IN THE COURT OF APPEAL OF BELIZE AD 2016

CRIMINAL APPEAL NO 1 OF 2014

NM Appellant

v

THE QUEEN Respondent

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BEFORE

The Hon Mr Justice Sir Manuel Sosa	President
The Hon Madam Justice Minnet Hafiz Bertram	Justice of Appeal
The Hon Mr Justice Christopher Blackman	Justice of Appeal

Appellant unrepresented.
C Vidal, SC, Director of Public Prosecutions, and P Staine, Crown Counsel, for the respondent.

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16 June 2015 and 17 March and 8 December 2016.

SIR MANUEL SOSA P

Introduction

[1] Given the nature of the convictions involved, the Court is anonymising the present judgment, a majority judgment, by avoiding the use in it of the names of the appellant, the complainant and her mother.

[2] Between 28 October 2008 and 28 February 2010, inclusive, TR, whose mother, LV, and stepfather, NM ("the appellant"), were living under one roof again after a previous separation, was twice subjected to an assault of an indecent nature and carnally known four times in her home in Santa Elena, Cayo District. On 15 March 2010,

the appellant was arrested by the police in San Ignacio, Cayo District and charged with having had carnal knowledge of TR on two separate occasions. On 29 March 2010, the charges of carnal knowledge were increased to four and the appellant was further charged with having on each of two discrete occasions committed upon TR an assault statutorily deemed aggravated by virtue of its indecent nature ("indecent assault"). The appellant stood trial in February 2014 before Moore J ("the judge"), sitting with a jury, in the court below on an indictment containing five counts of carnal knowledge of a girl between the ages of 14 years and 16 years ("carnal knowledge") and one count of indecent assault. At the end of that trial, he was convicted of two counts of indecent assault and four of carnal knowledge and sentenced to a term of imprisonment of three years on each count of indecent assault (to run concurrently with each other) and to a term of imprisonment of eight years on each count of carnal knowledge (also to run concurrently with each other). It was, however, ordered that the three-year sentences run consecutively to the eight-year sentences, to the end that the appellant should serve a total of 11 years' imprisonment.

The Crown evidence

[3] Concerning the first count of the indictment, TR testified as follows under examination-in-chief at trial. At about seven o'clock on the evening of 28 October 2008, having showered, she was in her room clad in a duster. She was wearing no underwear beneath the duster but had a towel wrapped around her. NM, the common law spouse of LV (who was not at home at the time), presently entered the room. He told her he wished to speak with her in the bedroom he shared with LV ("the master bedroom") but that she should meet him there in the state of partial undress in which she then was. He further instructed her to exit the house through an adjacent back-door and enter the master bedroom by way of another back-door. When she, complying with his instructions, had joined him in the master bedroom, NM proceeded, whilst clothed, to hug her and to rub his private parts against hers. Growing scared, she left the master bedroom and returned to her own room, where she immediately recorded the experience in her diary. Upon the return of LV, TR handed this diary to her and asked her to read what she had written in it since she (TR) was unable to tell her face-to-face

what had happened. (LV would later in the trial deny that the diary was thus handed to her.)

[4] As regards the second count, NM, on the testimony of TR, entered the bathroom whilst she was showering on the evening of an unspecified date in December 2008, when LV was in Belize City. He proceeded to join her in the concrete bath-tub. He had her sit on the edge of the tub and, as the water continued pouring from above and she remained motionless, performed cunnilingus on her.

[5] With respect to the third count, the evidence of TR was that, on an unspecified date in March 2009, after spending some time together painting the walls of the master bedroom (during which time she playfully daubed paint on the behind of NM and he, in repayment of the favour, daubed paint on her vagina), they showered separately and thereafter ended up in her (TR's) room. She had a towel wrapped around her but he proceeded to remove it and perform cunnilingus upon her. That act completed, he went on to penetrate her vaginally with his penis.

[6] In relation to the fourth count, TR gave evidence of having been sent back home from school on the morning of 3 July 2009, a Friday, on account of being ill with the flu. She was lying on her bed in her room when NM walked in. No one else was in the house at this time. He suggested that a bath would do her well and ended up bathing her. Then he performed cunnilingus on her and, wearing a condom, penetrated her vaginally with his penis.

[7] As to the fifth count, TR said in evidence that, at about ten or eleven o'clock one night sometime in 2009 after the incident of 3 July, when LV was away from the home, NM drove a younger sister of hers out of her (TR's) room and himself went off only to return later and have sexual intercourse with her.

[8] In regard to the sixth count, TR's evidence was that, one morning in February of 2010, she was sent back home from school for the reason that she was suffering from symptoms resembling those of the flu. She was busy washing some dishes when NM appeared and promptly began rubbing his body against hers. When she resisted his advances, he resorted to donning a pair of black thongs and staging an impromptu

show before her as she sat in the hall. She left the hall and retired to her room; but he followed her there and in due course had sexual intercourse with her.

[9] TR further stated in evidence-in-chief that she reported the incidents in question to the police and was examined by a gynaecologist but gave no indication of the dates of the report and examination.

[10] In cross-examination, TR was subjected not only to yelling on the part of NM but also to the ordeal of having to rehash what had happened on each of the six unfortunate occasions in question. But, as it is said, "It is an ill-wind that blows nobody good." The rehashing exercise evidently resulted in her remembering details she had perhaps forgotten during evidence-in-chief. Amongst the details she added to her previous testimony were the following: (i) on 28 October 2008 LV was in Belize City to do some shopping in early preparation for Christmas; (ii) the incident in December 2008 had occurred before Christmas and NM's work at that time was computer repair, which he performed at home as well as away from home; (iii) he used to stay home at night in December 2008; (iv) sexual intercourse in March 2009 took place on her bed with him on top of her and was preceded by oral sex performed on her by him; (v) on that occasion he also fingered her vagina; (vi) it was daytime, they were alone in the house and he used a condom; (vii) on one occasion when he had sexual intercourse with her notwithstanding that she was ill, he did not use a condom; (ix) she did not bleed the first time he had sexual intercourse with her; (x) on the last occasion in 2009 when he had sexual intercourse with her (TR) LV was asleep in her room on the other side of the house; and (xi) there may, in fact, have been no classes at school on the day in February 2010 when he last had sexual intercourse with her.

[11] TR also testified under cross-examination that she spoke to a Ms Lela Cowo, the leader of her church "cell group", about the incidents in question on 11 March 2011 and that she (TR) spoke to LV about the same matter on the next day.

[12] NM did not at any time in cross-examination suggest to TR (a) that he had never indecently assaulted or carnally known her; (b) that there was no back door by which she could have exited the house on the night of 28 October 2008; or (c) that he was, by reason of his work hours as someone else's employee, absent from the home on that

night or on any other occasion when, according to her allegations, he had either indecently assaulted or carnally known her.

[13] It was the testimony of LV, under examination-in-chief, that TR was born on 30 June 1994 and that she was therefore about 14½ years old in October 2008. LV said in evidence that on Saturday 13 March 2010 TR spoke to her about the incidents in question. She said that the conversation began with TR saying to her:

> "I know you do not believe me mom when I told you what had happened with [NM] before, but it was true."

Later that day, she and TR went to the San Ignacio Police Station to make a report and thereafter to the hospital in that town where the latter was examined by a medical doctor. After that they returned to the police station where they both gave full statements to the police. LV further testified that, on her return home, NM was not there. He was, on her evidence, at the church, located across the street from their home, but presently came over from the church, whereupon he was taken into custody by the police, who had, presumably, arrived there earlier.

[14] But LV's testimony was important for an entirely separate reason for, according to it, she and TR had returned home earlier on that afternoon in order for the latter to take a bath in preparation for the desired medical examination and NM, who was at home at that time, had ended up, after initial assertions of innocence, making a serious admission. He had tearfully confessed to having indeed had sexual intercourse with TR but pleaded in mitigation that he had only done so once.

[15] LV had thereafter proceeded to the police station together with TR and a Mrs Yolanda Cowo.

[16] LV was shown an item which she described as a diary belonging to TR, saying that she had obtained it from the latter on request. She was later to add, in answer to a question from the jury, that TR had not shown her diary to her (LV) in October 2008. This item was not, however, tendered in evidence by the Crown.

[17] LV, too, testified, in evidence-in-chief, of the existence of a back-door by which TR's room, and the master bedroom as well, could be accessed from the backyard.

[18] Under cross-examination, LV further stated that NM worked "for a couple of months" with "Maranco, a (*sic*) oil drilling company". When asked to elaborate, her one-word answer was, "Months"; and NM moved on to another topic, without challenging the accuracy (or adequacy on any other ground) of this reply.

[19] For some reason, NM also asked LV in cross-examination whether they used to sleep together in the same room. Her answer was:

> "We slept together up until November of 2009."

She went on to say, after further questioning, that the new sleeping arrangements had come into effect after her birthday on 27 November 2009.

[20] Conspicuous for its absence from the cross-examination was any suggestion that LV's evidence of the damaging admission by NM already adverted to above was untrue.

[21] In his evidence-in-chief, Dr Guillermo Rivas, a gynaecologist, stated that upon physically examining TR on 13 March 2010 he found that her hymen was not intact and that it had old scar tissue. He concluded from his observations that TR was sexually active and suffering from a vaginal infection.

[22] Despite the obvious fact that the doctor was not pointing the finger at him, NM not only cross-examined him but pulled out all the stops, as it were, in so doing, putting to the doctor, amongst other suggestions, that TR might have become infected through self-abuse, either digitally or by the use of a "sex toy" (his word). These suggestions were not accepted by the doctor.

[23] Also amongst the witnesses called by the Crown was Ms Lela Cowo, whose testimony was that she spoke with TR on 11 March 2010, either in the evening or later, and also received from TR, that night or next morning, a book, looking to her "like a composition book", on some pages of which there was writing ("the notebook"). Although she did not claim (a) to have seen TR writing anything in the notebook; (b) to be able to recognize the handwriting as being that of TR; or (c) even that TR ever told

her the writing was hers, Ms Cowo was allowed to express the conclusion that TR was, by such writing, “expressing the way she felt”, a conclusion in which it was implicit that such writing was TR’s. The notebook was, moreover, admitted in evidence by the judge and the writing in it read out in court by Ms Cowo.

[24] Ms Cowo was not cross-examined.

The defence evidence

[25] At the close of the Crown case, NM gave sworn testimony by which he sought to raise defences of alibi. He said he was innocent and that the entire case brought against him was a “set up”. By this he seemed to be saying that he had been framed for having induced LV, who was cheating on him, to drop her guard, so to speak, and thus end up being caught, and photographed, by him (NM) in bed with her lover.

[26] In this connection, piecing together some of the different parts of his evidence, the Court understood his story to be as follows. In March 2010, he received a report whose veracity he devised a plan to ascertain. Pursuant to this plan, one Tuesday or Wednesday morning that same month he visited LV at her place of work and told her that he was leaving to do some work out of town when, in fact, he had no intention so to do. He then went across the river to San Ignacio where he spent an hour or two. Thereafter he returned by taxi to Santa Elena but had the taxi drop him “down the lane” rather than at his home. This was how he was able to catch LV in bed at home with another man, who turned out to be a policeman. Apparently, neither occupant of the bed was aware of his arrival on the scene, as, according to him, he cleared his throat (presumably to make them aware of his presence) before taking a picture of them with his mobile phone and walking out of the house.

[27] The following Saturday the police came to the house at about 10 or 11 am and took him into custody on the basis that they had a warrant for his arrest. This was how he came to be charged with offences allegedly committed upon TR.

[28] It was, said NM, consistent with the trumping up of charges against him that part of the Crown case rested on evidence of a supposed back-door giving access to the back yard from TR’s room. Such a door, he said, did not exist.

[29] As to his alibis, NM's evidence was as follows. He started working "pan di rig" for Maranco (which, like LV, he described as an oil drilling company) in 2007. This may have been around the month of May. (He was to say in cross-examination later on that he continued working with Maranco up to 2011.) As a result, "he would be home for three days, four days" only. Employees would "go for 28 days, 30 days". On days off, he would "go do servicing and maintenance for different places, government and non-government organisations". In or about February 2009 (he may have meant to say 2008), he resumed cohabitation with LV at her address after a period of estrangement.

[30] NM sought to tender in evidence time records prepared by Maranco in respect of the period of his employment with them, which records would, according to him, identify his places of work and places of temporary accommodation and provide corresponding dates and times. Seeking to give an example of what he was talking about, he said that, if he was working on the rig at Spanish Lookout, his place of temporary accommodation would be in Central Farm. These records were prepared in the light of the dates when, according to the statement given by TR to the police before the trial, he had indecently assaulted and carnally known her. (He therefore bemoaned the fact that, at trial, the dates of which TR testified did not all tally with those she had previously given to the police.) Following production of the documents for inspection by both the judge and prosecuting counsel, the latter objected to NM testifying as to their contents on the ground that he was not their maker. The judge effectively upheld this objection, suggesting to NM that he might wish to "call the person who created those documents to come to court and testify as to what the meaning is of the contents of the documents".

[31] Under cross-examination, NM said that on 28 October 2008, and during December 2008, March 2009 and November 2009 he was working on the drilling rig. On 3 July 2009, on the other hand, he was, he said, at an hotel called Flores Bellas in Benque Viejo del Carmen, Cayo District; and in February 2010 he was "all about".

[32] When confronted with the fact that, despite his plea of alibi, he had not once suggested to TR, when she was in the witness-box, that her allegations of indecent assault and carnal knowledge against him were untrue, he was extremely evasive.

When he finally condescended to venture an explanation for such a glaring failure, all that fell from his lips was that he did not "know what all I should ask" her and, when further pressed, that he could not "get up and say I object to that Your Honour". He was thereupon reminded that he had nevertheless asked TR many questions during his cross-examination of her. (Prosecuting counsel did not, however, point out to him that, in fact, there were, in the course of cross-examination – as distinct from examination-in-chief – no less than four discrete moments, captured at pages 47, 61, 67 and 68 of the record, when occasion arose for him to deny the truth of allegations of the kind under discussion.)

[33] He responded similarly when reminded of his failure to deny the truth of the allegation of LV in the witness-box that he had tearfully confessed to her having had sexual intercourse with TR on a single occasion. First, he resorted to evasion; then he lamely explained that:

> "I neva challenge her because I don't know if I should."

This reply certainly explained why he properly refrained from seeking to interrupt the examination-in-chief of LV. What it did not, however, explain was why he failed to challenge her on this very serious matter in cross-examination. (He accepted before this Court that he had been provided with pencil and paper for the purpose of note-taking)

[34] Regarding the alibi related to the incident of 3 July 2009, the following exchange (which started out in respect of the majority of NM's alibis) inevitably stands out:

> "Q. [A]t the time when you said you were at work, I suggest to you, you were at [home] having sexual intercourse with a minor [TR]?
>
> A. So you could prove I was there at [home].
>
> THE COURT: Is that your answer?
>
> ACCUSED: I was not there, Your Honour, no, I was not there. Some days I was, some days I was not. Like the incident on the 3rd July, I have a check (*sic*) that I wrote, I have it right there in documentation, Your Honour, where I was the ***night***." (emphasis added)

(The evidence of TR, however, was that NM had performed cunnilingus on her and carnally known her on the morning, rather than on the night, of 3 July 2009.)

[35] The only witness called by NM was Miguel Pérez, the Chief Financial Officer for Maranco, who testified on Friday 7 February 2014. On the day before this witness was called, ie Thursday 6 February, the judge had advised NM that he needed to bring to court "the person who made the documents" and expressed willingness to adjourn the trial until Monday 10 February to give him sufficient time to reach such person. But, as it turned out, Mr Pérez was not the person who had, in any meaningful sense, "made" the documents. He had signed them but readily admitted that he could not vouch for the accuracy of the information contained in them since he had not prepared them himself. Quite properly, he was not permitted to tender them in evidence nor to testify about their contents. He could, however, of his own knowledge, say that NM had worked for Maranco in 2008 (starting in May), 2009 and 2012. (As will have been noted, unlike NM, he did not include 2007 amongst the years during which NM so worked.) He further explained that a member of the drilling staff normally worked in 12 hour shifts at a drilling site. There was a day shift running from 7 am to 7 pm and a night shift running from 7 pm to 7 am. A staff member would work on one shift for a period of 14 consecutive days and then work on the other shift for the next 14 consecutive days. The rules as to leaving the appointed place of temporary accommodation between shifts was, predictably, not stated in inflexible terms by Mr Pérez. Speaking of the relevant staff members, he testified as follows:

> "Most of the time they are not allowed to go home; but of course***, if there is a time of emergency that person can go home*** because what we normally do, we provide accommodations for the personnel." (emphasis added)

He also gave evidence, predictably again, of generous allocations of days off, saying:

> "I am not the person that would prepare the time sheets but the norm is 28 days on and ***10 days off***." (emphasis added)

What is more, Mr Pérez disclosed that in cases where the appointed place of temporary accommodation was in Belmopan, staff members were permitted to go home after the

end of their shifts, albeit on the strict condition that they should be back in Belmopan in time for their next shift.

[36] And, significantly, it was his further testimony that the sites at which drilling was conducted in 2008 and 2009 were all, like the town of Santa Elena, located in the Cayo District.

[37] In re-examination, Mr Pérez said that the time sheets in question had been prepared by Maranco's Human Resources Manager. (He gave no evidence as to the time of their preparation or as to whether the person in question was then still in the employ of Maranco.)

The grounds of appeal

[38] NM's grounds of appeal, six in number, were as follows:

> 1. "Prejudicial trial in that the Trial Judge did not accept very relevant documents that was (*sic*) important to me in this case, knowing the sensitivity of these allegations. The matter was also prejudicial because I as the appellant was not present when the Judge first question (*sic*) the victim.
>
> 2. Deformation (*sic*) of character to have my name all over the media for an alleged offence that I have not committed. It is evident that the conviction has shed negative light on the allegation in question.
>
> 3. The weight of evidence given by the prosecution was not sufficient to produce a guilty verdict in that there were inconsistencies in the dates and statements given by the victim.
>
> 4. Withholding of evidence for that the prosecution failed to present copies of the alleged victim's birth certificate to the court, to myself or to the Jury throughout the trial, hence failing to prove if the alleged victim was under the age of 16. Also the diary and notebook which were both root evidence of this case were mentioned but not accepted.
>
> 5. Lack of proof from medical practitioner's examination, failing to prove that any medical evidence of myself being the perpetrator of the alleged offence.

6. The Judge's Summation was misguiding and was basically convicting me before the jury could decide on their own. Also, The (*sic*) fact that the victim constantly mentioned that she was a liar or always told lies, was not a significant factor in the summation."

The rival contentions before this Court

i) Ground 1 – Time sheets and alleged questioning in absence of NM

[39] In oral argument, the complaint of NM was that the time sheets in question were not admitted in evidence by the judge. Had they been admitted, they could have shown, according to him, where he was on 28 October 2008 as well as in December 2008 and March 2009. NM was asked by the President to indicate *quantum valeat* and on the basis of recollection (since, oddly enough, he – NM – claimed not to have the pertinent time sheet with him in court) what shift he had worked on 28 October 2008. He indicated, as the Court understood him, that what he had seen on the time sheet was that he had worked the day shift on that day; and he reminded the court of the evidence concerning the workplace rule as to using such temporary accommodation, after work, as was provided by the employer. He evaded, however, a further question, from another member of the Court, as to the distance between the place of temporary accommodation provided for the night of 28 October 2008 and his home at the time. (To take but one example, nevertheless, one of the localities in which one of the places of temporary accommodation was said to have been situated, viz Central Farm is, as is well-known, within ten to 15 minutes' driving distance from Santa Elena.)

[40] In relation to the month of December 2008, NM, ostensibly relying on the time sheet for that month, initially said in this Court that he was shown to have worked from 1 to 31, which would have been contrary to the practice described at trial by Mr Pérez, and already referred to above. Later, however, NM drastically corrected himself, accepting that the sheet showed that he had had days off, unsurprisingly given the time of year, from 12 to 26 December. The sheet further showed, he said, that he had changed shift at least thrice, and at intervals of less than the usual 14 days. (Mr Pérez's evidence having been that the rule of practice required a staff member to work a

particular shift for a period of 14 consecutive days, this was a clear indication, if any was needed, that such rules were not written in stone.)

[41] With regard to March 2009, NM relied before this Court on the pertinent time sheet as showing that he had worked different shifts. But, again, he had to accept that the sheet made reference to days off, thus indicating that he would have been at home some days of that particular month.

[42] At that point of the hearing, NM accepted that he was at home at all other relevant times, except for 28 October 2008. The President then asked NM point-blank what his sheet had to say about 3 July 2009. The cryptic answer was that he did not have the date (he no doubt meant the pertinent sheet) there because "they changed the dates to me on the trial". (As will be recalled, this was the very date on which, as he had claimed at trial, he had spent the night at an hotel in Benque Viejo del Carmen when the allegation of TR was that he had performed cunnilingus on, and carnally known, her in the daytime hours.)

[43] NM accepted that ground 1 would not avail him in respect of the conviction on the sixth count of the indictment given that he was not employed by Maranco in February 2010.

[44] As to the second part of this ground, viz the alleged questioning of TR in his absence, no material was placed before us. All that NM said was that, before the start of the trial, both the judge and prosecuting counsel took TR into the judge's chambers. Whether she was there questioned or simply told something, he could not say. And he gave no indication of the length of time spent by these three persons in the chambers.

[45] In relation to the time sheets, it was implicit in the argument of the learned Director of Public Prosecutions ("the Director"), in reply, that the judge was entirely correct in not admitting them (the time sheets) in evidence since the person who was in court to tender them was not their maker and had admitted, moreover, that the information contained in them was not within his knowledge. (NM told this Court that the maker of the time sheets had ceased working for Maranco in 2012 and could not be located by Maranco, presumably at the time of the trial; but he did not remind this Court

that he had almost impolitely declined the judge's offer to have a subpoena issued to any person he might wish to call as a witness.)

[46] The Director further relevantly pointed to the fact that the content of the time sheets in question was unknown to the court below and, for that matter, to this Court and that NM had not demonstrated in precisely what manner it would have assisted him at trial.

[47] As regards the alleged questioning in the absence of NM, it was the submission of the Director that the record revealed that the trial itself was conducted in the presence and with the participation of NM.

ii) Ground 2 – Negative media publicity

[48] NM made it clear at the outset of his oral argument that his complaint under this ground was as to the defamation of his character and its likely influence on the outcome of his trial.

[49] Asked early on by the President what exactly he meant when he wrote that -

> "It is evident that the conviction has shed negative light on the allegation in question",

NM replied that both his business and his reputation had been ruined by the allegations made against him. However, as was pointed out to him, unfortunate as that may be, it was not a matter for the consideration of this Court on an appeal against conviction.

[50] Seeking otherwise to develop his argument, NM focused on alleged adverse pre-trial publicity, emphasising that, since he had been put on trial in Belmopan, some of the jurors who sat at his trial were from that city and Santa Elena (where he had, of course, been living) and knew him even before the allegations surfaced. Because of that prior knowledge, he argued, they would have more readily and vividly recalled the pre-trial publicity and connected it to him during the trial.

[51] In her relevant written submissions, the Director, apart from drawing further attention to the pertinent direction of the judge to the jury, referred to the fact that NM's

claim of adverse media publicity was wholly unsubstantiated and had not even been raised at trial.

iii) Ground 3 – Weight of and inconsistencies in the evidence of TR

[52] NM contended, in effect, that the verdict was unreasonable having regard to the evidence. He suggested that the evidence of TR was weak given the testimony of Ms Cowo concerning the writing contained in the notebook which, as earlier pointed out, was admitted in evidence. His argument was that the evidence of TR was weakened by the following self-deprecating statement in the notebook:

> "I am kind of liad. I kind a like telling lies."

He regarded that statement as indubitably attributable to TR in the light of Ms Cowo's testimony. He further sought to pray in aid of this ground the fact that the Crown had decided not to tender in evidence the diary of TR after she had testified that she had recorded in it details of the relevant incident of 28 October 2008. He claimed that prosecuting counsel had dismissed the diary as having nothing to do with the case on announcing his decision not to tender it in evidence. This he urged the Court, not without some ingenuity, to construe as a sure sign that TR had lied in saying that she had recorded in it details of the incident in question. And this, in his submission, was in keeping with the self-deprecating statement in the diary to which reference has already been made above.

[53] Further contending, contrary to fact as shall be demonstrated below, that the notebook was neither tendered nor admitted in evidence, NM urged this Court to conclude that it was because this item would have somehow assisted his case that it was left out by prosecuting counsel at the eleventh hour.

[54] NM went on to point to the non-production by the Crown of a copy of the birth certificate of TR at the trial as another manifestation of the weakness of its case against him. Given the view of the Court on this point, coupled with the fact that it forms the basis of ground 4, the summarising of the argument shall, for the moment, be deferred.

[55] The broad contention of the Director in response to this ground was that the evidence of TR was cogent and compelling and, once accepted by the jury, was entirely capable of proving the case against NM to the required standard.

iv) Ground 4 – Birth certificate, diary and notebook

[56] Unsurprisingly, given his lack of legal qualifications, NM mounted an oral argument in criticism of the Crown's omission to tender in evidence a copy of TR's birth certificate which was anything but legal. He contended, as the Court understood him, that, because the case should properly be regarded as one in which he might have been framed, it was, at the very least, important that, to paraphrase him, every "i" was dotted and every "t" crossed, irrespective of the legal requirements. In other words, LV might have been lying in court and therefore extra-legal requirements were in order.

[57] As to the dairy and the notebook, the argument of NM was the same one that has already been outlined above.

[58] Responding to ground 4, the Director, properly concentrated on its strict wording, which, of course, clearly conveys the assertion that the age of TR was, in the absence of a copy of her birth certificate, not proved as a matter of law. (As has just been explained above, that was not how NM actually argued the ground at the hearing.) The Director therefore cited the decision of this Court in *Itza (Oscar) v R*, Criminal Appeal No 24 of 2009) as authority for the proposition that the evidence of a mother is sufficient to prove the birth of her child.

[59] Concerning the notebook, the Director pointed out that it was disclosed in the record, at pages 112-113, that the judge did admit it in evidence but expressed reservations about the propriety of the admission. In her submission, the omission to tender the diary, as to the admissibility of which she also had doubts, was inconsequential *vis-à-vis* the case for NM.

v) Medical evidence

[60] NM evinced an intention to make much of the indisputable fact that the medical evidence at trial did not implicate him in the crimes charged. He was advised by the

President that that had not been the purpose of the medical evidence and that his time could be better employed than in arguing this ground. This advice he accepted.

[61] The Director was, accordingly, not called upon to respond to this ground.

vi) Criticism of summing up

[62] NM endeavoured to support this ground by arguing that the summing up suffered from two main weaknesses. The first, according to him was that the judge indicated to the jury that she had taken a certain view with regard to the evidence in the case. The judge was, adversely to him, planting a seed in the minds of the members of the jury. In effect, the judge was convicting him even before the jury could do so. This, he said, was clear to him from the following passage in the summing up:

> "Now as I sum up, you may believe that I am taking a certain view about the evidence, or that I've accepted certain things as facts."

[63] The second weakness was that, as he saw it, the summing up did not lay due emphasis on what, to him, were constant references by TR to herself as a liar.

[64] For her part, the Director submitted that the summing up was balanced and fair in every respect. Referring to the supposedly offending passage, she contended that in truth it was, read in its proper context, a very plain statement that her (the judge's) own view of the facts was irrelevant to the jury's adjudication. Furthermore, she argued, the judge had carefully refrained from expressing a view of her own, let alone attempting to impose one on the jury.

[65] As regards the second criticism advanced by NM, the Director underscored the fact that it was only in the notebook that TR had described herself as being "kind of liad". It was misleading and inaccurate, she submitted, to say that TR had constantly so referred to herself; and nowhere in her evidence at trial had she done so. The jury had, suggested the Director, been adequately directed as to the manner in which TR's evidence was to be assessed.

Discussion

i) Time sheets and alleged questioning in absence of NM

[66] The judge was undoubtedly right in taking the position that the time sheets could not be tendered in evidence through Mr Pérez and, further, that neither he nor NM could consult it in giving their respective testimonies. Moreover, as the Director pointed out, the decision to close the defence case at the time it was closed was one taken by NM alone, without any pressure whatever from the judge. Whether he knew when he did so that the Human Resources Manager was no longer in the employ of Maranco is unclear. It would be surprising, if in fact he or she was no longer in such employ, that Mr Perez, having identified such official as the maker of the sheets, did not say so in court. In any event, NM, whatever the state of his knowledge, could have easily, had he so wished, taken up the judge on her earlier offer and requested that the person in question be sought out and taken to court to testify.

[67] That said, however, the time sheets, as described to this Court *quantum valeat* (as already indicated above) at the hearing of this appeal, could hardly have served NM in the manner that he would have liked. It seems, after all, that the time sheets were concerned not with what had already happened but with what was supposed to happen at a future time. In the words of NM himself, spoken at the hearing before this Court in reply to a question from the President:

> "Every month they prepare the documents to show where we would stay, the location we will drill and the time we will work, from what time to what time the shift starts."

(One is not suggesting that Maranco did not prepare records after the event as well, only observing that the records which NM in fact chose to obtain from them – Maranco – were records which, on his own showing and for reasons best known to him, had to do only with what was to happen at a later point of time.)

[68] The manifold limitations of the time sheets can be seen in stark relief on an examination of NM's case in respect of the night of 28 October 2008. His alibi in regard to this night is undoubtedly the only one which might, at first glance, seem worthy of

some consideration. He said, as has been seen above, that he worked the 7 am to 7 pm shift that day. The time sheets, however, even if available as evidence, could only have shown that NM should have worked (not that he did work) the 7 am to 7 pm shift that day. Worse than that, they would not have shown whether, on the assumption that he did work that shift, he was, on some acceptable ground eg emergency, excused that night from spending the night at the place of temporary accommodation appointed by Maranco. Moreover, whilst Mr Pérez did confirm the existence of a workplace rule concerning the spending of nights at such an appointed place, nothing was said by him as to the extent, if any, to which the rule was actually enforced. And, of course, if the appointed place of accommodation for that night was Belmopan, as it might well have been, there would have been nothing, on the evidence of Mr Pérez, to stop NM from going home for the night.

[69] Alone or in combination with another or others, these considerations applied, in varying extents, to each of the remaining alibis relied on by NM at trial. In regard to the separate incidents alleged to have occurred in December 2008, March 2009 and on some date after 3 July in the latter part of 2009, there was the additional consideration, for example, that as a general rule, according to Mr Pérez, a relevant staff member would be given ten days off in a row after working two consecutive 14-day shifts. There could therefore have been ample opportunity to go home and commit the alleged crimes in each of these three months.

[70] As to the so-called alibi in respect of the alleged incident of 3 July 2009, that was all that it amounted to. To say that one spent the night at an hotel in a neighbouring town after one has been accused of committing a crime at home in the morning is not to present an alibi in the true sense of that word.

[71] And, as already stated above, the time sheets could not be invoked in respect of the last of the alleged incidents, viz that of the month of February 2010, because NM, on his own evidence, was not working with Maranco at that stage.

[72] As regards the supposed questioning of TR in the absence of NM, the latter, as already indicated above, did not say that he saw or heard TR being questioned. And such assertion of fact as was made was not made on oath as it should have been.

Moreover, there was no suggestion that TR was sought to be spirited into the chambers. It was plain that the threesome in question proceeded from some unspecified place into the chambers in the full view of NM. This Court could not imagine, in these circumstances, that anything sinister took place in the chambers of the judge. And it is impossible to accept (as NM would have the Court believe) that all three persons walked into those chambers without, at the very least, a prior statement by the judge as to the reason why she was taking prosecuting counsel and TR into her chambers. It is just as impossible to accept that the judge was acting on her own, ie without a prior application from prosecuting counsel. In short, the Court does not believe that it has all pertinent facts before it. If, as seems likely, all that was involved was something as innocuous as an unfortunate meeting resulting from an urgent request channeled by an unenlightened prosecuting counsel from a jittery young complainant to a relatively inexperienced judge, then, undoubtedly, it was the kind of meeting to which counsel for an accused person would ordinarily have been invited. But this was a case in which the accused was unrepresented; and the judge must have regarded it as wholly inappropriate, given the subject of the meeting (whatever that may have been), to have NM himself present. In this regard, the nature of the charges are not to be overlooked.

[73] All things considered, the Court found no merit in this ground. That said, the Court regrets that occasion had to arise for the making of a complaint against prosecuting counsel and judge of the kind here made. In a future case where, in similar circumstances, need arises for such a meeting, the presiding judge should speak clearly and loudly as to the reason for the meeting (at which a relative or friend of the unrepresented accused may well be invited to stand in as an observer) both before and after it takes place.

ii) Ground 2 – Negative media publicity

[74] NM did not refer the Court to even one specific example of negative media publicity directed at him in connection with this case.

[75] His expressions of regret over the fact that he was tried in Belmopan prompted the President to ask him whether he thought he would have fared better had he been

tried in, say, Belize City, to which his answer was Yes, and whether his case had received more negative pre-trial publicity than the average case, to which his reply was No.

[76] The Court considers that, in suggesting that he would have been better served by a trial in, say, Belize City, NM ignored the timeless wisdom of the truism that "the grass is always greener on the other side of the fence". As the President remarked at the hearing, such a trial would have taken him away from those very jurors who, because of their long acquaintance with him, would, if indeed he had previously had a good name, know of it.

[77] As regards his ready admission that his case did not generate any more negative publicity than the average case, the fact is that the judge, as was pointed out by the President, gave the jury the usual pertinent direction in her summing up. She said to them:

> "You can only consider the evidence that has been brought before you in this court. If you ever heard any media accounts, any news story, by gossip, anything outside of this courtroom, please wipe it from your minds, disregard it, it is not evidence. The only evidence you have before you is what you heard from the witness box and that is all that you should consider when you go to deliberate."

In the judgment of this Court, that direction was entirely adequate in the circumstances of this case.

[78] This ground was lacking in substance.

iii) Ground 3 –Weight of and inconsistencies in the evidence of TR and Ground 4 – Birth certificate, diary and notebook

[79] These two grounds can conveniently be discussed together since the contentions by which NM sought to support them, with their recurring themes of the birth certificate, the diary and the notebook, largely overlapped.

[80] The Court was not in agreement with the Director that the evidence of TR in this case was cogent and compelling in its entirety. But it was of the view that the material

parts of such evidence were indeed cogent and were not appreciably varied by the cross-examination, whose focus was for the most part wrong. As has already been observed above, NM did not put it to TR at any stage that he had not in fact, on any of the relevant six occasions, indecently assaulted or carnally known her as the case might be. Neither did he, as has also been noted earlier, challenge her in cross-examination on the existence of the back-door which, on her evidence, provided access from her room to the backyard on 28 October 2008.

[81] As already adumbrated above, Ms Cowo was not cross-examined at trial. No doubt NM saw in her reading of the writing contained in the notebook a source of assistance to him. (The Court was quite unable to see for itself the legal basis for the admission of the notebook in evidence but, in the absence of legal argument on the point, proceeded – far from comfortably – on the assumption that it was properly admitted.) It is true that the notebook contained the self-deprecating statement already referred to above and that, on Ms Cowo's evidence, it had been given to her by TR. But, properly in the view of the Court, the notebook was never shown to TR in court; and, as a result, there was no evidence from her identifying it as hers, let alone accepting that the writing inside it was hers. (And, again properly, prosecuting counsel refrained from asking Ms Cowo whether TR ever acknowledged to her that the writing in question was hers.) Whilst TR did testify of having written in an exercise book at the suggestion of Ms Cowo, it was not her evidence that she (TR) ever parted with such book. Therefore, whether the notebook and the exercise book were one and the same must remain, to some extent, a subject of conjecture. Nothing TR subsequently said or did in the witness-box suggested to this Court that she was being untruthful as a witness regarding anything of importance. And she certainly did not at any stage tell the judge and jury that she was a kind of lying type of person.

[82] NM's attempt to make mileage out of prosecuting counsel's decision at trial not to tender the diary in evidence was resourceful but ineffectual. The Court was unable to find in the record any indication whatever that prosecuting counsel's reason for deciding not to tender the diary in evidence was the one alleged by NM to have been stated by him, viz that the diary had nothing to do with the case. (The Court understood NM to be

saying that this meant it did not contain that which TR in her testimony had claimed to have written in it, ie that she had lied.) That no such indication could be found by this Court is not surprising. It appears clearly from pages 99-100 of the record that prosecuting counsel went so far as expressly to ask that the diary be marked for identification purposes. Prosecuting counsel does not take such a step in relation to an item he or she considers to have nothing to do with the Crown case. The likely reason, the Court was inclined to think, for the decision not to tender the diary in evidence, was that prosecuting counsel formed the view that it was inadmissible as evidence of the truth of its contents. In the circumstances, the Court categorically rejected as illogical NM's invitation to construe the decision not to so tender as a sign that TR had lied in saying that she had recorded in her diary details of the incident of 28 October 2008.

[83] Nor was there anything whatever in NM's contention that the notebook was neither tendered nor admitted in evidence, which contention constituted a launching pad for the further spirited suggestion to the effect that it was because the notebook was supportive of NM's case that it was so withheld. The truth is that it was only by a slip of the tongue that the judge indicated in her summing up (page 203, line 10 of the record) that the notebook was not admitted in evidence. It was perfectly clear from the record (at page 113, lines 13-16) that the notebook was duly tendered and admitted in evidence. This effectively deprived the further suggestion just referred to of a launching pad.

[84] NM's layman's attempt to criticise the non-production of a copy of the birth certificate could only be summarily dismissed as irrelevant in its exclusive concern with the rightness or otherwise of the omission outside the realm of the law. His argument that, because of his claim that he was "set up", this Court should take the position that a copy of TR's birth certificate should have been tendered in evidence was irrational and, to the knowledge of the Court, not supported by any legal authority. Furthermore, the Court had reason to doubt its seriousness, in view of the fact, of which the President reminded NM, that he himself apparently did not see fit to challenge LV's evidence on this point in cross-examination.

[85] As far as this Court was concerned, the only valid question here could be as to whether, as a matter of law, the age of TR was properly proved. The answer to that question could only be a resounding Yes: see *Itza's* case. It therefore made no difference, from a strictly legal standpoint, that TR's age was proved by way of LV's evidence rather than by way of a copy of her (TR's) birth certificate.

[86] This ground therefore failed.

iv) Medical evidence

[87] NM was clearly confused as to the purpose of the medical evidence in this case, which was to show that TR had been carnally known by someone prior to the time of her physical examination, not to prove who had carnally known her. His purported criticism of such evidence was therefore of no assistance to his cause; and nothing more need be said of this ground, save that it did not succeed.

v) Criticism of summing up

[88] The Court was in entire agreement with the Director's submission that the judge carefully refrained from expressing a view of her own in summing up to the jury. The judge was certainly not adopting a particular view of the evidence when she made the statement quoted by NM, viz:

> "Now as I sum up, you may believe that I am taking a certain view about the evidence, or that I've accepted certain things as facts."

Neither that sentence nor the passage that follows it, viz:

> "That's not important, that's your role, not mine. So you can disregard what I say about the facts, but not about law, okay…"

shows the judge embracing a certain view of the facts, still less seeking to impose one on the jury.

[89] NM's only other difficulty with the summing up under this ground was similarly lacking in significance. The judge could not, in the view of this Court be criticised for laying no emphasis in her summing up on the fact that written, amongst other

sentences, inside the notebook said by Ms Cowo to have been handed by TR to her (in a handwriting identified by no one), was the sentence:

> "She didn't quite believe me because I'm kind of liad. I kind of like telling lies."

The Court took this view for reasons already given at para **[81]**, above.

[90] In framing this ground, NM spoke of TR as having constantly referred to herself as a liar in the course of her evidence at trial. But, when invited by the President to point out any examples of this for the benefit of the Court, he was unable to do so. In fact, there are no such examples to be found anywhere in the record.

[91] This ground, too, did not pass muster.

[92] Despite the expression in his notice of appeal of a desire to appeal against his sentences, at the hearing NM neither applied for leave so to do nor advanced any reason why they should be reduced or otherwise varied to his advantage. The transcript of the sentencing hearing below discloses that the judge rightly reminded herself of the governing sentencing principles and went on to identify the mitigating and aggravating factors present in the case. Over generously, as this Court saw it, she treated as a mitigating factor not only NM's clean record but also an unspecified part of the content of a statement made on his behalf by the woman who was his common law spouse at the time of his conviction. Justifiably, the judge's list of aggravating factors was longer, being made up of (a) the serious nature of the offences; (b) their prevalence; (c) their circumstances, including the relationship of stepfather/stepdaughter; and (d) the absence of any expression by NM of remorse. This Court wishes to observe that, as regards (a) above, the instant case involves a lengthy course of reprehensible conduct and a grave series of offences; and, as regards (c) above, that NM was guilty of a scandalous abuse of trust in exploiting a child whom he ought to have been protecting. The Court considers it right to point out, furthermore, that in examining the circumstances of any case, the sentencer is entitled to take account of the way in which the accused chose to conduct his defence. In the present case, the approach adopted by NM was typified throughout by the posing of a general question requiring TR to narrate all over again every painful detail she had given in examination-in-chief in

relation to each of the six incidents in question. (It is to be gathered from comments of the judge that she found it necessary to adjourn more than once in the course of the evidence of TR in order that the latter might have time to regain her composure.) In addition to that, he was admonished by the judge for yelling at TR and suggested, in the course of his unnecessary cross-examination of the doctor, that TR had deflowered herself through masturbation, either digital or by means of a sex toy. Although this Court is in no position to say what led the judge to impose on NM the maximum permitted sentence for indecent assault, it unhesitatingly states that, in its view, such maximum was appropriate in the light of the crude and reckless manner in which NM chose to conduct his defence.

[93] It was for all the reasons given above that, on 17 March 2016, this Court intimated, by majority, that it was dismissing the appeal of NM and affirming his convictions and sentences.

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SIR MANUEL SOSA P

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HAFIZ BERTRAM JA