicates a

REASONS FOR JUDGMENT

1 realization or recognition of guilt.  
2  
3 Counsel for the defense is suggesting that  
4 the accused has given an innocent explanation  
5 as to -- or perhaps a reasonable, or should I  
6 say credible, that's the word --  
7 credible explanation as to why he lied about  
8 the knife and mentioned some aspects of that.  
9 He said first that Nelesa meant so much to  
10 him. I think counsel said Nelesa was his  
11 primary concern. Then also too the  
12 defendant's attitude towards the police. He  
13 said that he is resigned in his attitude to  
14 the police and does not trust the police. So  
15 there is a lack of trust. Now, as to the  
16 main thrust here that says that Nelesa was  
17 his main concern and that is the reason why  
18 he lied, did not want her to know, it is true  
19 that indeed he might not have wanted Nelesa  
20 to know that he had had sexual relationship  
21 with Alicia, whether consensual or not,  
22 however, I'm inclined to the view that it is  
23 out of a recognition of guilt why  
24 Mr. Whittaker told the police - sorry, lied  
25 about the knife. I believe Alicia's evidence

REASONS FOR JUDGMENT

1 that he had the knife there and it is out of  
2 a recognition of guilt why he lied. So this  
3 lie was deliberate. And of course it relates  
4 to the material issue, the knife, because  
5 Alicia is saying that he used the knife to  
6 intimidate her and to force her to submit.  
7 And I am clearly of the view that there is  
8 really no innocent explanation for the lie.  
9 No innocent explanation for the lie.  
10 Now, as I said -- well, I might not have said  
11 this. Yes, I think I did mention burden and  
12 standard of proof already. I did. So the  
13 Court, having asked itself why he lied, and  
14 having come to the conclusion that he lied  
15 out of a recognition of guilt, he recognized  
16 that if he had admitted - or let me put it  
17 this way, or in regards to the knife, yes, he  
18 lied, as I said, because he did not want it  
19 to be believed that he had the knife at the  
20 time when he went to the beach. I want to  
21 say this also, that even if I had not found  
22 that the lie as to the knife would constitute  
23 corroboration, but having found that he lied  
24 as to the knife, I would be entitled to ask  
25 myself why has he lied, and I would be

REASONS FOR JUDGMENT

1 entitled to use the fact of the lie in

2 determining whether or not Alicia spoke the

3 truth when she said that he had a knife at

4 the beach and put the knife at her throat.

5  
6 And I accept the evidence of Charron

7 Whittaker that he saw what he called this

8 injury at the chin or by the chin of Alicia.

9 He said it looked like it was a scrape or

10 that the chin was scraped. And the evidence

11 is that the knife was a sharp knife. And the

12 fact that the doctor found no injury, that

13 can be explained easily because the doctor

14 saw her on the 25<sup>th</sup>, that is sometime after.

15  
16 So when one looks at the evidence - the

17 evidence of the recent complaint, the

18 evidence of Charron Whittaker that he saw the

19 injury under her chin, then the fact of the

20 lie with regards to the knife and also too

21 another lie, namely that he had no sexual

22 intercourse at all with her, had nothing to

23 do with her that night - having considered

24 all those bits of evidence, I am convinced

25 that Alicia spoke the truth. So I have

REASONS FOR JUDGMENT

1 rejected the evidence of Mr. Whittaker that

2 the sexual intercourse was consensual and I

3 have accepted the evidence of young Alicia

4 that Mr. Whittaker, Mr. Kenny Whittaker, had

5 the knife, that he put the knife by her

6 throat, ordered her to take off her clothes,

7 and then against her will he had sexual

8 intercourse with her and, thereafter, that he

9 forced her to perform oral sex. In other

10 words, to put it in her own words, to suck

11 his penis. I accept her evidence that she

12 was threatened as to what would happen if she

13 screamed and if she made complaints, and also

14 too, as she rightly said -- and this is part

15 of her honesty too, in my mind -- she said

16 that she did not tell her mother because she

17 was afraid, and that was not the sort of

18 thing that she would want to talk to her

19 mother about.

20  
21 Having said all of that then, I find the

22 accused person guilty as charged. Guilty

23 with respect to Count 1 and guilty with

24 respect to Count 2.

25

REASONS FOR JUDGMENT

REPORTER'S CERTIFICATE

I, CAROL A. ROUSE, Official Court Reporter, hereby certify that the foregoing pages are, to the best of my skill and ability, a true and accurate transcript of the proceedings had in the said Court and reported in machine shorthand by me on the date and place aforementioned.

DATED THE 20th DAY OF FEBRUARY 2004

CAROL A. ROUSE  
