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

CRIMINAL APPEAL NO. 3 OF 2004

DIRECTOR OF PUBLIC PROSECUTIONS	**APPELLANT**
AND	
WAYNE HERRERA	**RESPONDENT**

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BEFORE:

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

Mr. Kirk Anderson, Director of Public Prosecutions, for the Crown.
Miss Merlene Moody for the respondent.

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4 October 2004; 9 March 2005.

MORRISON JA

1. At the conclusion of the hearing of this appeal on 4 October 2004, the Court announced that the appeal would be allowed and the Order of the Judge of the Supreme Court reversed. These are the Court's reasons for that decision.

2. The respondent was arrested in 2002 and charged with the offence of Incest, allegedly committed against his seven year old sister, contrary to section 62 (1) of the Criminal Code, Chapter 101 of the Laws of Belize (Revised Edition), 2000 ("the Criminal Code"). The indictment proffered against the respondent a single count in respect of alleged carnal knowledge of his sister on 14 November 2002, at which date it is common ground that his age was twelve years and seven months, he having been born on 12 April 1990.

3. When the matter came on for trial on 22 January 2004, the respondent was unrepresented. The learned trial judge (Lucas J) of his own motion raised with counsel for the prosecution the question of whether the respondent was amenable to trial at all in the light of the well know common law presumption that a boy under the age of fourteen years is incapable of sexual intercourse. After hearing submissions from counsel for the prosecution, who mentioned among other things the provisions of section 25(2) of the Criminal Code, Lucas J ruled on 26 January 2004 that the respondent could not be tried for the offence of which he was charged, because of the operation of the common law presumption, and accordingly quashed the indictment and discharged the respondent.

4. The appellant appealed from this decision, pursuant to section 49(1)(b) of the Court of Appeal Act, Chapter 90 of the Laws of Belize (Revised Edition) 2000, seeking an Order that a retrial be ordered on an indictment charging the respondent with Incest, on the ground that he had been wrongly discharged by Lucas J, thereby occasioning a miscarriage of justice.

5. When the appeal came on for hearing before this Court, the learned Director of Public Prosecutions, who appeared for the Crown, referred us to section 25(2) of the Criminal Code, which is in the following terms:

> 25-(1) Nothing is a crime which is done by a person under nine years of age.
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> (2) Nothing is a crime which is done by a person of nine and under twelve years of age who has not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct in the matter in respect of which he is accused.

6. On the basis of this provision, the Director submitted “that the Belizean position in relation to the age at which a minor can be convicted of a sexual offence case involving sexual intercourse on his part is different from the English Common Law position, in that

the age at which he can be prosecuted, in Belize, without any limitation whatsoever, is twelve years of age". The Director submitted further that the learned trial judge erred in law insofar as he concluded that the English common law irrebuttable presumption (which had, incidentally, been abolished in England by section 1 of the Sexual Offences Act, 1993) that a boy under the age of fourteen years could not commit an act of sexual intercourse and therefore could not be convicted of an offence involving such an act, was still applicable to Belize and was unaffected by the provisions of section 25 of the Criminal Code. Section 25 of the Criminal Code, the Director's submission ran, clearly shows that the position is by virtue of that statutory provision different in Belize, where a child above twelve years of age, is, without limitation, amenable to prosecution for any crime. Accordingly, the Director contended, Lucas J erred in coming to the conclusion and making the Order he did.

7. Miss Merlene Moody appeared for the respondent in this Court and essentially agreed with the Director that the learned judge had fallen into error when he quashed the indictment. While the reasoning in her skeleton argument was not in all respects identical to the Director's, she did concede that the language of section 25 of the Criminal Code was "clear and unambiguous and therefore the Court should give effect to it".

8. During the course of the hearing, the Court invited counsel's attention to the circumstances in which English statutes and the common law were deemed to be received as part of the law of Belize and in this regard we were referred to the Imperial Laws (Extension) Act, Chapter 2 of the Revised Edition of the Laws of Belize (2000). Sections 2(1), 3 and 4(1) of this Act are relevant and are set out below:

> 2.-(1) Subject to the provisions of this or any other Act, the common law of England and all Acts in abrogation or derogation or in any way declaratory of the common law passed prior to 1st January 1899, shall extend to Belize.
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> (3) Subject as aforesaid and to the provisions of the Criminal Code for the time being in force as well as to any other local legislation, the criminal law of England as it was by the common law and as amended or declared by any Act passed prior to 1st January 1899, shall extend to and have effect in Belize.
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> 4.-(1) Wherever by this Act, or any other law, it is declared that the common law of England or any other Imperial Law shall extend to Belize, the same shall be deemed to extend thereto so far only as the jurisdiction of the court and local circumstances reasonably permit and render such extension

suitable and appropriate, and all the said Imperial Laws shall be subject to any existing or future laws of the National Assembly of Belize.

9. The effect of these provisions is that English statute and common law in existence prior to January 1, 1899 was expressly extended to Belize, "so far only as the jurisdiction of the court and local circumstances reasonably permit and render such extension suitable and appropriate **and all the said Imperial Laws shall be subject to any existing or future laws of the National Assembly of Belize"** (emphasis ours). We need go no further than the case of **The Queen v Waite (1892) 8 TLR 782** (relied upon by Lucas J in the court below) as authority for the proposition that the presumption that a boy under the age of fourteen was incapable of sexual intercourse formed part of the common law of England prior to 1899 and therefore became by reception part of the law of Belize pursuant to the Imperial Laws (Extension) Act.

10. However, the question whether that presumption remains the law of this country depends entirely upon there being no subsequent enactment by the Belizean legislature which is inconsistent with its survival. In our view, section 25 of the Criminal Code is plainly such an enactment. That section, under the rubric "General

exemption from Criminal Liability", exempts from liability the following acts:

(i) Acts done by a person of nine and under (section 25(1)) and

(ii) Acts done by a person nine and over, but under twelve years "who has not attained sufficient maturity of understanding …", etc (section 25(2)).

11. It appears to us that these provisions of the Criminal Code demonstrate that the Belizean legislature has dealt with the question of exemption of young persons from criminal liability in a manner that is inconsistent with the survival of the common law presumption that attracted the attention of Lucas J in the instant case and that the presumption can therefore no longer be regarded as forming part of the law of Belize. It follows from this that the learned judge fell into error in quashing the indictment and that the appeal had accordingly to be allowed and his Order reversed.

12. As to the ultimate disposition of the matter, the Court was informed by the Director that this appeal had been brought for the purpose primarily of addressing the legal issues involved, with a view to their clarification. He accordingly undertook to this court that his office would not seek to proceed any further against the respondent. We

regard this stance as entirely proper in the circumstances, in agreement as we are with the Director's view that the situation of the respondent and his family might at this stage be more meaningfully addressed by the intervention of the social services. We accordingly made no order in consequence of the appeal being allowed.

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MOTTLEY P

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SOSA JA

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MORRISON JA