IN THE COURT OF APPEAL OF BELIZE, A.D. 2011

CRIMINAL APPEAL NO. 24 of 2009

BETWEEN:

OSCAR ITZA	**Appellant**
AND	
THE QUEEN	**Respondent**

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BEFORE:

The Hon. Mr Justice Mottley	**-**	**President**
The Hon. Mr Justice Morrison	**-**	**Justice of Appeal**
The Hon. Mr Justice Barrow	**-**	**Justice of Appeal**

Appellant in person.
Mrs Cheryl-Lynn Vidal, Director of Public Prosecutions for the Crown.

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6 October 2010 and 16 May 2011.

MORRISON JA

[1] At the conclusion of the hearing of this matter on 6 October 2010, the appeal was dismissed and the appellant's conviction and sentence were affirmed. These are the reasons for the decision which were promised at that time.

[2] This is an appeal from the appellant's conviction of and sentence for the offence of carnal knowledge of a girl on 1 December 2009, before Gonzalez J and a jury. The appellant was sentenced to 5 years' imprisonment.

[3] Mr Lionel Welch, attorney-at-law, who had appeared for the appellant at the trial, filed four grounds of appeal on his behalf on 18 December 2009. However, when the appeal came on for hearing on 6 October 2010, Mr Welch advised the court that he no longer represented the appellant and sought permission to withdraw. Upon the court being satisfied that Mr Welch had in fact advised the appellant in good time of his unavailability to represent him on the appeal, he was permitted to withdraw, with the result that the appellant presented his appeal in person.

[4] The appellant was indicted for the offence of carnal knowledge of a girl, contrary to section 47(2)(a) of the Criminal Code (Ch. 101, Laws of Belize, Revised Edn, 2000).

[5] The brief facts of the prosecution's case were that, on a Sunday between 1 and 31 March 2008, Miss JC, who was at the material time 15 years of age, was at her home in the San Jose Succotz Village near Benque. At about 2:00 during the afternoon of that day, Miss JC's parents left the house, leaving her in charge of her younger siblings. Shortly after her parents had left, the appellant, who was a neighbour, living almost directly opposite, arrived at the house asking to borrow a DVD. He was then taken by Miss JC into her father's workshop in search of a DVD. While there, the appellant began to kiss her, then removed her panties and proceeded to have sexual intercourse with her. In due course, the appellant left the house.

[6] Miss JC initially told no-one about this incident. Some time later, on 4 April 2008, the appellant returned to Miss JC's house, again while her parents were not at home. But on this occasion, Miss JC's mother returned to the house while the appellant was still there and saw him coming out of Miss JC's bedroom. Asked what he was doing there, the appellant's reply was that he was showing Miss JC "a white paper" (which he had in his hand). The appellant then left the house after having been ordered to do so by Miss JC's mother. After a conversation with Miss JC, during which her mother's evidence was that she said to her that "if she doesn't tell me [what happened] I will take her to the doctor", her mother took her to the police station and then

to the hospital. Miss JC's mother told the court that Miss JC was born on 14 October 1992.

[7] In addition to Miss JC and her mother, evidence was also given at the trial by EC, Miss JC's brother, who confirmed the appellant's visit to the house on a date in March 2008 "to borrow a DVD" and that on that occasion the appellant and Miss JC had gone into her father's workshop. Evidence was also given by Dr Guillermo Rivas, a medical officer specialising in obstetrics and gynaecology, who, at the request of the police, examined Miss JC on 7 April 2008. His examination revealed evidence of a vaginal infection and previous sexual activity. The infection with which Miss JC presented was not, Dr Rivas testified, a sexually transmitted disease, but was in fact "a common infection that you find most in ladies than in girls".

[8] After an unsuccessful no case submission had been made on his behalf by Mr Welch, the appellant was advised by the trial judge of his rights, to say nothing, to make an unsworn statement from the dock or to give sworn evidence. The appellant elected to say nothing, whereupon Gonzalez J summed up the case to the jury and the appellant was in due course convicted and sentenced.

[9] On appeal, the appellant in person asked the court to consider the following four matters:

1) That no identification parade had been held by the police;

2) that Miss JC's birth certificate had not been tendered by the prosecution to prove her age;

3) that Miss JC had been forced by her mother to put him "in this position"; and

4) that the doctor's evidence did not establish that it was the appellant who caused penetration of her vagina.

[10] The appellant's first point raises the perennial issue of identification. Miss JC's evidence was, as we have already indicated, that the appellant was her neighbor, "who is across the street". Her evidence was that she had known him for two years before March 2008. He was a friend of her father (who was a technician), and would occasionally visit their house when he needed repairs done to "something like their television set". She was accustomed to seeing the appellant every day when she was crossing the street, and she had had several conversations with him in the past. His March visit to Miss JC's house had taken place in the early afternoon, when there was ample natural light inside the house and she had been able to observe him without obstruction for a period of more than 15 minutes.

[11] Miss JC's brother, EC, also testified that he had known the appellant for two years before March 2008; he had spoken to him more than 10 times and had in fact visited the appellant at his house on one occasion. Further, he had seen the appellant at his own house "many times" before March 2008.

[12] In **Goldson & McGlashan v R [2000] UKPC 9**, Lord Hoffmann stated (at para. 18) that the principle stated by Hobhouse LJ (as he then was) in **R v Popat [1998] 2 Cr. App. R. 208, 215** was the one which ought to be followed in respect of the cases of disputed identification in which an identification parade should be held. In that case, Hobhouse LJ had said that, in cases of disputed identification, "there ought to be an identification parade where it would serve a useful purpose". In **Goldson & McGlashan**, Lord Hoffmann went on to indicate that it might not be necessary to hold an identification parade in cases "where there was no point in doing so …", as would be the case "if it was accepted, or incapable of serious dispute, that the accused [was] known to the identification witness".

[13] **Allen James v R** (Criminal Appeal No. 7 of 2009, judgment delivered 30 October 2009) is an example of a case in which this court considered that no useful purpose would have been served by an identification parade, in circumstances in which it turned out that the appellant and the identification witness were cousins and that they had shared a bedroom at the home of

their grandmother for some two to three months. In the light of this evidence, it was held that this not was a case which called for any special directions from the trial judge as to the failure to hold an identification parade and as to the danger of a dock identification, in keeping with the decisions of the Privy Council in **Aurelio Pop v R (2003) 62 WIR 18** and **Pipersburgh & Robateau v R [2008] UKPC 11**. .

[14] Similarly, in the instant case, we consider that no useful purpose would have been served by the holding of an identification parade. The appellant was a close neighbour of both JC and her brother EC, had been known to both of them for two years before the incident which led to the appellant's prosecution, and had been a close friend of their father and a frequent visitor to their house.

[15] Despite the fact that it could not be said that identification was seriously in issue in this case (it was never suggested to Miss JC that she had wrongly identified the appellant as the offender, but rather that she had fabricated the story of what the appellant had done to her), the judge nevertheless – correctly – gave the jury a **Turnbull** direction in unexceptionable terms. He invited them to examine carefully the circumstances of the identification of the appellant by Miss JC and pointed out to them that, although the offence was allegedly committed on a date some time in March 2008, it was not reported to the police until what appeared to be almost a month afterwards. Although the judge told the jury specifically that no identification parade had been held, he did not give any special directions in respect of that in light of the evidence that the appellant was well known to Miss JC and her brother. Given the clear and unchallenged evidence of the witnesses' prior knowledge of the appellant, we can find no fault in the learned trial judge's approach to this aspect of the case.

[16] The appellant's second complaint relates to the proof of Miss JC's age, which, because of the special nature of the charge against him, was obviously a critical ingredient of the offence to be proved by the prosecution. Although there was evidence that a copy of Miss JC's birth certificate had been given to

the police by her mother, it is not clear why it was never formally tendered in evidence by the prosecution. But be that as it may, there was nevertheless clear and unchallenged evidence from Miss JC's mother that her date of birth was 14 October 1992, thus making her 15 years and 4 months of age at the time of the alleged offence. In **R v Cox [1898] 1 QB 179, 180**, Lord Russell of Killowen CJ stated that there was no statutory requirement that the only evidence of the age of a child was the production of the birth certificate, pointing out that the age of a child "may be proved by any lawful evidence". In our view, Miss JC's mother's evidence clearly satisfied this requirement and we do not therefore consider that there is any merit in this complaint.

[17] The appellant's third complaint was that Miss JC was forced by her mother to make out the charge against him. The only evidence in the case to suggest that Miss JC might have been influenced by her mother to make the complaint against the appellant was the mother's evidence of what she had said to Miss JC after having encountered the appellant emerging from her bedroom (see para. [6] above). However, there was no implication in Miss JC's evidence that she had been influenced by her mother in any way and, although the appellant himself did ask her mother in cross examination (which the appellant conducted in person, apparently in Mr Welch's absence) "why are you doing this to me", it was at no time suggested to Miss JC when she was cross examined by Mr Welch that she had acted under her mother's influence. We are accordingly unable to find anything in the evidence to support the appellant's complaint in this regard.

[18] The appellant's final complaint relates to the medical evidence. The trial judge plainly told the jury that "The doctor was not able to say whether or not the defendant was the person who penetrated [Miss JC]", describing this as "the limitation of what the doctor said in evidence". The jury were thus being told – quite properly, in our view – that, while the medical evidence did suggest prior sexual activity on the part of Miss JC, it did not by itself in any way point to the appellant as the offender. We therefore consider that this complaint must fail as well.

[19] In the light of the fact that the appellant did not have the benefit of counsel in the presentation of the appeal, we have also given consideration to the grounds originally filed by Mr Welch on his behalf, which were as follows:

1) The verdict of the jury in the circumstances was unreasonable, unsafe, or unsatisfactory and should be set aside.

2) The judge did not adequately direct the jury in the summing up specifically regarding the age of the accused.

3) The judge in the circumstances was wrong in law to allow the case to go to the jury.

4) It was a miscarriage of justice for the judge to send the case to the jury.

[20] It suffices to say that in our view none of those grounds discloses any basis upon which to disturb the appellant's conviction. The evidence of the appellant's guilt in this matter was clear and cogent and there is absolutely nothing to suggest that his trial was anything less that fair. It is for these reasons that we concluded that this appeal should be dismissed and the conviction and sentence affirmed.

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MOTTLEY P

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MORRISON JA

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BARROW JA