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

CRIMINAL APPEAL NO. 20 OF 2009

BETWEEN:

MANUEL FERNANDEZ **Appellant**

AND

THE QUEEN **Respondent**

BEFORE:

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

Mr. Simeon Sampson SC for the appellant.
Mr. Cecil Ramirez for the Crown.

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4 and 19 March 2010.

CAREY JA:

[1] The appellant was convicted before Lord J and a jury for the offence of rape and sentenced to ten years' imprisonment. He now appeals to this court against the conviction and sentence.

[2] The facts which may be shortly stated, were these: on 2 September 2007, CM a housewife was at home when the appellant, who is related to her by

marriage, turned up. At that time, the children had gone to bed and her husband was away from the home. She thought he was drunk. He told her he wished to have sex with her but she declined his invitation, observing that that was not possible as he was her husband's cousin. Undaunted, he pressed on, grabbing hold of her hand and dragged her off towards a house at the rear of the premises. In the course of resisting his advances, she fell and hurt her head on a stove. When she stood up, he was able to pull up her skirt, and have intercourse with her. Afterwards she told her daughter that the appellant had raped her.

[3] The appellant gave evidence on oath. He testified that the intimacy which had occurred was entirely consensual. He also drew the jury's attention to the fact that he was handicapped in that he had only one arm, a disability which would have prevented him from pulling her legs apart to facilitate (any) penetration (on his part).

[4] There was a visit to the locus in quo on the application of the defence, which took place after the close of the case for the defence. This visit was distinguished by unusual features which provoked a ground of appeal, with which we will deal hereafter.

[5] Three grounds of appeal were filed on behalf of the appellant. We propose to deal with them in turn.

Ground 1.

"The learned trial judge erred in law when at p. 158 lines 21 – 26, he said '[RB} also corroborated her mother's story in stating what she was told by her mother shortly after the report to her … I leave this also to you to so decide as you see fit.'"

[6] It is, we think, tolerably clear that the trial judge was not using the word "corroborate" as a term of art. A recent complaint is altogether incapable of constituting corroboration in the eye of the law, because it does not link the accused to the crime, See **R v Baskerville [1916] 2 KB 658**. There is authority for saying as well, that where the word corroboration is used in the legal sense, it is necessary to explain its meaning to the jury – **R v O'Reilly (1967) 51 Cr. App. R. 345**. In the instant case, the trial judge did not do so. It was quite incorrect for the trial judge to direct the jury that the daughter corroborated her mother's story as he said, "in stating what she was told by her mother shortly after the report to her." The significance of a recent report or complaint is to show consistency of conduct on the part of the victim. Thus the report cannot amount to corroboration in whatever sense the word is used. The direction was, we fear, unhelpful, confused and incorrect.

[7] Ground 2.

The judge conducted the Court's visit to the locus as if it were another trial. He permitted the jury to put leading questions to the complainant there, and allowed demonstrations not provided for in sections 105 – 107 of the Indictable Procedure Act, Cap. 96. See p. 92 lines 14 to bottom, and p. 94 and p. 95. This was a novel and unprecedented trial procedure which allowed the jury to cross-examine a defendant at locus.

[8] The purpose of a visit to the locus in quo is to enable the jury to better understand evidence which has been adduced before them. Witnesses attend to give a demonstration or to point out locations which were alluded to at the trial. As **Karamat v R [1956] AC** shows, every effort has to be made to ensure that there is no communication between witnesses and jury except to give a demonstration. The proper procedure after the view is that the witness or witnesses who attended at the locus and gave a demonstration, or pointed out

locations, are recalled when the court reconvenes to be examined and cross-examined as to what the witness demonstrated or indicated. It is in that way that the locus is brought into the courtroom.

[9] With respect to this visit, it is not inaccurate to advance the view as stated in the ground of appeal that the procedure adopted by the trial judge was novel and unprecedented. The victim, it is true to say, pointed out certain areas where the offence took place and so did the appellant. They both made statements that formed no part of the demonstration. It is nothing to the point that defence counsel participated in all this. He was permitted by the trial judge to cross-examine the victim on a matter that formed no part of the viewing exercise. The judge seemed to be entirely unaware of the purpose of the visit as the following questions illustrate.

(p. 94)

"The Court: Do you remember where he touched you?
Witness: He just hold me down and have sex with me.
The Court: If you had not fallen on the ground, where do you feel he would have taken you?
Witness: I don't know.
The Court: how long it took him to take off your underwear?"

The jury were also permitted to ask questions of the appellant and the victim, unrelated to any demonstration or viewing exercise. There was no recall of the witnesses to give evidence in Court as to what they had done at the locus.

[10] The appellant was entitled to a fair trial. It is guaranteed by the Constitution. A fair trial means that the rules are obeyed. Where the judge himself participates in the breach of the rules, the irregularity can only be described as gross or egregious. In **Albino Garcia Jr. v R CA 24/04** 24 June

2005, we commented on the egregious conduct of the trial judge in that case. We cited **Randall v The Queen, [2004] UKPC** in which Lord Bingham said –

> "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."

In that case, Lord Bingham noted that the right of a criminal defendant to a fair trial is absolute. He stated as follows:

> "But the right of a criminal defendant to fair trial is absolute. There will come a point when the departure from good practice is so gross, or so persistent, or so prejudicial, OR so irremediable that an appellate court will have no choice but to condemn a trial ….. and quash a conviction as unsafe, however strong the grounds for believing the defendant to be guilty …."

In our judgment, this departure from procedural propriety qualifies as gross with the consequence that we must, perforce, interfere to set aside the conviction.

[11] In the event, we do not think it is at all necessary to consider the remaining ground save to say that it was too insubstantial for comment.

[12] The appeal is accordingly allowed, the conviction and sentence set aside. We direct that a new trial be held.

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MOTTLEY P

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CAREY JA