

OF THE FALKLAND ISLANDS

REGINA

-V-

LEN STANFORD MCGILL

JUDGMENT and VERDICTS

Representation

Mr Joe Hart and Mr Stewart Walker for the prosecution.

Ms Sarah Lindop for the defence.

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I. INTRODUCTION

- [1] Mr McGill, the defendant, is charged on a nine count indictment before this court, the trial took place between 8th January 2018 and the 11th January 2018. The trial was by judge alone, the defendant having elected a judge only trial as is his right pursuant to section 16 of the Jury Ordinance 1996.
- [2] The case concerns historic sex abuse. The complainant, now 55 years of age alleges that the defendant, sexually abused her between 1970 and 1976, between the ages of 8 and 14 years old. At the time the defendant was between the ages of 13 and 19, some 5 years older than the complainant.
- [3] The indictment alleges three counts of sexual assault, three counts of attempted rape and three counts of rape all occurring at the farm in Stanley where the defendant lived. In summary the complainant alleges that she used to visit fairly regularly the farm where the defendant lived to help with the domestic and farm work; and that when no-one else was around the defendant would sexually abuse her. She was too young and too frightened to object.
- [4] The evidence against the defendant consists principally of the evidence of the complainant. The defence is a blanket denial that he carried out any sexual abuse whatsoever.
- [5] The issue in the case is whether the prosecution have proved, so that the court is sure, the defendant carried out the alleged sexual abuse.

II. THE INDICTMENT

- [6] The nine count Indictment consists of three sets of charges.
- [7] The first set is three counts of Indecent Assault contrary to section 14 of the Sexual Offences Act 1956 in its application to the Falkland Islands by virtue of the schedule to the Application of Enactments Ordinance 1962. The particulars of each of the three counts are that the defendant between the 17th day of November 1972 and the 31st

day of January 1973 indecently assaulted the complainant, a female child aged 10, by placing his fingers in her vagina on different occasions.

- [8] The second set is three counts of attempted rape contrary to section 1 of the Sexual Offences Act 1956 in its application to the Falkland Islands by virtue of the schedule to the Application of Enactments Ordinance 1962 and the common law. The particulars of each of the three counts are that the defendant between the 1st day of February 1973 and the 31st day of January 1974, attempted to have sexual intercourse, per vaginam, with the complainant, a female child aged 11, who at the time of the said intercourse did not consent to it, and the defendant either knew that she did not consent or was reckless as to whether she so consented.
- [9] The third set is three counts of rape contrary to section 1 of the Sexual Offences Act 1956 in its application to the Falkland Islands by virtue of the schedule to the Application of Enactments Ordinance 1962. The particulars of each of the three counts are that the defendant between the 1st day of February 1974 and the 31st day of January 1977, had sexual intercourse, per vaginam, with the complainant, a female child aged between 12 and 14, who at the time of the said intercourse did not consent to it, and the defendant either knew that she did not consent or was reckless as to whether she so consented.
- [10] The prosecution have chosen dates in the Indictment beginning from the fourteenth birthday of the defendant. They have so chosen because, at the time, a child under the age of fourteen years of age had the defence of *doli incapax* which presumptively exempted children from criminal liability. It is agreed by counsel, and common ground, that all the counts stand or fall together.

III. LEGAL DIRECTIONS

- [11] I have discussed with counsel the appropriate legal directions that I must follow when sitting as both the tribunal of law and fact. I will now set those out. Counsel have helpfully supplied a list of the directions that they agree are applicable to this trial and have been given in advance a copy of this legal directions section of my decision so

any additions, alterations or amendments could be suggested. None have been so suggested:

- (1) Burden and standard of proof;
- (2) Historic sexual offences;
- (3) Delay in reporting the complaint;
- (4) Previous consistent statements of the complainant;
- (5) Elements of the offences; and
- (6) Good character of the defendant;

A. Burden and standard of proof

[12] The burden of proof is on the prosecution and the standard of proof is such that the court must be sure of the allegations. The golden thread that runs through criminal justice is the immutable position that only when the court is sure of guilt can it convict. It follows that evidence which might well be true and to a considerable extent probably is true is not sufficient to reach the standard of proof in a criminal trial which requires evidence upon which the court is sure of guilt. The standard of being 'sure' is the modern way of saying beyond reasonable doubt.

B. Historic sexual offences;

[13] I remind myself of the judgment of Fulford LJ in *R v PS* [2013] EWCA Crim 992 where he said at paragraph [35]:

35 As it seems to us, the direction to the jury on delay, given the facts of this case, should have included the following elements:

- i) delay can place a defendant at a material disadvantage in challenging allegations arising out of events that occurred many years before, and this was particularly so in this case when the defence is essentially a simple denial (the defendant was saying that he had not acted as alleged);
- ii) the longer the delay, the more difficult meeting the allegation often becomes because of fading memories and evidence is no longer available – indeed, it may be unclear what has been lost;
- iii) when considering the central question whether the prosecution has proved the defendant's guilt, it is necessary particularly to bear in mind the prejudice that delay can occasion; and
- iv) a summary of the main elements of prejudice that were identified during the trial.

[14] I will accordingly in my analysis of the evidence summarise the main elements of prejudice that have been identified by the defence and take those into account as part of all the evidence and circumstances I consider in reaching my findings of fact.

[15] I also remind myself that sexual offences have some unique characteristics. It is important when I approach the facts of the case to bear in mind that emotion is not a good indicator or reliable pointer to the truthfulness or untruthfulness of what a person is saying. Experience tells the courts that there is no stereotype for these types of sexual assaults. The offence can take place in almost any circumstances between all kinds of different people who react in a variety of ways.

C. Delay

[16] There are invariably two sides to the coin when it comes to delay in reporting sexual offences in respect of children and particularly where there are factors such as in this case engaged.

[17] I am entitled to consider why these matters did not come to light sooner. The defence would say that it is because they are not true. They say that the allegations are untrue and they would say that had the allegations been true you would have expected a complaint to be made earlier. The defence would say that she could have complained to her mother, grandmother or father.

[18] On the other hand, the prosecution would say that it is not as simple as that. When children are abused they are often confused about what is happening to them and why it is happening. They are children and if a person is abusing them in their home, to whom can they complain? A sexual assault, if it occurs, will usually occur secretly. A child may have some idea that what is going on is wrong but very often children feel that they are to blame in some way, notwithstanding circumstances which an outsider would not consider for one moment them to be at blame or at fault. A child can be inhibited for a variety of reasons from speaking out.

D. Previous consistent statements of the complainant

[19] It is common ground that the complaints made by the complainant to various persons are not evidence. The evidence is not admissible to prove the truth of the allegations

made to Mrs. Turner, Dr. McNerny and Ms. Rimicans. The evidence of previous consistent statements was adduced by the Crown, without objection by the defence, to rebut an assertion of recent fabrication.

[20] Such statements are not independent evidence as they have of course originated from the complainant; and therefore show only consistency. I will accordingly only afford those previous complaints the weight that they are due.

E. The elements of the offences

[21] Indecent assault requires an assault in circumstances of indecency. In the present case the evidence of the complainant that the defendant put his fingers in her vagina, if true, undoubtedly satisfies the definition of the offence.

[22] Attempted rape requires an act which is more than merely preparatory to the act of rape, as set out below. In the present case the evidence of the complainant that the defendant tried and failed to put his penis in her vagina because at the time and her age, she was too small and his penis too large, if true, undoubtedly satisfies the definition of the offence.

[23] Rape requires the penetration of the vagina by the defendant's penis without consent with the defendant knowing that the complainant did not consent or was reckless as to whether she so consented. In the present case the evidence of the complainant that the defendant put his penis in her vagina and ejaculated inside her without her consent, if true, undoubtedly satisfies the definition of the offence.

F. Good character of the defendant

[24] I will direct myself on both limbs of the good character direction. First, the defendant has given evidence in interview and in court, his good character goes to his credibility. Secondly, the fact he has not offended in the past and is now nearly 60 years of age may make it less likely that he acted as is now alleged against him.

IV. THE EVIDENCE

A. The complainant's evidence

[25] The complainant gave her evidence in chief by way of a video interview recorded on 12 February 2017 when she made the complaint to the police; and was cross examined at the trial itself. (I have anonymised passages from her evidence to preserve the prohibition on disclosing the complainant's identity.) She was born in 1962. She gave a summary of the assaults at the beginning of the video interview:

And my [XYZ], um, suffered heart attacks at a young age, at 31, and my brother and I were always sent down to help at the dairy. Um, a lot of the time because I was a severe asthmatic, um, it was - I was looking after [XYX] while the others were working but there were times that I had also had to work in the cow shed milking and stuff like that as well. And there's only, like, five years between my - me and [the defendant]. There was me, I was youngest, then there was a year and a bit between me and my brother, and then there was a year and, and a bit between my

So, yeah, I used to have to go down to the dairy and I can't - I, I was, like, eight going on nine when [the defendant] started, sort of, touching me. Um, he was, like - if I was doing the dishes he'd come behind me, um, and then if I was in the dairy, if I was in the bottl... bottling shed on my own he would come in. It just didn't feel right but I was scared of him cos he, like, like, he used to use the horsewhip and stuff on the cows and, um, he'd, like, frighten Cora and I with it and stuff like that. I don't know how old, how, how old I was, like. For a couple of years he would, if [XYZ] was in bed sick he would come in, whatever excuse he had given. [XYZ] would be away delivering and Cora would be away delivering milk as well. And he would come in and I'd have to go into his bedroom, which was the other end of the house. [XYZ] was down one end and this bedroom was up by the kitchen and bathroom. And it was, like, I had to get into bed with him.

And then my first real bad memory of, of that he would lay down and he would try to put his dick inside me but he couldn't cos I was too small and he was too big, so he would just keep it between my legs and do what he had to do, I guess. I didn't understand it at the time. That's when I started to c... being scared of being on my own with him. And if I said I don't wanna go [XYZZ] used to get angry, and so did [XYZ] I just went. And it just carried on for - every time I had to go down to the dairy I just - I used to kick up and my parents thought it was because I didn't want to work but I couldn't tell them cos I was scared of him. And on every occasion, like, he would try to get on his own with me and sometimes I couldn't avoid it, I didn't have any choice.

And then when I was about 13 I was sleeping between them, like, when I was 8 or 9. Until then he was always sleazy, rubbing up against you and he would make it - if somebody would come in he'd make it look like it was okay, you know. And it was around about - I dunno - when I was 12 or 13 that I, I just had this feeling that he was also doing it to Cora, just, like, pick up on things and I felt awful cos I was glad it was her and not me. We never, ever talked about it. I think she knew about me and I knew about her but we just didn't talk about it.

And I was about 13 when he now he c... cos, like, over the months, years he kept trying to have sex with me, but I guess you know, er (*crying*) he was - to me he was huge. I was about 13 when he managed in his room. It was always, like, when my [XYZ] and [XYZZ] were out delivering or out with the cows. By that stage I think I - I know it sounds stupid but I'd face - I'd, like, make, um, I'd make out that I'd had an asthma attack or something and I'd pretend that I couldn't go down, down to the dairy. And then my [XYZ] and [XYZZ] talked about selling the dairy and going away to the UK.

And then he - er, [the defendant] found a girlfriend and then after that he left me alone. I think it was a combination of him having a girlfriend, um, [XYZ] and [XYZZ] talking of selling the dairy, which they did in, in 1977. Er, [the defendant] moved out and, yeah, as I got older I was helping my mum cos at this stage she'd had my baby brother, who was very ill so I had to look - help her look after my baby brother, so it just - there wasn't one thing, there wasn't, like, we have to stop or whatever. Most of the time he didn't, didn't really talk to me. But it just stopped. I must - well, I'd been 14, yeah, 15, no, I'd have been 14 probably.

...

At the time I, like - because I was so used to him just putting it between my legs, so, and now I've - like, it hurt obviously and I thought, "Oh, something's different." Um, you know, obviously at that age I'd been talking to girls and stuff, um, and then I realised, like, what he was - what he'd managed to do. Er, well, yeah, it was just another day, really, yeah. And I just wanted - I just couldn't wait for - I thought if [XYZ] and [XYZZ] sold the, the dairy and went to UK they'd take him with him and then it would be all over so I just kept quiet. I couldn't tell anybody. He never really - I don't remember if he ever said, you know, "Don't - you can't tell anybody," or - I don't know, I guess it was just unspoken, like, because he was the head of us kids, if you know what I mean, you know, and when [XYZZ] wasn't there he was the boss and you done as he said, so it was never really said. No, it was never really - he's never - I can't remember if he ever said, "You can't tell anybody," or, "They wouldn't believe you." I really can't, you know, remember if he ever said that. I'm just thinking it was an unspoken thing, you done what he said.

[26] In particular the complaint had a constant theme through her evidence that explained her presence at the dairy. She said:

[XZY] when she was 31 had her first heart attack and from then on was never really well. She had well times obviously but - so when he was sick [JKL] and I were sent down to the dairy because obviously [XYZ] wouldn't be able to do her work at the dairy or in the house.

Okay. And, and what was your job when you were sent down there? What did you do?

Well, I had to, like, look after [XYZ] and do the, the cleaning in the house, you know, the (inaudible) wash and the ironing.

Even at age eight?

Yeah. Um, we - that's what you do, really, you know. By age I was knitting and sewing, you know, you were just brought up to do those sort of things. So, I would be doing the washing and the ironing. Um, we had to get in the peat, peat for the peat buckets.

[27] The video interview is long and the evidence on each set of counts in the Indictment was given. In relation to the frequency of the indecent assaults she said:

You know, more or less every time that we had to go to the dairy. It would be, you know, two, three, four, five, six weeks at a time, maybe. Like, I don't know how many times a year.

Right. So, he did it for six weeks at a time, several times a year?

[28] In relation to the attempted rapes and rapes she said:

I don't know when it was. I mean, I was probably, I dunno, 10, 11. I can't even remember, like, the day or why or, or how. I think one day I can remember coming out of the bathroom because, like, the bathroom door was there (indicates) and [the defendant]'s bedroom door was there (indicates) and I went past to called me into his room and there was only - [XYZ] was the only one in the house but she was down - she was poorly. Um, she'd just got out of the hospital so she down at the other end of the house. [XYZZ] and Cora would have been delivering milk and [the defendant and my brother] would supposed to have been clearing out the cowshed afterwards.

And I'd - I had gone over to help get bre... you know, to get breakfast cos [XYZ] was in bed and we'd sort of laid it out the night before but I'd gone over to, like, put the milk on and stuff like that. When I come out of the bath... I'd gone to the bathroom, I'd come out, when I come out of the bathroom [the defendant] was in his bedroom and he called me into the bedroom. Um, he, he was dressed, that I can remember he was dressed but it was, like, he lay down on the bed and told me to lie down on the bed. And then I could feel - I just laid there, you know, I guess just thinking, "Right, I'll, I'll just here. He just wants me to lay here. I'll just lay here." But then I could feel him taking his trousers down. And then he put his willy between my legs and he was, like, rubbing it between my legs and I just laid there I guess. I just - yeah.

Yeah. How did he put his willy between your legs? How - what position were you both in?

Well, I was back on - like, I was laid on the side of the bed like that (demonstrates), you know.

So, on your side?

On my side, yeah.

Right.

And, um, he had his arm over me.

Where was he compared to you?

Behind me.

Right, okay.

So, from behind he put, like, put his willy between my legs. Um, he was, like, fumbling. You could feel it, he was trying to, you know, push it in but it wouldn't go cos I was too small I guess.

Okay. Where - what underwear you were wearing or what was your (inaudible)?

I had underwear. I always wore, wore dresses and I had my knickers on.

So, was he - what - did you still have any knickers when he was doing that?

I did at the beginning but then he pulled my knickers down.

He pulled your -

Well, he tried to put it in when, um, when he was just pushing it between my legs I had my knickers on. He'd do that quite a bit.

Right. So, so, tell me how often would this happen?

You know, more or less every time that we had to go to the dairy. It would be, you know, two, three, four, five, six weeks at a time, maybe. Like, I don't know how many times a year.

And how often would this happen, going to his room?

It would depend on how long I was at the dairy for.

Right. Usually be, like, six week?

It could anything from one to up to six weeks, depending on - if it was [XYZ] that had a heart attack obviously it would be longer. If it was, I don't know, for whatever reason, you know, maybe [XYZZ] had a cold or Cora, you know, was sick or whatever we'd be called. Haymaking was a busy time anyway. I mean, I, I used to love it cos I would stay over the house with [XYZ] (inaudible) that, you know, I didn't have to be near him.

Mm-hmm. So, when would you call how? How often do you think that would happen or was it opportunist really?

Probably - you know, obviously I can't tell you no one was in the house because when [XYZ] was in her sick bed - I don't know how - just whenever he could, basically.

[29] In relation to the timing of the attempted rapes and rapes she said:

Right, okay. And what would happen?

Well, er, I would go in and he would be laid on the bed fully clothed mostly cos it would be normally after the, the milking had been done before it went to school or, or it would be after school, before we had to go and do the milking.

[30] In relation to the defendant assaulting Cora and Cherry she said:

I was really pleased because I thought - I think he was doing it to Cora and maybe Cherry as well.

[31] The complainant said the abuse stopped when she was 14:

I was probably just 14 when he started, um, going out with Teresa, just I never - yeah, because it culminated - um, just stopped after - like, as I got older I got more defiant, "I'm not going down to the dairy."

Right. Well, er, at home?

Yeah, at home I would.

Right. And what did you used to say at home?

Like, I used to pretend I had an asthma attack or something of s... you know, I used to get fits of anger and just shout and bawl at mum and tell her I'm not going to the dairy. Then I'd be on a punishment. The punishment was better than going to the dairy. But there wasn't always time to actually get out of it but probably when I was about 13, fou... probably 14 it just all - er, [the defendant] started going out with Teresa..

[32] In cross examination the complainant insisted that she went to the bottling shed in the dairy to help, and gave a full description of how the milk bottles were cleaned and refilled. She confirmed that she was definitely at the dairy during school times and clearly remembered walking up to school, and looking after the cows in the afternoon.

[33] She reiterated that the first incident of indecent assault occurred in the bottling shed when the defendant would come up behind her and put his hands up her skirt or dress, and inside her knickers into her vagina. She said he did it when no one was there, even by the sink, in the peat shed or the scullery. She said this abuse happened the year she had turned 8. She was able to give a graphic and detailed account of the attempted rapes and the rapes. Saying they occurred in the small bedroom, or bedroom 3 as we have called it. She said penetration started when she was 12, i.e 1974 and he had been seeing Theresa for 2 years when he was still abusing her.

[34] In cross examination she told the court of two attempted suicides in later life, and that she had suffered from depression and agrophobia.

B. The brother's evidence

[35] The complainant's brother gave evidence for the prosecution. He said he often went to the dairy and his job was to clean out the cows' 'toilet'. He said the complainant went

on occasions to the dairy but not when he was helping out. He told the court that the dairy environment was not good for his sister as she had asthma and eczema.

[36] He said that people would go to the dairy house for social occasions. That he would stay over and on occasions the complainant would stay over.

C. The complainant's account to others

[37] During the years that followed, the complainant described what had occurred to her to different people, as follows:

[38] Betty Turner. She is the defendant's older sister. Betty lived at the dairy until 1969, left and then moved back in 1970 until 1972. She stayed in the larger bedroom we have referred to as bedroom 2. She said that the complainant's mother would bring the complainant and her brother to the dairy but did not remember how frequently. She just remembered that they came. In 1972 she left for the UK and in the early 1980s the complainant who had also moved to the UK by then came to stay with her. She said the complainant had been mentally unwell and that was one of the reasons she came to stay with her. She told the court that the complainant discussed her family and she asked the complainant, who would have been around 20 years of age by then, what was causing the breakdowns. The complainant said the defendant had abused her. She said the complainant did not expand or give details of the abuse. She said the complainant had told her that the defendant had abused her and another member of the defendant's family. The complainant did not give any details of the abuse. She told the complainant that she could report it in the UK, but the complainant did not want to do so as it would blow the family apart.

[39] Karen Rimicans. She is the senior psychiatric nurse at the King Edward Memorial Hospital. In January of 2007 she saw the complainant who had moved back to the Falkland Islands. She had been referred to her for depression and agoraphobia. She saw her a number of times and referred her to Dr McInerny who is the visiting consultant psychiatrist. Dr McInerny made a report which contained a passage whereby the complainant had said she had been sexually abused. No details of the sexual abuse were given and there was a minimal description of the sexual assaults. The complainant did not disclose the name of the defendant to either Ms Rimicans or Dr

McInerny and was careful not to do so. The only detail Ms Rimicans had noted was that the abuse of the complainant was when she was 8 years old.

[40] Dr McInerny. He gave evidence over video link. In his report he had noted that the complainant said she had been sexually abused over a number of years during her childhood, from 8 years to 15 years. She did not give information as to the nature of the abuse.

[41] Owing to confidentiality and the wishes of the complainant both Ms Rimicans and Dr McInerny kept the allegations of sexual abuse confidential despite being able themselves to identify the defendant.

D. The defendant's evidence

[42] The defendant is 59 years old and has been a police officer for 31 years, rising to be the chief of police of the Falkland Islands. Unsurprisingly for a police officer he has no previous convictions or cautions, nor disciplinary matters against him.

[43] He told the court he was one of 6 children and that his natural father died when he was about 6 years old. His mother remarried. The family was leaving the Falkland Islands but just prior to departure his stepfather bought a dairy in Stanley and they stayed.

[44] At the dairy lived his mother and stepfather, and his sisters. The older one was Betty, the younger Cora.

[45] He lived in the dairy house until 7 July 1977 when his parents sold up and went to the UK. He stayed on the Falkland Islands as he was in a relationship with his girlfriend, Theresa.

[46] He described the working day when the dairy was functioning as beginning at 4.30am when he woke. He lit the peat fire in the kitchen and then by 5am went out with, Quick the cattle dog, to round up the cows for milking. There were 22 cows but this reduced to 18 over time. His recollection was that he got the cows in alone. In the cowshed he and his mother milked by hand in the top shed while his father milked the remaining cows by machine in the bottom shed. He said only his mother, stepfather and he milked the cows. In the bottling area were Betty, then Cora and his mother. He said he didn't bottle.

- [47] This routine happened every day of the year. On schooldays the schedule was tight and they had to be back in the house after milking to wash, change into school clothes and walk to school. He had no recollection of the complainant ever being in the bottling shed.
- [48] He gave evidence he never touched the complainant in the bottling shed or elsewhere. He said he never touched Cora or Cherry.
- [49] He was not responsible for deliveries and did not take part in deliveries on school days. On weekends he would 'ride the tailgate' helping his father with deliveries. After school he would change his clothes, locate the cows and take them into the paddocks as preparation for rounding them up the next morning. The cows were milked once a day.
- [50] He said the complainant was not regularly at the dairy. She came on weekends, for the Sunday routine. She came infrequently. He had no recollection of ever being left alone in the house. He said the complainant never assisted in getting the cows in and did not sleep over on a regular basis.
- [51] He denied ever calling the complainant into his bedroom and denied abusing her in any way. Most of the family spent time in the kitchen as it was heated.
- [52] The defendant told the court that the dairy ceased to operate as a dairy in 1973 and by Christmas of 1973 it had closed as a dairy. His step father took a job as a storeman from January 1974. He told us that he did 'O' levels in August 1974 and stayed on at school to improve his results leaving school the following year, 1975, when he had just turned 17. He remembered becoming the boyfriend of Theresa after an outing to the Upland Goose to celebrate the class finishing their 'O' levels in August 1974.
- [53] He said he has had a good and continuing relationship with the complainant. He had been welcomed into her home and attended her wedding. He had no idea why the complainant was making the allegations and could only say that so far as they concerned him they were completely untrue.
- [54] His evidence was consistent with his interview when he had again denied the allegations and had no explanation for the complainant making them.
- [55] In cross examination he accepted he had given more details about dates than in his interview but said it was because he had been able to carry out some research.

E. The defendant's witnesses

- [56] Cora Gambles gave evidence. She left the Falkland Islands for Northern Ireland in 1977 and has not returned other than to visit. She said the complainant's brother would come to the dairy often, during school holidays, weekends and once for a month when there was trouble at his home.
- [57] Cora said the complainant came to visit but never stayed over, although she could think of two occasions when she did so. If she did, she stayed in her room with her. Her friend Cherry came and visited the dairy, mostly just for the day but sometimes stayed over in her bedroom. She said no-one was allowed to stay during the school times.
- [58] She remembered that the complainant had asthma and eczema, and said that she never helped her in the bottling shed. She gave evidence that the complainant was not involved in the morning routine activities of the dairy. She said that neither her nor the defendant had any free time in the morning before school.
- [59] On the weekend there was a more relaxed timetable, and the defendant helped her in the bottling shed wash the bottles. The dairy stopped delivering milk in November of 1973.
- [60] Cora said the complainant was never sent to look after [XYZ] if [XYX] was unwell. She said that the defendant never touched her and never indecently assaulted her. Nor did he indecently assault Cherry.
- [61] In cross examination she said [XYZ] had only once been laid up unwell. That was for a week. She did the cooking then. She denied that the complainant came over to look after [XYZ]. She accepted that she would be in her brother's camp in this case.
- [62] Cherry Robson gave evidence. She was a childhood friend of Cora. She spent time at the dairy home. She stayed overnight on weekends and during holidays, but never during the school week. When she stayed she shared a bedroom with Cora.
- [63] She used to help the defendant and Cora with the daily routine. She only recollected that the complainant came to the dairy on social occasions. She had no recollection of the complainant spending the night at the dairy.

- [64] She said the defendant had never acted inappropriately to her and accepted the defendant was her friend.
- [65] Jeannie McKay and Kathleen Dobins also gave evidence for the defence to the effect that the defendant during the relevant period have never acted inappropriately towards them.
- [66] Nancy Jennings produced the records showing that the defendant's stepfather had been employed as a storekeeper in 1974.

V. ANALYSIS OF THE EVIDENCE

- [67] The striking feature of the case is that there is no explanation given for the complainant giving untruthful evidence. Usually there is a motive or reason why someone should be untruthful. In this case no such reason or explanation is ventured. To make such grave allegations is a difficult and serious thing to do.
- [68] The starting point therefore is that there is no evidence before the court as to why the complainant should give untruthful evidence. However, the burden and standard of proof is such that all evidence must be carefully examined to see if the court can be sure of guilt.
- [69] These matters happened some 44 years or so ago. There is no independent corroboration of the complainant's evidence, so the case rests entirely on her word. She gave her evidence in a careful manner and appeared to me to be an honest witness. That alone is not sufficient when other witnesses also appear to be credible giving contradictory evidence to that of the complainant.
- [70] The prosecution say in their closing submissions that:
- “The only sensible explanation is that she is trying to tell the truth. Amongst some details that she may have got wrong there is an unshakeable core of consistency about the abuse which she suffered and her account has all hallmarks of truth.”
- [71] The prosecution further point to the fact that the complainant did not seek to embellish her account which, if untrue, she could easily have done. Further they point to important details from the evidence, such as “singing” while the bottles were being washed as one of those important matters that point to a more significant truth.

[72] In the final analysis the prosecution hang much on their point:

“The Prosecution must ask rhetorically why would [the complainant] give this account of abuse if it were not true.

She risks her reputation, her family her own comfort and comes to court to stand by the account she gave.

...

The Crown maintain therefore that the evidence in this case points to a lady now in her fifties telling the truth as best as she can remember it of abuse that happened to her as a child.

No reason to lie and every reason not to reveal the abuse she suffered. This fact raises her credibility.”

[73] While this approach is of course a factor to take into account, it is important not to be over persuaded by it in a criminal trial. Where there is a complete conflict of evidence between the complainant and a defendant – she says/he says – it is not in my view best to approach the subject from the prosecution’s stance that the person who has least reason to lie should be preferred. The proper approach is to look for supporting or corroborating evidence. In many cases this will be contemporary or documentary evidence and that is often a powerful supporting factor. But the absence of supporting on the prosecution side is more important owing to the burden and standard of proof. As Ms Lindop eloquently said in closing:

“If the evidence is equal then the Crown will not have proved their case.”

[74] And the prosecution said:

“He [the defendant] was undoubtedly superficially plausible but ultimately the Prosecution say he is not telling the truth.”

[75] The submission made by Ms Lindop is self-evidently correct. It follows it is important to analyse the key factual issues in this case.

[76] A key issue is the opportunity that the defendant had to carry out the alleged abuse. On the complainant’s evidence the abuse happened consistently and frequently over a number of years. She effectively said she was there for extended periods including school times and used to stay over. This is particularly the type of issue the court must be aware of that is difficult for the defendant to gainsay or provide proof against given the passage of 40 plus years. The defence point out that the loss of the complainant’s, and indeed the defendant’s, mother, father and grandparent could have assisted with the frequency of visits by the complainant to the dairy, her role at the dairy and how often she stayed overnight. Accordingly, I make due allowance for that.

- [77] On the issue of opportunity the complainant says that she went to the dairy during school days and helped out with the daily routine on those days. This is inconsistent with the evidence of her brother, the defendant, Cora and Cherry; and also inconsistent with the acknowledged fact she was a frail girl suffering from asthma and eczema. She could not easily interact with the farm animals or such things as haymaking. The tight timetable of the morning regime is also inconsistent with any alleged abuse during schooldays. This does not mean abuse did not happen but it prevents me from being sure of the complainant's evidence as to the consistency and frequency of the alleged abuse.
- [78] The chronology is also important. The complainant was born in 1962. She has consistently said the abuse began at the age of 8. That puts the abuse first occurring in 1970. However, the prosecution have chosen in their Indictment a starting date of 17 November 1972. That is when the complainant was at least 10 years old. It follows that even if abuse occurred on the complainant between the ages of 8 and 10 it is not subject of a count on this indictment. In the circumstances of this Indictment it does appear that the start date is a material averment (*doli incapax*) and therefore even if abuse occurred before the 17 November 1972 when the complainant was 8 years of age the defendant cannot be convicted of it.
- [79] The dairy ceased to operate as a dairy at the end of 1973. The complainant would be 11 years of age. This appears to be a plain fact. The evidence of the defendant and Cora, supported by photographs and the work records of the defendant's stepfather put this really beyond doubt. The complainant did not mention this fact in her video evidence.
- [80] Given the allegations of the complainant are predicated on the abuse occurring whilst she says she was helping work at the dairy and the rapes occurred only once she was 13, the dates do not fit. She of course could just be mistaken about her age at the time of the rapes but the burden and standard of proof always remain on the prosecution so discrepancies such as these cannot easily be put aside as mistakes when guilt beyond reasonable doubt is concerned.
- [81] Both sides rely on some of the same passages in the evidence of the complainant. For example the position for sex that the complainant said she was in as described at paragraph [28] above. She describes it as happening on her side with her legs closed.

The prosecution say the description is detailed and without hesitation, therefore has the ring of truth. The defence say trying to force someone to have sex on your side on a narrow bed with your legs closed is not realistic. The defendant would have adopted a position on top of her and pushed her legs apart. These matters, both having some merit, do not in my view advance the overall conclusion very much.

[82] It also appears that the defendant started a relationship with Theresa about August 1974. The complainant would have been 12 at that time and the dairy would have ceased to operate as a dairy. The complainant in her video interview said that once the defendant had found a girlfriend he left her alone. I note that in cross examination she did say that it continued after the defendant had gone out with Teresa but that is a detail that was not in the original video evidence.

[83] The complainant in her witness statement to the police described an attempted rape as:

“...From behind he then put his erect penis between the tops of my legs, between my thighs and tried to put his erect penis into my vagina and anus.”

[84] In her video evidence the complainant said that the defendant never attempted to enter her ‘back passage’. Whilst this is a clear difference in her own accounts, the prosecution seeks to explain it:

“... where there seems to have been some misunderstanding as the officer took [the complainant]’s statement about anal sex the Complainant does not take the easy route and say it might have happened, she says she remembers that it did not.”

[85] While the prosecution can say, after all this time there are bound to be some inconsistencies and differences in the complainant’s account and that allowance should be given for them, I remind myself that it consistently remains the prosecutions duty to prove their case and not have allowances for errors made.

[86] In support of the complainant’s version of events is the fact that she told Betty in the early 1980’s, and Dr McInerny and Ms Rimicans in 2007. This is not independent corroboration of her allegations as the source of the evidence is the complainant herself repeating it to others. It does however show consistency and one must ask if she is making it up or has somehow a false memory why would she have said it to these people and as early as the 1980s. Of course, she gave no details and at the time was having mental health problems.

[87] Also in the disclosure to Betty the complainant said that the defendant had abused another member of the defendant's family. The Complainant in her video evidence to the police said she thought the defendant was abusing Cora and Cherry as well, and "Just the way he was with them is exactly how he was with me". Indeed she stated she was relieved that the defendant was abusing someone else rather than her.

[88] I am satisfied having heard from Cora and Cherry who completely deny any such abuse or inappropriate behaviour from the defendant that the complainant is wrong about this and no other member of the family, nor Cherry, was abused.

VI. CONCLUSIONS

[89] This is a difficult case. The sexual abuse of children is pernicious and must be stamped out. It is a difficult thing to bring forward allegations of sexual abuse, particularly when it is against persons still known to the abused.

[90] I have to consider all the evidence and all the legal directions I have set out above. I cannot consider anything that has not been adduced as evidence in court at the trial. Courts of law set exacting standards and I must do right to all persons according to law and give a true verdict according to the evidence. The allegations of the complainant although supported by consistent subsequent complaints that make recent fabrication unlikely, remain uncorroborated by any independent evidence.

[91] The position remains that even if I think the evidence of the complainant is probably true in all the circumstances, which may well be the case, where there are inconsistencies and errors, and contradictory evidence from other witnesses which has not been itself undermined, and a chronology that does not fit the allegations, the immutable standard of proof, proof so that I am free from doubt as to the guilt of the defendant, is not made out.

[92] In the circumstances I enter not guilty verdicts on all counts.

[93] Finally I commend the Cinnamon police investigation. Historic abuse allegations are difficult to investigate and it is clear this matter was dealt with sensitively. It is important that these historic sex matters are fully investigated and dealt with properly; with due process of law so that the people of the Falkland Islands can have confidence in their criminal justice system.

The Honourable James Lewis QC
Chief Justice of the Falkland Islands.