

IN THE COURT OF APPEAL OF BELIZE AD 2019  
CRIMINAL APPEAL NO 9 OF 2016

**SANTIAGO SHOLOM**

Appellant

v

**THE QUEEN**

Respondent

—

BEFORE

The Hon Mr Justice Sir Manuel Sosa  
The Hon Mr Justice Samuel Awich  
The Hon Mr Justice Christopher Blackman

President  
Justice of Appeal  
Justice of Appeal

O Twist for the appellant.

S Smith, Senior Crown Counsel, and J Chan, Crown Counsel, for the respondent.

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16 March 2017 and 22 February 2019.

**SIR MANUEL SOSA P**

*Introduction*

[1] On 14 June 2016, Santiago Sholom (“the appellant”) went on trial before Moore J (“the Judge”) and a jury on an indictment which charged him with the unlawful carnal knowledge of JC, a female child under the age of 14 years, “on a precise date unknown between the 1st day of September and the 30<sup>th</sup> day of November 2011” in Belmopan, Cayo District. On 27 June 2016, the jury returned a verdict of Guilty against the appellant and the Judge proceeded to impose on him a sentence of 12 years’ imprisonment. The appellant filed a notice of appeal against his conviction on 1 July 2016; and his appeal

came on for hearing on 16 March 2017. At the very outset of the brief hearing, Ms S Smith, Senior Crown Counsel, for the respondent, informed the Court that the respondent was unable to support the conviction, which it considered unsafe, but was applying for a retrial. The Court proceeded to hear both sides on the question of a retrial and thereafter adjourned to the afternoon. On the resumption, the Court announced that it was allowing the appeal; refusing the application for a retrial (for reasons to be given in writing at a later date); and directing the entry of a verdict and judgment of acquittal. The promised reasons now follow.

*The appeal against conviction*

**[2]** The promise of written reasons only with respect to the refusal of the application for a retrial was deliberate. Miss Smith gave as the reason of the respondent for not being able to support the conviction that JC testified under cross-examination of having given the police a statement according to which the act of sexual intercourse complained of had taken place sometime during the period September to December 2011. It followed from that evidence, if it was true, not only that such act might well have taken place outside the period of time specified in the indictment but also that it might well have taken place at a time when JC was no longer under the age of 14 years, her date of birth being 7 December 1997. Suffice to say, therefore, that the Court had no reason to disagree with the decision of the respondent not to support the conviction.

*The rival contentions on the application for a retrial*

**[3]** Ms Smith, who filed no submissions in writing on the appeal, spent most of the time allotted to her for oral argument seeking to make a case for a retrial only on a lesser offence to that on which the appellant had stood trial, such lesser offence being carnal knowledge of a female child between the ages of 14 and 16. With respect, her sole forceful contention in support of that case was that the evidence given by JC under cross-examination was capable of establishing the commission by the appellant of such lesser offence, given an appropriately worded indictment. However, just before the adjournment for lunch, she materially altered the respondent's application by asking for a retrial on both that offence and, in the alternative, the more serious one on which the appellant had

already been tried. As she correctly, pointed out the possibility that the evidence of JC at a second trial would allege intercourse only before she reached the age of fourteen could not be ruled out. The inclusion of the alternative charge would leave the door open for a conviction for the more serious offence in such an event.

**[4]** Mr Twist, in vigorous opposition to the application for a retrial, submitted, to put it in a nutshell, that a retrial would enable the prosecution to, as it were, patch up a case whose fatal weakness had already been laid bare. That, he stressed, would hardly be fair and just to the appellant.

### *Discussion*

**[5]** The Court is primarily concerned in giving reasons for decision in this case to make clear why, after showing a distinct inclination in the course of oral argument towards the granting of the respondent's application, it ended up refusing to order a retrial. The turning point was the perfectly understandable last-minute request of the respondent for a retrial not on a single charge, but on two charges, albeit in the alternative. It is not inconceivable that, were a retrial to be allowed, JC could fail to repeat that which she said under the pressure of cross-examination in the June 2016 trial and steadfastly allege that the appellant carnally knew her during the period September to November 2011. The respondent could find itself on the receiving end of harsh criticism from the public in such an eventuality for not having indicted on both relevant counts. Hence, the Court's above-stated readiness to understand the late variation of the respondent's request.

**[6]** On the other hand, the request as varied simultaneously weakened the respondent's chief argument and invested the appellant's objection with considerable force. In the light of the variation of request, it could no longer be said, in aid of the respondent, that a retrial would merely place before a new judge and jury evidence, previously adduced, which suffices to establish a lesser charge that was not before them in an earlier trial or, put in another way, that such a new trial would not afford the respondent an opportunity to correct defects in the case presented in respect of the more serious charge at the earlier trial to improve the chances of a conviction on it the second time around. A remark to that effect could properly be made only before the respondent decided and disclosed to the Court that what it actually wanted was a chance to obtain

a conviction on either of the two charges, not only on the lesser charge. Mr Twist rightly chose, having heard the variation of the respondent, to reiterate an objection which had, when originally voiced, come across with rather a hollow ring. To that then suddenly irresistible objection the Court readily acceded. To grant the respondent's application would be to allow them a second bite at the craboo and thus pave the way for a conviction of the appellant on an unfairly rehabilitated case of unlawful carnal knowledge of a female child under the age of 14 years. Having acceded to Mr Twist's objection on behalf of the appellant, the Court went on to make the orders as to retrial and acquittal already set out at para [1], above.

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SIR MANUEL SOSA P

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AWICH JA

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BLACKMAN JA