THE COURT OF APPEAL OF BELIZE AD 2016

CRIMINAL APPEAL NO 15 OF 2014

BRIAN CHARLESWORTH 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 Murrio Ducille	Justice of Appeal

O Selgado for the appellant.
C Ramirez, Senior Crown Counsel, for the respondent.

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2 and 9 March and 24 June 2016.

DUCILLE JA

[1] Following a trial before Gonzalez J and a jury, the appellant was convicted of one count of carnal knowledge of a female child under the age of fourteen years, to wit: six years and sentenced to twenty years imprisonment. On 9 March 2016 the Court dismissed the appeal against conviction and affirmed the conviction. The Court however granted the application for leave to appeal against sentence and treated such application as the appeal, which was thus allowed. We set aside the sentence of 20 years imprisonment and substituted therefor a sentence of 16 years' and nine months' imprisonment to take effect upon the expiration of any term he may have been serving

on 9 March 2016. We stated that reasons for decision would be given in writing at a later date.

[2] The facts were that between the 1 January 2011 and 21 October 2011, the appellant had carnal knowledge of the virtual complainant whilst in his care.

[3] The prosecution relied on the evidence of Anna Young, the mother of the virtual complainant, the virtual complainant as well as the medical report of Dr Egbert Grinage who was not called as a witness for the prosecution.

[4] The first ground argued by Mr Selgado for the appellant against the conviction was that the Learned Trial Judge admitted prejudicial evidence in the form of a medical report by Dr Egbert Grinage who did not himself testify at the trial.

[5] The evidence of WPC Alphia Jones is that she took the virtual complainant to Belize Health Care Partners where she was examined by Dr. Grinage and he filled out and signed the medico-legal form and handed it to her. She identified the Medico-Legal Form in Court which was tendered and admitted in evidence without any objection from the defence. The finding from the report disclosed that the physical exam finding was that there was a complete tear even if healed is definite evidence for carnal knowledge.

[6] Section 36(3) of the Evidence Act states

> "(3) The provisions of this section shall, with the necessary modifications, apply in the case of a document purporting to be a report by a registered medical practitioner on any injuries received by a person which are the subject of a prosecution in any trial on indictment, in any preliminary inquiry or in any proceeding in a summary jurisdiction court:
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> Provided that the report purports to have been written on the same day as, or on the day following, that on which the examination was made by the medical practitioner."

The Medical report of Dr Grinage having been tendered without any objection, requiring the attendance of Dr Grinage to testify in Court, was admissible by virtue of the

provisions in the Evidence Act. The effect of the medical evidence is that the virtual complainant was carnally known at some point. This evidence could not be considered to be corroborative of evidence against the appellant which was pointed out by the Learned Trial Judge.

[7] Having regard to the admissibility of that evidence in the trial we see nothing wrong as this could have been properly considered by the jury.

[8] In the light of the foregoing we find no merit in the complaint that the admission of the medical evidence by the Learned Trial Judge was prejudicial to the case of the appellant. Accordingly, this ground of appeal fails.

[9] The second ground is that the appellant was prejudiced in his defence as the prosecution relied on the 29th September, 2011 as the date when the offence occurred and there was no prior disclosure thereby affecting the alibi defence of the appellant. The thrust of Mr Selgado's argument was that the appellant was not given an opportunity to narrow down a timeframe, as he puts it, that was practical in which he could have formed his defence.

[10] He argued that the alibi witness which the appellant had called in his defence could not have been narrowed down to give him an effective alibi as he had no disclosure of the date of the allegation.

[11] It is not unusual for an indictment to be framed in the manner where the allegation is between one day to another. This frequently occurs where children have been the subject of sexual offences. The courts have always taken cognizance of the fact that children of tender age who have been subjected to such offences are unable to pinpoint with exactitude the date of occurrence of such offences.

[12] Having regard to the evidence of the virtual complainant and her mother in this case, there is no specific date that has been alluded by either one of them. It therefore cannot be seriously advanced that the prosecution had information which they failed to disclose to the defence.

[13] It was submitted by Mr Ramirez for the respondent that the statement upon which the prosecution relied to support their case was also accessible to the appellant. Consequently the appellant could not be heard to say that he was taken by surprise. We accept this submission.

[14] In the circumstances, we find no merit in this ground.

[15] The third ground of appeal is that the Learned Trial Judge during his summation made prejudicial statements before the Jury. One of the main complaints by the appellant is that the judge said to the jury "The complainant merely said that the accused went on top of her, inserted his penis into her vagina, and then got up, put on his clothes and went out. You see members of the jury, it is for you to decide what you want to do with that evidence but that is what happened".

[16] Throughout the length and breadth of his summation, the judge was most emphatic in reminding the jury of their role as judges of the facts. At p 162 of the transcript he told them: "Now members of the Jury, within the course of my summation of the evidence in this case I appear to have a particular view of the facts or of the evidence or if I express a view of the evidence or emphasize a particular aspect of the evidence do not adopt my view or emphasis of the evidence unless you agree with my view or my emphasis of it."

[17] Further at p 163 he said "So members of the Jury, you can clearly see from those directions that when it comes to the facts of this case it is your judgment alone that counts. It is your views of the evidence that counts and it is for you to decide how you will approach the evidence and what you will take into account."

[18] The judge consistently reminded the jury in his own terms that they are the sole judges of the facts. Notwithstanding the formula of words he may have used, there is no doubt that the jury's function was well defined that they were the sole judges of the facts.

[19] We find no fault with the judge's direction. Accordingly there is no merit in this ground of appeal.

[20] The fourth ground concerns the sentence of twenty years imposed by the Learned Trial Judge on the appellant.

[21] On this ground of appeal, the appellant raised a constitutional issue on the validity of the imposition of a mandatory minimum sentence. This was however not pursued when counsel for the appellant came to argue the appeal.

[22] The judge imposed a sentence of twenty years imprisonment on the appellant which sentence is now being appealed.

[23] In exercising his judicial function in the sentencing process, a sentencing judge must take into consideration the perpetrator of the crime, the crime and the victim. The judge must also be mindful of both aggravating and mitigating circumstances of the case. In addition, the judge must take into consideration the age of the convict, whether he has pleaded guilty or not at the first opportunity. The judge must also consider whether the convict had past convictions of a similar nature and his conduct before and after the commission of the crime. He must consider the objects of sentencing having regard to retribution, deterrence, prevention and rehabilitation. Each case has to be considered on its own merits bearing in mind the proper measure to be employed in determining what is reasonable and fair and to ensure that the sentence is proportionate to the crime.

[24] In this case the judge took into consideration that the appellant had a previous conviction of carnal knowledge of a child and one of indecent assault. He adjudged the appellant as a pedophile or a child molester. He took into account that he was 45 years of age, the remand time he spent in prison and the plea of mitigation made on his behalf by his counsel. He considered the sentencing history of the Supreme Court for similar offences and whether an appropriate sentence will act as a deterrent. At the conclusion, his view was that an appropriate and fair sentence was twenty years imprisonment to take effect at the conclusion of any sentence the appellant may be serving. We were unable to agree with that view.

[25] For the reasons earlier given we dismissed the appeal against conviction and affirmed the conviction.

[26] We however granted the application for leave to appeal against sentence and treated the application as the appeal, which was thus allowed. We set aside the sentence of 20 years imprisonment imposed by the judge. We considered that a term of 18 years would have been appropriate were it not for the fact that the appellant had been in custody pending trial. We further considered that we were bound to deduct from that period of 18 years the shorter period of one year and three months (rounding off to the nearest month the time spent in custody on remand for the charge of which Mr Charlesworth was convicted and in respect of which he had appealed). We therefore imposed on the appellant, in substitution for the sentence of 20 years imprisonment that we had set aside, a sentence of 16 years and 9 months imprisonment, to take effect upon the expiration of any term he may have been serving on 9 March 2016.

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SIR MANUEL SOSA P

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HAFIZ-BERTRAM JA

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DUCILLE JA