IN THE COURT OF APPEAL OF BELIZE, A.D. 2006

CRIMINAL APPEAL NO. 13 OF 2006

BETWEEN:

JASON FLORES	**Appellant**
AND	
THE QUEEN	**Respondent**

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BEFORE:

The Hon. Mr. Justice Sosa	**-**	**Justice of Appeal**
The Hon. Mr. Justice Carey	**-**	**Justice of Appeal**
The Hon. Mr. Justice Morrison	**-**	**Justice of Appeal**

Appellant in person.
Mr. Kirk Anderson, Director of Public Prosecutions, for the Crown.

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7 July, 27 October 2006.

MORRISON, JA

1. The appellant was convicted on 24 May 2006, after a trial before Gonzalez J. and a jury, of the offence of carnal knowledge of a child, contrary to section 47(1) of the Criminal Code, Chapter 101 of the Laws of Belize ("the Code") and grievous harm, contrary to

section 81 of the Code. He was sentenced to 15 years' imprisonment on the charge of carnal knowledge and 4 years' imprisonment on the charge of grievous harm, with both sentences ordered to run concurrently, and appealed to this court in respect of both conviction and sentence.

2. This appeal was heard on 7 July 2006, at the conclusion of which it was dismissed and the appellant's conviction and sentence on both counts were affirmed. These are the reasons for that decision.

3. The offences with which the appellant was charged in this case were allegedly committed in January 1999. At that time Miss N, the virtual complainant, was 10 years and 11 months old, having been born on 25 February 1988. On the evening of 1 January 1999 she was at Why Not Island in Dangriga Town, a social centre at which games and different kinds of social activities took place. She was there with her sister and two other friends and by 8:00 p.m., when she started getting sleepy and tired, she had been there for about an hour. She proceeded to make her way home alone on foot to Pine Street. While on her way she heard someone call her name, to which she did not respond initially, but stopped when she heard her name called out again by a voice which she now recognized as the appellant's. The appellant then emerged from a group standing by some bushes in a dark area and, after some discussion, offered her a ride home, which she accepted.

4. The appellant, who was described by Miss N as Jason, was previously known to her as someone who lived at the home of an acquaintance of her family, Mrs. Sally Oswirafo, known to her as Miss Sally. She had been accustomed to seeing the appellant at Miss Sally's home for over a year, during which time she would see

him sometimes daily and was often driven by him in Miss Sally's car. She would also sometimes see him in the street, as she walked to the store or anywhere like that and had also spoken to him before.

5. On the night in question she recognized him, she said, as the area in which she was when he came out to her, had what she described in her evidence as "perfect light" provided by a nearby lamp post light. She then went in the car with him (he was, in fact, using Miss Sally's car that evening), took a seat in the back and they set out. They had not gotten very far, when the appellant told her that he had two stops to make, before taking her home, one to "check if there was any dance at Malibu" (described by Miss N as "a dance place"), and another place in Wagierale. They passed Malibu, but didn't actually stop, and then stopped briefly at the other place, which was a home in Wagierale, at which the appellant spoke briefly to someone, then returned to the car where Miss N had remained seated in the back seat. He appeared to her to be frustrated or angry about something, mumbling to himself, slamming the car door as he re-entered, locking doors and driving off at a fast rate of speed. After a while, it appeared to Miss N that they were in a remote area, at which stage the appellant stopped the car, came out of the vehicle and "was heading for my back door". By this time, she "was done aware that something was wrong", so she moved towards the driver's door, which had been left open by the appellant, but he grabbed her feet and threw her back onto the car seat. She began to fight back and he punched her across her face and started to choke her with the chain that she was wearing ("a fantacia gold chain with a heart medal with a Barbie head in the middle"). Eventually the appellant overpowered her, tied her hands with the car seatbelts, pulled down his pants,

tore off her underwear, put his penis in her vagina and started to have intercourse with her. While this was going on, Miss N was trying to get her hands loose and started scratching the appellant in his face, whereupon he punched her in her face again and started to choke her. She passed out for a while and when she came back to herself "he was still on top of me"; then, she said, after about 10 – 15 minutes, "he came off me and he dressed himself and went back to the car". Miss N then untied herself, came out of the car and set off on foot "heading the opposite direction in front of the car walking". The appellant came after her, held on to her hands and forced her back to the car, where he "haul out a piece or iron" from the back of the car, and used it to hit her in her head, her neck and on her knees three times. She fell to the ground, whereupon he dragged her "across to the side of the road" and left her there in what seemed to be some kind of sandy area. After the appellant had left, Miss N got up and started walking towards the beach area and a kind of "big cement block…like a big stone", behind which she stopped and remained until morning. In the morning, at about 5 – 6:00 a.m., she saw three boys walking towards her and they took her to Dangriga police station, with the help of "this Mennonite man who they had stopped along the road and asked to give us a ride to the police station". By this time, she was feeling pain in her neck area, her throat was hurting her (indeed, she was unable to speak in response to questions from one of the boys), and, she told the court, "My neck was on one side" – all of this apparently as a result of being struck by the appellant with the piece of iron. Her neck was in fact swollen and her clothes were muddy and bloody.

6. At the police station, Miss N related her ordeal and told a police officer "that it was Jason that did this to me". She was in due course taken to the Dangriga Hospital where she was seen by a

doctor and treated. The entire ordeal, she said, from the time when the appellant invited her into the car to the point where he abandoned her in the remote area lasted some two to three hours.

7. At Dangriga Hospital, Miss N was seen by Dr. Melissa Espat, who observed a large injury to her neck region, as a result of which "she couldn't mobilize her neck". It was completely swollen and bruised, the bruising covering a large area "from below where the thyroid is located all the way going to the back". The doctor also saw multiple scratches and abrasions, all the way past the abdominal region and to the pelvic region, which was very tender to the touch. Her external genital area was "crusted with blood" and there was "a small cut more or less about 2 cm" in the perineum, that is, the small space ("a small piece of like island") between the vagina and the anus. The area was bloody and there were also signs of clotting internally, which would have been caused by small cuts or tears inside the vagina itself. The injury to the neck, Dr. Espat testified, was consistent with a blow from a blunt object, such as a metal pipe. The injuries to the genital rea were consistent with trauma caused by a forced injury within the last 6 – 12 hours "more or less". Dr. Espat classified Miss N's injuries overall as grievous harm, pointing out that the injury to the neck in particular was potentially life threatening.

8. The appellant was taken into custody on the morning of 2 January 1999 (that is, the morning after the offences were allegedly committed) and urine, blood and semen samples were taken from him at Dangriga Hospital, also by Dr. Espat. Certain items of clothing that he was wearing at the time were also taken from him by the police. Miss Sally's car was also checked and "a gold colour medallion with a doll head engraved on it" was found on the back

seat. When asked about this, the appellant's response was that it must have been Miss N's and must have been left there when he gave her a lift to the corner of Moho and Saint Vincent Street on the night of 1 January 1999. He stated that the car had in fact run out of gas and that he had therefore been unable to take her home. Blood stains were observed on the back door panel and the back seat of Miss Sally's car and some tools, a pipe and a jack handle were also found in the back of the car.

9. Various items of clothing taken from the appellant and Miss N, together with samples taken from both of them were on analysis found to show evidence of the presence of blood and semen.

10. In a statement given after caution (which was admitted in evidence at the trial without objection from the appellant), the appellant denied having committed the alleged offences, though he admitted that he had given her a ride in Miss Sally's car on the night in question, but had had to leave her at a point close to her home because "on the way I realized that the fuel was very low and that I might not make it if I go to leave N way to her house".

11. The appellant gave sworn evidence in his defence, in which he denied committing the alleged offences and told the jury in greater detail that which had been foreshadowed by his cautioned statement. While he had offered N a drive home in Miss Sally's car on the night in question, he said, he had had to leave her part of the way, because the car was low on fuel, and, shortly after she left the car, the car had in fact run out of fuel before he got home and he had himself pushed it "all the way home" (a distance, he said, of about a hundred metres), where he went inside and fell asleep. When told the next morning of what was being alleged against him,

he had immediately denied it. He testified that he did not know "what happened inside the vehicle and I don't know how smears got inside the vehicle". He concluded his evidence in chief in this way:

> "Listening to the evidence in this court, I am not saying that something did not happen to N, but I did not do anything to N. All I did was dropped her off at the Cor. of Moho Rd. and Faith Assembly of God Church and that was the last time I saw N for that night and the duration of the time until 17th November, 2004 when I was here for trial."

12. The appellant called a single witness, his aunt, Ms. Edna Broaster, who supported the appellant's denial that the investigating officer, Cpl. Castillo, had taken the appellant to her house, as the Corporal had said he had done, during the course of the investigation, at the appellant's request.

13. On this evidence, the appellant was convicted of the two offences with which he had been charged, with the consequences already stated at paragraph 1 of this judgment. From his conviction and sentence, he filed a single ground of appeal, which is as follows:

> "Denial of Justice, and a Breach of my Constitutional Rights along with Misuse of Justice. To have my re-trial tried at the same venue of which I was previously convicted, and also tried by the same Prosecutor that had tried me for the same offence. Also that one of the Supreme Court Judge had already transferred this matter to be tried at a different venue; and still another Judge transfer it back to its original place, without my consent. That was a denial of Justice and

a Breach of my Constitutional and Human Rights, along with Misuse of Justice."

14. As he had done at his trial, the appellant appeared on his own behalf in this court. As none of the matters of which he complained in his ground of appeal appeared from the record itself, the appellant was given great latitude by us (as, indeed, he had been by the learned trial judge) to enable him to identify and to develop his complaint. In essence, his complaint was in three parts:

    (i) That he was tried at the same venue as that at which he had previously been convicted (this was in fact a re-trial);

    (ii) that although one judge of the Supreme Court had already transferred his matter to be tried at another venue, another judge transferred it back "to its original place", without his consent; and

    (iii) that the prosecution at his re-trial was conducted on behalf of the Crown by the same counsel who had done so at his previous trial.

15. Points (i) and (ii) above are related points. The appellant complained that when the matter came on for trial in Dangriga (which had also been the venue of his first trial), a jury was empanelled, but had to be dismissed "because of something that happened to the jurors or some conspiracy". Because of that incident, the appellant told this court, he knew he was not likely to get a fair trial in Dangriga, so he applied for the case to be transferred for trial to another district. That application, he said, was granted by Arana J. and the matter was transferred to Punta

Gorda for trial on 13 March 2006. However, the matter was not tried at Punta Gorda, but in fact in Dangriga. The appellant insisted that when the matter came on again for trial in Dangriga on 17 May 2006 he told Gonzalez J. that it had in fact previously been transferred on his application to Punta Gorda, but that the learned judge made no response to him and his trial proceeded. This, the appellant said, was prejudicial to him and amounted to, as the ground of appeal complained, "a denial of Justice and a Breach of my Constitutional and Human Rights, along with Misuse of Justice".

16. As we have already indicated, the record of the proceedings at the appellant's trial was completely silent as to all of this. What it did disclose was that after the appellant had been pleaded, he was told of his right to object to any of the jurors whose names were about to be called and, when Gonzalez J. enquired whether he understood what was about to take place, he indicated by clear words that he did. At the end of the process of jury selection (during which he made no objection to any of the jurors called), the appellant was asked (twice) by the trial judge whether he was "comfortable with the Jury", to which his response was "Yes, Your Honour". Thereafter, the trial proceeded without any complaint whatsoever from the appellant on any issue related to venue or the composition of the jury.

17. In these circumstances, it did not appear to us that there was any basis, as a matter of fact, for the appellant's complaint. But in any event, the true nature of his complaint remained obscure, as the record showed that every effort was made by the learned trial judge to ensure that the appellant received a fair trial, particularly in the light of the fact that he was unrepresented. The appellant was, in fact, the beneficiary of extraordinary latitude from the judge,

including being permitted to conduct cross-examination of Miss N in a completely unnecessary and offensive manner.

18. The appellant's third complaint, which was that the same counsel had appeared for the prosecution at both his trials, was not, to his credit, really maintained by him once he was asked by this court to state a basis for it. "I didn't know, that is why I wrote it down to find out more or less", he said, and when assured that there was nothing amiss in what had happened, his comment was "That is something new I learn, Your Honour. I didn't know". It follows that absolutely no reason was advanced to us why counsel who appeared for the prosecution at the appellant's first trial should not also have done so at his re-trial and in our view this did not constitute an irregularity of any sort in the proceedings.

19. Before this court, the appellant made a number of additional points beyond his stated ground of appeal in an effort to persuade us that his trial had been unfair. It is sufficient to say that there was no merit in any of these points. The appellant was convicted on overwhelming evidence after a trial at which he was treated by the learned trial judge with conspicuous fairness and even - it may be said – benevolent over-indulgence. For all of these reasons this court decided that his appeal against conviction should be dismissed.

20. The appellant also appealed against the sentence imposed upon him in the court below. In the light of his age and general circumstances, he submitted, the sentence of 15 years' imprisonment that was imposed on him for the offence of carnal knowledge was excessive. We did not agree with the appellant's submission. Indeed, it appeared to us that the appellant was also

fortunate in the fact that the sentences of 15 years for carnal knowledge of a child and 4 years for grievous harm were ordered by the learned trial judge to run concurrently, and not consecutively, as they may well have been, given that on the evidence of N the offences were essentially separate. The evidence in this case described a brutal and heartless attack by the appellant, a grown man, on a defenceless child, which called for condign punishment which, it is arguable, the appellant was fortunate to escape.

21. These are the reasons why this court dismissed the appeal and affirmed the appellant's conviction and sentence.

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SOSA JA

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CAREY JA

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MORRISON JA