IN THE COURT OF APPEAL OF BELIZE, A.D. 2005

CRIMINAL APPEAL NO. 24 OF 2004

BETWEEN

ALBINO GARCIA JR.	**Appellant**
v.	
THE QUEEN	**Respondent**

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BEFORE:

The Hon. Mr. Justice Mottley	**-**	**President**
The Hon. Mr. Justice Sosa	**-**	**Justice of Appeal**
The Hon. Mr. Justice Carey	**-**	**Justice of Appeal**

Mr. Michael Peyrefitte for appellant.
Mr. Kirk Anderson, Director of Public Prosecutions, for the Crown.

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21 February & 24 June 2005.

CAREY, JA

1. On 21 February, we determined that in all the circumstances, this appeal should be allowed, the conviction quashed, the sentence set aside and a verdict and judgment of acquittal entered. Our reasons which we intimated, would be given at a later date, now follow:

2. The appellant was tried and convicted before Sampson J (Ag.) sitting with a jury, on an indictment which charged unlawful carnal knowledge of a child above the age of fourteen (14) years but below sixteen (16) years, and sentenced to five years' imprisonment.

3. The material facts which we summarize, were these:

At about 9:00 p.m. on 26 January 2002, while the victim KM was at the rear of her home engaged in some domestic chores, viz. taking out the dirty dishes, she was grabbed from behind by the appellant, who covered her mouth and forced her under some "nata trees" (presumably anotto trees). There despite her struggles and resistance, he succeeded in removing her jeans and underwear and had sexual intercourse with her.

4. During her ordeal, she said, she was able to observe him sweating in his face although she described the conditions as "like darkness behind the nata trees". The lighting available for observing her assailant, came from a fluorescent light shining in her backyard and lights at the four corners of the appellant's house which neighboured hers. No evidence was adduced as to the relative positions of these light sources and herself under the trees. We

would observe in passing that, it is not easy to appreciate how this stark information regarding the lighting was of much value or how it was capable of enlightenment to the jury.

5. When he was finished with the young girl, he walked "straight to his yard".

6. During her testimony, a most improper question was put to her by counsel for the Crown:-

Q: Did he tell you anything about your sister?

This was followed by this question by the trial judge:-

Q: What did he tell you? (p.20)

The response provoked by this unbelievable interrogation was:-

"Well, while he was having sex with me, he told me that he had already used my little sister".

THE COURT: That sister of yours has a name?

THE WITNESS: MM.

7. This appalling and egregious conduct on the part of Crown Counsel and more regrettably, on the part of the trial judge, permitted evidence, the prejudicial effect of which, plainly outweighed its probative value. It was most unfair to the appellant for it breached

an elementary rule of evidence, which the trial judge should have been alert to prevent.

8. We resume the summary:

It was not until the 8 April, 2002 before KM reported the matter to the police, and on the following day she provided an additional statement in which it is recorded - "I was not forced". There was no explanation vouchsafed to the jury for these odd features in the case. The girl's mother was asked to explain the reason for her delay in reporting the matter to the police but she said that she learned of the matter about 23 - 26 March, but the more important question, we would have thought, was the victim's delay in reporting the matter. There was some evidence that she had confided to a male friend but the jury were never made aware of when that had occurred. It is right to point out that as this would not have amounted to a recent complaint, the prosecution did not adduce evidence in that regard. What evidence was elicited emerged in the course of cross examination, and is, not surprisingly, largely fragmentary and incomplete.

9. Despite the appreciable delay in reporting the matter to the police, KM was nonetheless medically examined and the doctor's certificate was tendered in evidence. It had no value.

10. The appellant gave evidence on oath and denied the allegations made against him. He confirmed evidence given by the girl's mother that she had accused him of having sex with her daughter and demanded that he marry her or she would go to the police. He rejected the idea because as he said he did not have sexual intercourse with her.

11. Some seven grounds of appeal were filed and strenuously argued on behalf of the appellant. We mean no disrespect to counsel but save for one ground which we will identify hereafter, the grounds were without substance. Because of our concerns about the trial we were prompted to examine with both counsel the management of the trial and deficiencies in the summing up in an endeavour to see whether a fair trial had been had by this appellant.

12. It is the essence of a fair trial that the rules be followed not only by counsel but as well, by the judge, who sits to ensure compliance. We think that it was plain that the defence put forward by the appellant at his trial was that the girl's story was a fabrication and used by her mother to coerce him into marrying her daughter. The issue then was the credit of the victim.

13. The appellant did not attempt at any time during his examination in chief, to put himself at any particular place at the material time. He

said he did not have sex with KM. He was denying he charge. The trial judge enquired of the defence counsel the nature of this defence. The unequivocal response - “My defence is that my client never did anything”. The judge said that “out of generosity” he would leave “this principle you call an alibi”. Accordingly, he gave a *Turnbull* direction.

14. This approach led him to pay scant attention to the real issue in the case, namely, the credit of the victim. The Director acknowledged that to be so. Additionally, the trial judge omitted to deal with the unexplained delay in reporting her ordeal by the victim, a factor which we think had some impact on her credit. It was a matter which ought to have been brought to the attention of the jury by the trial judge.

15. In our view, a fair trial requires the issues which fairly arise on the facts to be placed before the jury. The summing should be tailor-made to the facts and circumstances and the issues which arise in the case. We do not think that the summing up was tailor-made for the facts and issues in the instant case.

16. We have mentioned in our summary of facts an incident which we described in pejorative terms and to which we must return. It is a matter of grave concern because the conduct of the prosecutor was

most improper. The form of the question he put to the victim suggests to us that counsel knew very well, what the witness was meant to say:

"Q: Did he tell you anything about your sister?"

The situation was aggravated by the trial judge soliciting the content of the statement. In our judgment, this amounted to a material irregularity of such a nature as to affect the fairness of the trial and must necessarily provoke our interference with the result.

17. It is accepted in this jurisdiction that the prosecutor for the Crown is a minister of justice whose objective is not conviction at any cost but whose prime concern is the fair and impartial administration of justice of which he is a minister. See the observations of Shelley, JA in *R v. Barrett (1970) 16 WIR 267*. The Privy Council were constrained in *Randall v. The Queen (Privy Council Appeal No 22 of 2001)* 16 April 2002 to restate the nature of the duty imposed on the prosecuting counsel as part of rules developed to ensure that proceedings in a criminal trial are conducted in a manner which is orderly and fair. Lord Bingham giving the opinion of the Board said this:

> "The duty of prosecuting counsel is not to obtain a conviction at all costs but to act as a minister of justice: *R v. Puddick*

(1865) 4 F & F 497 at 499; R v. *Banks [1916] 2 KB 621, 623*. The prosecutor's role was very clearly described by Rand J in the Supreme Court of Canada in *Boucher v. The Queen (1954) 110 Can CC 263, 270:*

"It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction: it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented; it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings."

18. This brings us to the reaction of the trial judge. We would have thought that in the light of the glaring impropriety of the question by Crown Counsel, the judge would promptly have intervened to disallow the question and, as we think he should, firmly rebuke counsel. It is most regrettable then, that the judge for whatever

reason, thought it right to approbate counsel's impropriety by insisting on an answer, and thus allowed highly prejudicial evidence to be adduced which had no probative value. We think it desirable to remind of the observations of Lord Bingham in *Randall v. The Queen (supra)* at para. 10(3) with respect to the judicial obligation in the trial process:

> "It is the responsibility of the judge to ensure that the proceedings are conducted in an orderly and proper manner which is fair to both prosecution and defence".

He continued:-

> "It cannot be too strongly emphasised that these are not the rules of a game. They are rules designed to safeguard the fairness of proceedings brought to determine whether a defendant is guilty of committing a crime or crimes conviction of which may expose him to serious penal consequences".

We have felt it necessary to underline the imperative of a fair trial for a criminal defendant by reason of the views we take of the material irregularity identified. "The right of a criminal defendant to a friar trial is absolute" per Lord Bingham, *Randall v. The Queen (supra)* at para 28.

19. We are satisfied that this departure from good practice is so prejudicial as to entitle us on this ground alone to condemn the trial as unfair and to quash the conviction. As we have previously noted the failure of the judge to identify the real defence being advanced to enable the jury to focus on the true question which fell to be determined by the jury: Was KM to be believed when she claimed the appellant had sexually assaulted her? The judge did not assist the jury by referring to the unexplained delay in reporting the assault, which could reflect on her credit worthiness.

20. The cumulative effect of all these factors, we think left us no choice but to quash the conviction and enter a verdict and judgment of acquittal.

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MOTTLEY P

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SOSA JA

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CAREY JA