IN THE COURT OF APPEAL OF BELIZE AD 2015

CRIMINAL APPEAL NO 9 OF 2014

**SATURINO POP** Appellant

v

**THE QUEEN** Respondent

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BEFORE
The Hon Mr Justice Sir Manuel Sosa President
The Hon Mr Justice Dennis Morrison Justice of Appeal
The Hon Madam Justice Minnet Hafiz Bertram Justice of Appeal

O Selgado for the appellant.
L Willis, Senior Crown Counsel, and P Staine, Crown Counsel, for the respondent.

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16 March and 14 October 2015.

**SIR MANUEL SOSA P**

*Introduction*

[1] On 5 March 2014, at the end of a trial before Moore J ('the judge') and a jury which had commenced on 3 March, Saturino Pop ('the appellant') was convicted of three counts of having carnal knowledge of a female child under the age of 14 years, which child shall, in the remainder of this judgment, be referred to as KT. On 9 March 2014, the judge imposed on the appellant a sentence of 12 years' imprisonment on each count, and ordered that they should run concurrently, commencing on the day of that date.

[2] The Court heard oral argument in the appellant's appeal on 16 March 2015 and, at the close of the hearing, gave judgment to the effect that, for reasons to be given in writing at a later date, the appeal was allowed, the conviction quashed, the sentence set aside and a retrial ordered. (Whilst the Court refrained from providing for venue in its order, it expressed the wish that retrial, if any, should be in Belize City.)The appellant was also offered bail, to be taken before the Registrar, in the terms on which he had been admitted to bail prior to trial, including the term requiring the bail sum to be $8,000.00 and the number of sureties two, each in the sum of $4,000.00.

[3] Bearing in mind both (a) the fact that there is an order for retrial and (b) the reasons for judgment, which reasons shall now be set out below, the Court does not consider it either convenient or necessary to describe the evidence adduced at any length or in one continuous narrative. It proposes instead to refer to the evidence only in the course, and so far as strictly necessary for the purpose, of the exposition of such reasons.

*The form taken by the hearing*

[4] The Court, having heard the oral argument in support of the grounds of appeal filed on behalf of the appellant, found it somewhat desultory and lacking in persuasive force but was of the view that the first ground, viz that the trial was unfair, if made to subsume the second, viz that prejudicial evidence was admitted by the judge, could significantly be improved qualitatively as well as added to quantitatively (in terms of the number of sub-topics meriting coverage). The President accordingly raised for the consideration of Mr Willis, Senior Crown Counsel, certain core matters of concern.

*Specific concerns of the Court*

[5] After listening to Mr Willis's responses to these matters, the Court reached the conclusion that this appeal should be disposed of in the manner already indicated at para [2], above as the conduct of the trial and certain portions of the summing-up were deficient to such an extent as cumulatively to render the trial unfair. The Court shall now proceed to expound on these deficiencies.

i) Prejudicial evidence of pregnancy and childbirth

[6] Given that the appellant was unrepresented, it was important for the judge to exercise maximum vigilance to ensure the exclusion of evidence and remarks needlessly prejudicial to him. The Court therefore considers it unfortunate that the Crown introduced, and was permitted by the judge to continue leading throughout the trial, evidence that KT became pregnant and gave birth to a child after having allegedly been carnally known. It is to be recalled in this connection that the case for the Crown was that KT was only 13 years old at the time of each alleged act of carnal knowledge. Not only did the judge allow prosecuting counsel to lead such evidence through KT herself: the doctor was permitted to testify that the result of a pregnancy test administered to KT because she claimed not to be menstruating was Positive. He was further allowed to state in evidence his estimate that she was then about 10 weeks pregnant. This, in all likelihood, had the undesirable effect of magnifying the enormity of the alleged offence in the eyes of the jury, and thus unnecessarily stirring their emotions, for the twofold reason that (a) it is not every carnal knowledge victim who becomes pregnant and (b) this particular victim was only 13 years old at the time. And the jury may well have been encouraged to dwell on the evidence of KT's pregnancy when the judge herself saw fit to ask yet another witness, viz an aunt of KT who shall, in the remainder of this judgment, be referred to as IT, whether KT had indeed given birth to a baby. The Court notes, in this regard, that, as if to drive home the point to the jury, the judge followed up with a further question as to whether IT was with KT when she was delivered of the baby, which question was answered in the affirmative. (As if that were not enough, the judge dealt with the evidence of pregnancy and childbirth more than once in the course of her summing-up.)

[7] It is further to be observed that even the investigating police officer, viz Woman Corporal Nora Santos Parham, was permitted to be led on the subject of KT's alleged pregnancy and the supposed reaction of the appellant when told by her (the corporal) of it.

[8] In the view of the Court, the proper time for evidence of the pregnancy and childbirth was at the sentencing phase rather than at the trial itself.

ii) Directions on evidence of age

[9] The Court was also concerned as to the adequacy of the judge's directions to the jury on the element of the offence of carnal knowledge relating to age. It was the evidence of the sole witness as to the age of the virtual complainant, viz IT (who was not cross-examined at all), that there was an interval of some 9½ years during which she did not see the former. She had last seen the baby girl who was born on 12 April 1999, and supposedly registered as KT, when she (KT) was still a baby. But IT had not been present at the registration. Some 9½ years later, she saw a child whom she took, for reasons which she did not identify, to be the baby supposedly registered as KT.

[10] The judge did not direct the jury carefully to consider the difference between this evidence of IT and the evidence of a woman who, in a hypothetical case of carnal knowledge, testifies that the virtual complainant is her biological daughter, was born on a given date and has lived with her since birth. In the view of this Court, the imperfections of IT's evidence were effectively glossed over when the judge told the jury that –

> ' … the aunt said that she has known [KT] since she was born'

and that –

> '[i]f you accept the evidence of [IT] it may leave you with no doubt that [KT] was indeed 13 years of age and under 14 on the dates in the indictment …' [emphasis added]

The judge would have done well to tell the jury that the evidence of IT was necessarily not as weighty as that of a better-informed witness, such as the mother in the hypothetical case just referred to, would ordinarily be. The judge might have illustrated the point by explaining that, whilst the evidence of IT might well satisfy a test based on the balance of probability, it was another question whether it would satisfy the higher standard of proof beyond reasonable doubt. The Court considers that directions along these lines would be of value to a reasonable jury weighing the evidence of IT that KT and the subject of the birth certificate were one and the same person.

iii) Judge's view on the facts

[11] A third concern of the Court had to do with the judge's expression of a view of her own as to the meaning of certain things said by the appellant in his unsworn statement from the dock ('the dock statement').

[12] The appellant undoubtedly referred, in the dock statement, to KT as being 'a true friend' and suggested that in Mayan culture, presumably his and KT's culture, 'everything was loving and sharing'. It is also the case that, in his brief 'closing speech' to the jury, he went a little farther and said, 'I and this young gal was like, in love.'

[13] The record, however, discloses no express reference whatever by him, at any stage of his trial, to the topic of sexual intercourse.

[14] That notwithstanding, the judge, in her summing-up, essentially told the jury that she understood the appellant to have admitted, in his so-called closing speech, having sexual intercourse with KT. This is how the Court understands the following passage of the summing-up:

> 'In fact … you may come to the conclusion that he is saying that he carnally knew [KT] because sex with an under-aged girl is acceptable in his culture, the Maya culture …'

read together with this one:

> 'If I understand what he is saying, he is asking for an excuse for carnally knowing [KT] because of what he says to you is his culture. Now that was what I gathered from his dock statement, his unsworn statement …',

which appears a little later in the charge.

Here the concern of the Court is twofold. First, it was, to put it colloquially, 'something of a stretch' to interpret the appellant's broad comment that 'everything was loving and sharing' in the Mayan culture as an admission by him of having had sexual intercourse with KT. Not only are the words here quoted very much on the vague side: they are also

necessarily to be read in conjunction with everything else contained in the dock statement, including the rather neutral description of her simply as 'a true friend'.

[15] Indeed, even if it had been in the dock statement itself, rather than only in his sorry attempt at a closing speech (of an evidential value of nil), that the appellant had said that he and the appellant were in love, it would have been an extreme case of a *non sequitur* for the judge to say that he was thus admitting to the jury that there had been sexual intercourse between him and KT. Axiomatically, and as Mr Willis readily and properly conceded, to have, in a permissive culture, a true friend who happens to be an under-aged girl is not necessarily to be in a sexual relationship with her. This must be the case in any context, most of all in that of a criminal trial, in which guilt must be proved beyond a reasonable doubt.

[16] As the judge gave no more than a single direction, and that only in the general first part of her summing-up, as to the jury being entitled to disregard any expression by her of an opinion as to the facts, there remained a risk, in the view of this Court, that the jury may have arrived at their verdict on the basis of this supposed admission by the appellant without taking time thoroughly to examine the Crown evidence against him. After all, the judge never gave them a special warning (ie one immediately following the expression of the opinion in question) against so doing. On the contrary, she explicitly told the jury at one point:

> 'There is no defence of carnal knowledge if you find that carnal knowledge occurred <u>based on what [the appellant] has said</u>.' [emphasis added]

A statement such as this could easily have been interpreted by a reasonable jury, even if not so intended, to mean that they were free to find on the basis of anything the appellant had said in court that he had had sexual intercourse with KT. As at present advised, the Court is of the firm view that there is no authority for departing from the time worn direction that it is for the jury to decide whether the evidence for the prosecution (not an accused's dock statement, still less his or her closing speech) has satisfied them of his or her guilt beyond reasonable doubt. Mr Willis, again, commendably conceded that, apart from the fact that such a direction was nowhere in

the judge's charge to be found, the absence from it of a direction designed to ensure that the jury appreciated their entitlement to disregard the judge's view on the facts was conspicuous.

iv) Extent of judge's assistance to appellant on importance of cross-examination

[17] Finally, the Court was concerned that the appellant did not challenge the evidence of KT that he had had sexual intercourse with her. It feared in this regard that the appellant might not have appreciated that, if believed by the jury, this and the rest of the evidence given by KT was capable, in and of itself, of establishing three of the four elements of the offence of carnal knowledge. The Court considers that, again, the judge should have, in the absence of the jury, made sure that he had a full appreciation of this crucial reality and of the importance, in consequence, of cross-examination by him of this witness, if in fact it was his defence, to all or any of the charges, that he had not had sexual intercourse with her. There is no conceivable excuse for this omission bearing in mind that, at this early stage in the trial, the judge had yet to hear the appellant's dock statement and address which plainly convinced her, wrongly, that the appellant was not raising the defence of denial of sexual intercourse.

[18] In the circumstances, the Court was satisfied that the appellant's trial was less than fair and considered that it must be guided by the oft-cited dictum of Lord Steyn, delivering the judgment of the Privy Council in *Allie Mohammed v the State* [1999] 2 AC 111, 123-124, viz:

> '… it is important to bear in mind the nature of a particular constitutional guarantee and the nature of a particular breach. For example, a breach of a defendant's constitutional right to a fair trial must inevitably result in the conviction being quashed.'

*Overall concession of the respondent*

[19] The Court notes, for the sake of completeness, that Mr Willis rightly conceded that, in the circumstances, the conviction of the appellant on each of the three counts was unsafe.

*Concluding remark*

[20] It was as a result of all the concerns set out above that the Court could see no reason to reject the concession of Mr Willis on behalf of the respondent and concluded, moreover, that the proper disposal of this appeal was that which was in fact ordered and which is recorded in para [2] of this judgment.

*By way of postscript*

[21] Although this matter did not arise at the hearing, the Court must point out, for the guidance of the judge on a retrial, that the judge at trial did not, as she should have done, direct the jury to consider each charge in the indictment separately. In similar vein, the Court wishes to make clear that, in the absence of legal argument, which it considers necessary, it has refrained from expressing any view on the question whether the evidence of IT relating to the age of KT was admissible in the circumstances of the instant case. It expresses the hope that such question, should it arise at a retrial, will be fully argued in the light of its (this Court's) unreported and undated judgment in *Ellis (Lincoln) v The Queen*, Criminal Appeal No 7 of 1995, and any other relevant authorities.

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SIR MANUEL SOSA P

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MORRISON JA

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HAFIZ BERTRAM JA