IN THE COURT OF APPEAL OF BELIZE, A.D. 2010

CRIMINAL APPEAL NO. 15 of 2007

BETWEEN:

JOSE HUESO	**Appellant**
AND	
THE QUEEN	**Respondent**

BEFORE:

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

Mr. Orlando A. Fernandez for the appellant.
Ms. Cheryl-Lynn Branker-Taitt, Director of Public Prosecution for the respondent.

13, 30 October 2009 and 19 March 2010.

MOTTLEY P

[1] On 13 October 2009, we allowed this appeal, quashed the appellant's conviction, set aside his sentence and ordered a new trial. These are the reasons for that decision.

[2] Following a trial before Lord J and a jury the appellant was found guilty on two counts of having carnal knowledge of a child under the age of fourteen at Las Flores Village in the Cayo District. The offences are alleged to have been committed on 12 and 14 of January 2006.

[3] In view of the order for the retrial, it is not necessary to rehearse the facts.

[4] In the single ground of appeal filed by the appellant, it was alleged that following prejudicial statements made by Elena Bachan while giving her evidence-in-chief the trial judge ought to have advised the appellant, who was unrepresented at the trial, that he had the right to apply to have the jury discharged and a new trial ordered or to proceed with the trial before the same jury.

[5] We did not call on the Director of Public Prosecutions to answer this ground as we considered that it was without merit. However, the Court, ex proprio motu, required the Director to address the Court on the direction which the judge gave the jury on the fact that appellant did not give any evidence. In addition, we also invited the Director to address the Court on the direction given to the jury on evidence which the judge identified as being corroborative of the evidence of the virtual complainant.

[6] At the close of the case for the prosecution the judge informed the appellant of his right to remain silent. The appellant exercised his right and did in fact remain silent and called no witnesses. In dealing with the defence, the judge reminded the jury that the defendant did not give evidence. He told the jury:

> "You must remember the defendant had not given evidence that is his right. He is entitled to remain silent and require the prosecution to prove its case. You must not assume he is guilty just because he has not given evidence, because failure to give evidence cannot, on its own prove guilt. However, as he has been told depending on the circumstances you may take into account his failure to give evidence when deciding your verdict." (emphasis added)

[7] It is not clear what the judge meant when he said that the appellant had been told that, dependant on the circumstances, the jury, when considering their

verdict, could take into account his failure to give evidence. The record does not indicate that this was said to the appellant or by whom it was said .

[8] In telling the jury that they may take into account, when considering their verdict, the failure of the defendant to give evidence, the jury could well have come to the conclusion that the judge was inviting them to draw inferences from the appellant's failure to give evidence. Such inferences which the jury could have drawn were that if the defendant was not guilty why did he not give evidence or that he did not give evidence because he is guilty and did not want to expose himself to being cross-examined by counsel for the prosecution.

[9] This was a serious misdirection in law. Under the laws of Belize, the fact that a defendant does not give evidence in the course of a trial cannot, under any circumstances, be taken into account by the jury when deciding the guilt of a defendant.

[10] A person who is charged with a criminal offence has the right to remain silent. This right is guaranteed by section 6(6) of the Constitution which states:

> "6(6) A person who is tried for a criminal offence shall not be compelled to give evidence at a trial."

[11] This is one of the fundamental rights guaranteed to a defendant under the Constitution. If a defendant exercises his right to remain silent, it is wrong for the judge to invite the jury to take into account, in reaching their verdict, the fact that the appellant exercised his constitutional right and remained silent. In telling the jury that "…. the failure to give evidence cannot on its own prove guilt" the jury might well have come to the conclusion that the judge was suggesting that the failure could be used with other evidence to prove the guilt of the appellant.

[12] Under no circumstances, in deciding the guilt of a defendant, can a jury make use of the fact that he exercised his fundamental right to remain silent and

give no evidence. This was a serious misdirection which on its own would have caused the Court to allow the appeal.

[13] Earlier in the summing up the judge, in dealing with the evidence of the virtual complainant told the jury that she said that , about 4:00 am on 18 January 2006, she was feeling very bad and told her mother everything . The judge went on to direct the jury that:

> " The mother Elena Bachan may have partially corroborated the evidence of Ana Bachan to some extent as she stated in evidence she examined her daughter Ana Bachan when she complained of pain in her stomach. I found her vagina was sore."

[14] Corroboration is no longer a requirement in sexual offences. However, a judge is given a discretion, when he considers it necessary, to warn the jury of the special need for caution before acting on the sole evidence of a virtual complainant in a case of carnal knowledge (see section 93(2) of the Evidence Act, Cap. 95). The judge however sought to shore up the evidence of the virtual complainant by suggesting to the jury that the evidence of the mother may have partially corroborated the evidence of the daughter. While the evidence of the mother may have supported the daughter in a very limited respect, it could not in law have amounted to corroboration of the evidence of the virtual complainant as it did not implicate the appellant in the commission of the offence. Such a direction was not required and at best it was misleading.

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MOTTLEY P

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SOSA JA

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CAREY JA