IN THE COURT OF APPEAL OF BELIZE, A.D. 2007

CRIMINAL APPEAL NO. 9 OF 2006

BETWEEN:

EVAN REYNOLDS	**Appellant**
AND	
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 Morrison	**-**	**Justice of Appeal**

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

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10 October 2006, 8 March 2007.

MOTTLEY P.

1. On 22 February 2006, the appellant was convicted on two counts of rape of AM, who, at the time when the offences were alleged to have been committed was under the age of fourteen. The appellant was a police officer for over 30 years and at the time lived at Benque Viejo Town in the Cayo District with his common law wife Maria and a young child. A relationship developed between the appellant and the family of the virtual complainant.

2. In respect of the first count, the case for the prosecution was that, sometime between 1 November 2003 and 31 December 2003, AM was sent by her mother to take barbecued chicken for the appellant who was at his home. On arrival at the house, AM told the appellant that she had

brought barbecued chicken from her mother for him. She enquired for Maria, with whom she was friendly and with whom, from time to time, she played basketball. The appellant told her that Maria was in her bedroom but soon discovered that she was not there. The appellant prevented AM from leaving the bedroom. He threw her on the bed, "hauled" her pants and panty to the side and then had sexual intercourse with her without her consent. The appellant however did not ejaculate in her. The appellant then offered her $20 which she refused. AM said that, while the appellant was having intercourse with her, the appellant informed her that if she did not behave herself he would shoot her. She was afraid due to the fact he was a police officer and she had previously seen him with a gun while he was in his uniform. After she returned home, she did not tell her mother or any other person what happened at the appellant's house.

3. The third count of the indictment alleged that, between 1 and 29 February 2004, the appellant again had carnal knowledge with AM without her consent. On this occasion, AM, who was feeling ill, had gone home early from school. She was asleep, when suddenly she realized that someone was on her bed. She opened her eyes and she saw the appellant who was in the process of lying on top of her. She attempted unsuccessfully to push him off. She pleaded with him not to have sexual intercourse with her again as he had given her an infection on the last occasion. This plea was in vain as the appellant again had sexual intercourse with her without her consent. The appellant had gained access to her house using a key which her mother had given to him. It should be noted that neither AM nor her mother had, in their statements to the police, including the statement that had been recorded the day before the trial, made mention of the appellant being given a key to the house. The appellant denied that he was ever given a key to the house. Again, AM did not make any complaint to her mother or any other person.

4. On 13 June 2004, AM, who was going to her grandmother's home to get something, was asked by her mother to take a lemon pie to her grandmother. She asked Benjamin Cruz, who is married to her aunt, her mother's sister, to take her to her grandmother's house as they lived in the same yard. Her mother however said that it was her daughter who asked her permission to go with her brother-in-law to her grandmother. No mention is made by the mother that she gave her daughter a lemon pie to take to her grandmother's house.

5. The appellant passed the aunt's house and saw AM standing in a door way which had a screen. The appellant inquired whether her aunt was at home and what she was doing there. He offered to carry her home, but she refused to leave. When this conversation took place, Benjamin Cruz was sitting nearby at a table. The appellant left the aunt's house but he soon returned. On this occasion, the appellant asked AM what time her aunt was expected to return home. The appellant then told AM that he was going to fetch her mother so she could see what she was doing. He again left. The appellant informed her mother that he had seen her daughter in a compromising position with a man whom he believed to be the mother's brother-in-law at her sister's house and that he wanted to take her to the house.

6. AM started to cry and told her "uncle what had happened" to her – that "Mr. Reynolds had raped her." On arrival at the house with the mother, the appellant pointed out to her that her daughter's slippers were on the verandah, while she was inside the house. When she entered the house, the mother saw AM who she described as crying "bitterly". She asked AM what happened but she did not respond. The mother then confronted AM telling her that the appellant had alleged that he saw Cruz molesting her. Cruz however denied the allegation stating that AM alleged that it was the policeman who had molested her.

7. Nothing more occurred until 6 August when a complaint was made by the mother to the Superintendent of Police.

8. Also on the 6 August 2004, AM was taken by the police to be examined by Dr. Manga Raju Meenavalli, a consultant gynaecologist and obstetrician. The consultant did not find any signs of recent injuries outside or inside her genitals, although her hymen was absent. The vagina was found to be very narrow. The consultant expressed the view that:

> "….the narrowness of the vagina is not compatible for a successful sexually intercourse by an adult male with sexual penetration of an adult penis."

When asked by Crown counsel to explain what he meant by this statement, the doctor said that if an adult male had sex with a girl by force, as described in the circumstances of this case, she would expect that the penetration of the vagina would leave some effect of injuries. She however said that:

> "If the girl had been experienced though, sexual intercourse one episodes (sic), probably, it is possible if not carefully using lots of extra help like lubricants and stuff like that and being gentle and all. But it could be likely you know, if you can't that means with the co-operation of the person but it is difficult."

She went on to say that it was possible for a 13 year old girl to have sexual intercourse once without having much of any injuries left. It should however be noted that the prosecution had charged the appellant with two counts of unlawful sexual intercourse of AM without her consent. It was never their case that sex had occurred on only one occasion. Indeed it was their case that the appellant had on two separate occasions forced himself upon the young girl who was fighting to resist him.

9. In re-examination, Crown counsel asked the doctor what she meant by successful penetration of the vagina. The doctor replied that she meant full penetration of the vagina and not slight. Again it should be noted that the prosecution case was that there was full penetration. It certainly was no part of their case that only slight penetration had taken place.

10. The judge reminded the jury that AM was the only one who gave evidence that the appellant had sexual intercourse with her. The judge then made reference to the existence of scientific evidence. He said:

> "There is scientific evidence, there is no evidence of somebody witnessing what happened."

The judge pointed out to the jury that Dr. Meenavalli did not find "any injuries, any signs of recent injuries inside and outside of the genitals. Her vagina was found to be very narrow." The judge went on to tell the jury that the doctor said that the examination of AM was conducted too late for him to be able to assist the court. Putting this slant on the evidence meant that the judge in our view failed to appreciate the full force of the evidence given by the doctor and consequently did not properly leave it to the jury for their consideration.

11. By telling the jury that there was scientific evidence, it may very well be that the jury could have understood the judge to be saying that there was scientific evidence which supported AM's evidence that the appellant had sexual intercourse with her. On the contrary, the evidence of the doctor did not support the allegation that she had sexual intercourse.

12. The appellant denied that he ever had sexual intercourse with AM. He said that on 13 June 2004 he had occasion to go to the house of Benjamin Cruz who was married to collect a fuse for a little electric cart for the handicap. On reaching the house, he found the front door opened. He looked inside and saw Benjamin Cruz with his hands inside of the front of

AM's pants. He immediately left and went to AM's mother and told her what he had seen. On returning to the house, her mother entered the house and shortly afterwards she returned and spoke to him saying that she did not want any problems with her sister and she would take care of it.

13. The appellant who was unrepresented filed 5 grounds of appeal. We asked the Director of Public Prosecutions to address us on grounds 4 and 5. The grounds were:

    4. The learned judge erred when he failed to instruct the jury to take into consideration from the doctor's testimony, that from his examination of the victim and in his opinion as an expert witness, he did not find it possible for an adult male to sexually penetrate the victim's vagina without some sort of lubrication or without voluntary assistance of the victim, because of the narrowness of her vagina.

    5. The learned judge erred when he failed to instruct the jury that there was no proof of any penetration. Without conclusive proof of any degree of penetration the judge should have strongly directed the jury that this doubt should have been resolved in the favor of the accused.

14. The medical evidence did not show that there was any penetration of the vagina. Even though the examination was conducted some time after the date when sexual offences were alleged to have taken place, the doctor expressed the opinion that "the narrowness of the vagina is not compatible for a successful sexual intercourse by an adult male with sexual penetration of an adult penis" and that "her vagina was narrow, too narrow to facilitate easy penetration of an adult male penis".

15. The medical evidence did not support the prosecution's case that AM had sexual intercourse with an adult male person and that it was without her consent. The onus was on the prosecution to show that sexual intercourse had taken place. This was an essential ingredient on all four counts. In view of the state of medical evidence, it is indeed surprising that a no case submission was not made. In our view, the evidence did not support any allegation that AM had had sexual intercourse. The judge ought to have withdrawn the case from the jury and should, in the circumstances, have directed the jury to return a verdict of not guilty.

16. It was for these reasons that we allowed the appeal, quashed the conviction on all counts and set aside the sentence and entered a verdict of acquittal.

17. Before leaving this appeal, the court considers it necessary to comment on the fact that the jury was permitted to return verdicts on all four counts of the indictment. Counts 1 and 2 related to the single act of sexual intercourse taking place sometime between 1 November 2003 and 31 December 2003. Count 1 alleged that carnal knowledge have taken place without the consent of AB, while count 2 alleged that carnal knowledge had taken place with AB a female under the age of fourteen years.

18. Counts 3 and 4 relate to a single act of sexual intercourse which was alleged to have occurred between 1 and 29 February 2004. Count 3 alleged that carnal knowledge of AB had taken place without her consent, while count 4 alleged carnal knowledge of AB a girl under the age of fourteen years.

19. The jury were allowed to return verdicts on all four counts. We consider that this is an undesirable practice. In **R v Lewis [1965] 9 W.I.R. 333.** The appellant had been convicted and sentenced on an indictment which contained two counts. On count 1, he was charged with having carnal

knowledge of a girl under the age of twelve years. Count 2 related to a charge of rape made by the same complaint and on the same occasion. It was held by Court of Appeal in Jamaica:

> "Although the appellant was on the evidence guilty, technically, both of rape and of carnal abuse, it was undesirable that two convictions should have been recorded against him for what was, for all practical purposes, substantially one offence only, arising out of one incident. The trial judge ought not to have treated the counts as two substantive counts as if they were for two entirely different offences, and the correct procedure which ought to have been followed was that on the return of the verdict of guilty on the first count, the jury should have been discharged from giving a verdict on the second and, clearly, alternative count."

20. The court commends this practice to the judges and expect that if the prosecution brings an indictment containing two separate counts of rape and unlawful sexual intercourse relating to the same act that judges will treat the counts as alternative and if the jury convicts on one count, then the jury should be discharged from returning a verdict on the other count.

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MOTTLEY P

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SOSA JA

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MORRISON JA