IN THE COURT OF APPEAL OF BELIZE AD 2016

CRIMINAL CASE APPEAL No. 3 of 2012

NLN Appellant

v

THE QUEEN Respondent

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BEFORE

The Hon. Mr. Justice Sir Manuel Sosa	President
The Hon. Mr. Justice Samuel Awich	Justice of Appeal
The Hon. Mr. Justice Christopher Blackman	Justice of Appeal

C. Vidal SC, Director of Public Prosecution, and
S. Lovell, Crown Counsel, for the respondent.
H. Elrington SC for the appellant

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10,12 June 2015 and 18 March, 2016.

AWICH JA

[1] The appellant, NLN, appealed against convictions and sentences on three counts of carnal knowledge of a girl under 14 years old, an offence under s. 47 (1) of the Criminal Code, Chapter 101, and one count of aggravated assault (an assault of indecent nature), an offence under s. 45 (f) of the Criminal Code.

[2] We dismiss the appeal against the convictions on the first count, the third count and the fourth count. We affirm the convictions on the three counts, and the

sentences of: 12 (twelve) years imprisonment on the first count; 12 (twelve) years imprisonment on the third count; and 2(two) years imprisonment on the fourth count. We order, however that, the sentences on the first and third counts run concurrently, and consecutively to the sentence on the fourth count. So, the total period of imprisonment becomes 14 (fourteen) years, replacing 38 (thirty eight) years imposed by the learned trial judge. We allow the appeal against the conviction on the second count, quash the conviction and sentence therefor, and direct a judgement and verdict of acquittal on the count.

[3] The appellant was tried at the Supreme Court at Dangriga, before the learned trial judge, Gonzalez J and a jury from 21 to 24 February 2012, on an indictment which charged the appellant with four counts. The first count charged the appellant with carnal knowledge, "between 1July, 2009 and 31 August 2009", of EN, a girl under 14 years old, at Barranco Village, Toledo District. The second count charged him with carnal knowledge between, "1st July 2009 and 31st August 2009" of EN a girl under 14 years old, at Barranco Village, Toledo District. The third count charged him with carnal knowledge, "between 1st August, 2010 and 31 August, 2010", of EN, a girl under 14 years old, at Barranco Village, Toledo District. The fourth count charged him with aggravated assault (of indecent nature) on 26 September 2010, of EN at Barranco Village, Toledo District. The appellant pleaded not guilty to each count.

[4] On 24 February, 2012 the jury convicted the appellant on all four counts. On 27 February, 2010 the trial judge sentenced the appellant to 12 years imprisonment on each of the carnal knowledge counts, and 2 years imprisonment on the fourth count of aggravated assault. He ordered that all the sentences run consecutively. The appellant was not represented by an attorney at the trial. In this Court, in his appeal, he is represented by learned counsel Mr. Hubert Elrington S.C.

The Evidence

[5] A Summary of the evidence is the following. The appellant met DD, the mother of EN, the complainant, at a guests house in Barranco Village where she was accommodated. He offered his house in the village free of rent to DD, and she moved in. She lived there with her daughters EN and ZN. They were minors. The appellant then moved in and lived with DD as his partner. The children continued to live with their mother DD and the appellant. They referred to him as their step-father. Up to September, 2010 they had lived together for about two years.

[6] DD testified as follows. On 26 September, 2010 she departed home to go to her business premises in the village, leaving the appellant, EN and ZN at home. She returned and peeped into the bedroom. She saw EN lying on her stomach on DD's bed watching television. The appellant sat on the bed close to EN. ZN stood leaning on the appellant's legs, and watched what the appellant was doing. The appellant: reached forward with his hands and rubbed and squeezed EN's buttocks, lifted one leg of EN's short pants, looked in, and put his left hand in the pants. EN stated that, the appellant, "placed his middle finger inside my vagina; he would stop for a while and do it again."

[7] DD opened the door suddenly, surprising the appellant. He jumped up. DD held him by the arm and dragged him outside. He pleaded that the devil made him do that, said DD. She took him to the house of AN who he regarded as his mother, and reported the incident. The appellant repeated to AN that, the devil made him do that, said DD.

[8] After some discussion at AN's house DD and the appellant returned to the house where they lived. She told the children that he would no longer live with them. She forced him out of the home. Five days after, DD reported the matter to the police. On this evidence about the incident on 26 September 2010, the appellant was convicted on the fourth count of aggravated assault.

[9] Regarding the first, second and third counts, the record of the proceedings does not show how a report was made about the incidents of carnal knowledge, the subjects of the charges. At the trial EN testified about occasions on which the appellant had sexual intercourse with her. The appellant denied ever having had sexual intercourse with EN.

[10] EN testified about the first carnal knowledge, that is, sexual intercourse in the summer of 2009 as follows:

> "I do remember the summer of 2009. July and August are the summer months. During that time something happened to me. During the summer of 2009, I was going to my mother's room, twice. My step-father pushed me on the bed and took off all of my clothes. Then he pulled down his pants and got on top of me. Then his private part got hard. Then he placed it inside of me. Private part is also known as penis. He placed it in my vagina. This was in the afternoon. He was inside of me for two to three minutes. Then he got off and left the room. On that occasion [the appellant] was my mother's boyfriend."

[11] EN proceeded to testify about two other occasions of sexual intercourse which she said occurred in the summer of 2010. She testified as follows:

> "For the summer of 2010 I was lying on my mother's bed and had the door open, and [the appellant] came in the room and put me on the bed and took down my pants. Then he took his penis and put it inside of me i.e. my vagina. I can't recall what day of the week it was. This was in the afternoon around 4.00 pm. School was not open at the time. It was summer vacation. I know it was summer because we

did not have school several days in a row. I know it was him because I saw his face and the room was clear".

"(Adjourned at 1.15 pm)
(Court resumed at 1.30 pm)"

"I remember the month of August 2010. In August, 2010 I was in my mother's room when [the appellant] came to my room and took off all my clothes. Then he pulled down his pants and got on top of me and then put his penis inside my vagina. I saw his face. I could tell it was [the appellant] because I saw him and I know what he looks like i.e. his face. The light at the time was bright. This was around 4.30 pm. I was not going to school. We were on vacation. At that time [the appellant] did not speak."

[12] About 26 September, 2010, EN testified as follows:

"On 26th September, 2010 my sister and I were watching TV in my mother's bed. While there [the appellant] put his hands in my pants and squeezed my buttocks. My sister is [ZN]. This was between 4 and 5 pm. He was seated about one foot behind me. I know it was [the appellant] because I saw him earlier when he helped me with my home work.

On that evening I saw his face and entire body. Then he placed his middle finger inside my vagina. He would stop for a while and do it again. I was wearing a T-shirt and a pair of pants. He slid his hand into my vagina. He did not remove my pants. I had on underwear. I don't remember what kind of underwear I was wearing. Then after a couple of minutes I noticed he had left. I saw my mother half hour

> later, while myself and sister played. She called me and said [the appellant] was no longer living with us".

[13] The appellant testified in his defence and called his mother as a witness. He said that, he was not guilty; he was a law abiding citizen, he went on his own and reported to the police. About DD, the first prosecution witness, the appellant said that she was, "deceitful and lied." She used to get her children to fabricate things against me, he stated. He suggested in cross-examination that, DD proposed that he transfer his property to her in exchange for her dropping, "the accusation".

[14] For convenience we set out the part of the record that conveyed the defence. On page 32 it is recorded that the appellant stated this:

> "Well jury, as far as these dates that I am accused of I maintained that I am innocent. Nothing had occurred. Nothing had transpired between me and the child who is Ms. EN and I maintain my innocence. The aggravated assault, I cannot say that I was absent on the occasion. The truth of the matter is the house belongs to me. It's my house. DD lived with me in the house. I lived there. In each of these incidences may be I was there, may be I was in P.G. If I could remember those dates then I could say okay. I don't remember. I am not denying that I don't live there. It was our house. I maintain my innocence. I am not guilty."

The jury accepted the evidence for the prosecution, and rejected the appellant's defence, and convicted him on the three counts of carnal knowledge.

[15] On 16 March, 2012 the appellant in person, filed a notice of appeal which included the grounds of the appeal, against all the four convictions and sentences. The grounds were too general and vague. On 26 May, 2015 at case management

proceedings Mr. Elrington for the appellant, applied for an order amending and adding to the grounds. The Court granted the application. He filed the following amended grounds of appeal:

"**AMENDED GROUNDS**

1. The learned Trial Judge erred and was wrong in law when he failed to inform the accused before the Jury selection began that he had the right to challenge Jurors without cause and an unlimited amount of Jury challenge for cause.

2. The learned Trial Judge erred and was wrong in law when he admitted in evidence, evidence that was inadmissible and highly prejudicial.

3. The learned Trial Judge erred and was wrong in law when he left three Counts of Carnal Knowledge to the jury without any evidence having been adduced by the Prosecution to show that Appellant had, on three separate and distinct occasions, had Carnal Knowledge of the Virtual Complainant.

4. The learned Trial Judge erred and was wrong in law when he told the Jury on three separate occasions that the Virtual Complainant had been born in October of 2009.

5. The learned Trial Judge erred and was wrong in law when he failed to inform the Defendant at the close of the prosecution's case or before calling on him to present his case (the Defense case) that he had three rights; (i) The right to remain silent, (ii) The right to make an unsworn statement; and (iii) The right to make a sworn statement.

6. The learned Trial Judge erred and was wrong in law when he failed to direct the jury that in sexual cases it is dangerous to convict without corroboration and that this danger arose from the fact that sexual allegation were easy to make and hard to disprove and in a number of cases innocent persons had been convicted on the uncorroborated evidence of complaints in sexual cases.

7. The Joinder of the count of Aggravated Assault, with the counts of carnal Knowledge resulted at the trial, in inadmissible and highly prejudicial evidence being left to the Jury without any adequate warning to them that they should not act on the inadmissible and highly prejudicial evidence."

[16] We shall deal last with the third ground of appeal which we have allowed. We start with the first and fifth grounds. They are factual; they are complaints about what was said to have been omitted by the judge in the trial.

The first ground of appeal.

[17] The question to answer in the first ground of appeal is this: did the judge, or more accurately, the registrar in court, not inform the appellant of his right to object to a person selected as a juror? The appellant did not present this factual matter in an affidavit sworn by him or by anyone present at the trial. An affidavit in response would then have been filed. Mr. Elrington did not represent the appellant at the trial so, he relied on consultation with the appellant. Contrary to Mr. Elrington's contention, the record of proceedings at page 8, lines 8 to 13 is a summary which indicates that, the appellant was informed of his right to object to a person selected as a juror under s***. 23 of the Juries Act, Cap 128***. The following was recorded:

"THE COURT: Mr, Nicholas, you have any objections to any of the jurors?

THE ACCUSED: No

THE COURT: Mr. Ramirez [Prosecutor], are you comfortable?

THE PROSECUTION: Yes, My Lord, no objections.

(Jurors sworn individually)"

Something better than what was recorded had to be presented to us to persuade us to the contrary. We reject the first ground of appeal.

The fifth ground of appeal.

[18] For the same reason we reject the fifth ground of appeal that, at the close of the prosecution case, the judge failed to inform the appellant of his rights: to remain silent, to make an unsworn statement, or to swear and testify in which case he would be cross-examined, if the prosecution chose. Similarly the question to ask is: did the trial judge not explain to the appellant the options open to him? Again this factual matter was not presented in an affidavit form. Again the record indicates that the judge explained to the appellant the right to exercise any one of the three options available at the close of the prosecution case, and the right to call witnesses.

[19] At page 31 lines 13 to 18 the following is recorded):

"THE COURT: Mr. Nicholas, do you have witnesses you would like to call?

THE ACCUSED: Actually one your Honor.

The accused elects to testify after the court [had] explained his rights to him."

[20] Nothing to the contrary was presented to this Court. We reject the fifth ground of appeal. We suggest, however that, it is better to record the full words of the explanation of options open to an accused, and of his right to call witnesses.

The second ground of appeal.

[21] The inadmissible evidence that the appellant complained about in the second ground of appeal was in the testimony of DD. At page 14 of the record it is recorded that she stated that: the appellant lifted the leg of the short pants and looked inside and, "then put his middle finger and his left hand inside the short pants, inside her vagina, and he was moving his hand in and out, right and left, turning his finger inside her vagina. And so I stood and watched for perhaps 8 seconds…" Mr. Elrington submitted that, DD could not see the appellant's hand inserted into EN's vagina, that portion of the testimony of DD should not have been admitted.

[22] We accept that the portion of DD's testimony that, the appellant put his middle finger in EN's vagina and so on, was inadmissible. However, the complaint is of no consequence. The rest of the testimony about the appellant rubbing and squeezing EN's buttock, lifting the legs of her short pants and looking in was admissible, and would be of sufficient sexual nature and indecency to comprise an assault of indecent nature, an aggravated assault, an offence under s.45 (f) of the Criminal Code. See ***George v R [1956] Crm.LR 52***, and ***Court v R [1989] AC 28***. In any case, a separate admissible evidence that, the appellant inserted his finger into EN's vagina was adduced in her own testimony. We reject the second ground of appeal, it is of no consequence.

The fourth ground of appeal.

[23] The complaint in the fourth ground has no merit whatsoever. In the testimony of DD, the mother of EN, she stated unequivocally that EN was born on 8 October, 2000. So, EN was under 9 years old in July and August 2009, and

under 10 years old in July and August 2010. Those were the two periods in which the offence of carnal knowledge of a child was said to have taken place. The charges against the appellant were for having carnal knowledge of EN who was under 14 years old. We reject the fourth ground of appeal.

The sixth ground of appeal.

[24] The sixth ground of appeal is that: "the learned trial judge…failed to direct the jury that in sexual cases, it is dangerous to convict without corroboration, and that this danger arose from the fact that sexual allegations were easy to make and hard to disprove, and in a number of cases innocent persons had been convicted on uncorroborated evidence of complainants in sexual cases."

[25] This ground was drafted in the usual formulation of the complaint under the old law about lack of a mandatory warning by a trial judge to the jury, of the danger of acting on uncorroborated evidence of a complainant in a sexual case. But the law has been changed in 1998, by ***Act No. 18 of 1998***, which amended the ***Evidence Act Cap. 95***, ***Laws of Belize***.

[26] The old law regarding evidence of a complainant in a sexual case was that, the trial judge was required to warn the jury of the danger of acting on, that is, convicting an accused on, the evidence of the complainant without corroboration; failure to give a warning was fatal to a conviction – see ***R v Trigg, 47 Cr App R 94,*** and ***R v Birchall and Others, 82 Cr App R 208 CA.***

[27] The new law introduced by ***Act No. 18 of 1998*** is now ***s. 92 of Evidence Act. Subsections (3)*** provides as follows:

> **(3) Where at a trial on indictment –**
>
> **(a) a person is prosecuted for rape, attempted rape, carnal knowledge or any other sexual offence, and**

the only evidence for the prosecution is that of the person upon whom the offence is alleged to have been committed or attempted; or

(b) an alleged accomplice of the accused gives evidence for the prosecution,

the judge shall, where he considers it appropriate to do so, warn the jury of the special need for caution before acting on the evidence of such person and he shall also explain the reasons for the need for such caution.

[28] This Court has since interpreted ***s. 92 (3) of Evidence Act*** to mean that, in sexual cases the trail judge is no longer bound to caution the jury of the danger of acting on the uncorroborated evidence of the complainant, the judge now has discretion to give the warning, "where he considers it appropriate.".

[29] In ***Mark Thompson v The Queen, Cr App No. 18 of 2001***, one of the grounds of appeal was that: "the judge failed to give the *mandatory warning* to the jury, of the need for caution before acting on the sole evidence of the victim, and that the judge failed to explain the meaning of corroboration." This Court (Rowe P, Motley and Sosa JJA) in the judgement prepared by Rowe P stated at paragraph 11 as follows:

"In our view a trial judge is given a discretion to determine the cases in which a caution is required under section 92 (3) (a). If the section were to be interpreted that it becomes mandatory to give the warning in every case in which the prosecution evidence comes solely from the victim, the words, 'when he considers it appropriate to do so,' would be meaningless, and the statute would have made no change

whatsoever to the rule at common law, which prior to the statue, required a mandatory warning to be given in such cases."

[30] The Court proceeded to note that, the same statutory change had been made in England by ***the Criminal Justice and Public Order Act***, ***1994 (UK)***, and that the Court of Appeal in England had held in ***Makanjoula and Easton v R [1995] 2 Cr App R 469***, and in other cases that, the trial judge had a discretion as to whether or not he would give the warning about the danger of acting on uncorroborated evidence of the complaint. This Court proceeded to note further that, in ***Makanjoula*** and the other cases courts in England had held that, there had to be *evidential basis* for suggesting that the evidence of the complainant was unreliable and therefore there was need for such a warning. This Court adopted the reasoning in ***Makanjoula***. It is now our law. The appeal in ***Thompson*** against conviction was dismissed.

[31] ***Thompson*** was followed by the Court in its judgement in, ***Jimmy Jerry Espat v The Queen, Cr App No. 3 of 2009,*** a case of rape. In the case, one of the grounds of appeal was that, the trial judge, "failed to give to the jury [a] direction based on section 92 (3) (a) [of the Evidence Act] which states…" The direction that the appellant contended was not given to the jury was the warning about the danger of convicting on uncorroborated evidence of the complainant in a rape case. This Court (Motlley P, Sosa and Carey JJA) noted that, counsel for the appellant had failed to give, "any reason why he thought the circumstances warranted a warning to the jury of the special need for caution", and that the Court did not discover any. It accepted the evidential basis reason. The appeal was dismissed.

[32] At the hearing of this appeal, Mr. Elrington did not make any oral submission to explain the sixth ground further. In view of the testimony of the appellant asserting innocence, and suggesting that DD was deceitful and used to

get the children to fabricate things against him, and tried to obtain his house in exchange for dropping the accusation; and in view of the fact that there was no evidence of the circumstances in which EN made the report of the incidents of carnal knowledge, one expected that Mr. Elrington would argue that there was evidential basis for the trial judge to exercise his discretion to give a warning of the danger of acting on the uncorroborated evidence of EN regarding the first, second and third counts. Only EN testified about the carnal knowledge. Mr. Elrington did not make that argument. It was for the appellant, who was represented by counsel, to put forward that point, if he believed that those factors made the evidence of EN unreliable and warranted a warning by the trial judge.

The seventh ground of appeal.

[33] The seventh ground of appeal calls for detailed discussion. The complaint in the ground, put in a different way, is that, as the result of the court trying the count of aggravated assault together with the three counts of carnal knowledge, evidence which was highly prejudicial and inadmissible in the trial of the carnal knowledge counts (although good and admissible to prove the count of aggravated assault) was admitted and influenced the conviction on the carnal knowledge counts; and further, the judge gave no adequate warning to the jury that they should not act on the evidence regarding the aggravated assault count when considering their verdicts on the carnal knowledge counts.

[34] In his written submission Mr. Elrington cited the judgement of this Court in ***Dennis Gabourel v The Queen, Criminal Case Appeal No. 30 of 2005***, in support of the argument that, evidence to prove one count was prejudicial to and influenced conviction on another count. Incidentally Mr. Elrington was counsel in that appeal case.

[35] Counsel's further submission was that, it was for the trial judge to raise the question of prejudice arising from the joint trial of the four counts, and then

proceed to decide whether the judge could exercise discretion and order separate trials of the counts.

[36] In oral submission Mr. Elrington, in fact, submitted the other way round that, evidence for proving the carnal knowledge counts was wrongly admitted and prejudicially influenced the conviction on the aggravated assault count. When the learned DPP Mrs. C Vidal SC, sought to respond to Mr. Elrington's oral submission, " that evidence of carnal knowledge affected aggravated assault count," that is, affected the decision of the jury to convict on the aggravated assault count, Mr. Elrington interjected that it was, "the other way round."

[37] Our decision and reason are the same whether the submission by Mr. Elrington was that, the joint trial of the aggravated assault count with the carnal knowledge counts led to admission of some of the evidence for the aggravated assault count, which prejudicially influenced the jury in convicting the appellant on the carnal knowledge counts, or that the joint trial wrongly led to the admission of some of the evidence for the carnal knowledge counts, which prejudicially influenced the jury in convicting the appellant on the aggravated assault count. On the facts the two submissions can be answered by the same reason.

[38] The first response by the DPP to the seventh ground was simply that, "the joinder of the counts in the indictment [did] not infringe section 73 of the Indictable Procedure Act…or Rule 4 of the Indictment Rules, which allow for the joinder of charges on indictment." This response would be an easy way out; but it would side-step the core of the complaint, namely, that: in the joint trial of the four counts evidence intended to prove the fourth count, but which evidence was irrelevant and prejudicial in deciding the first three counts was admitted, and rendered the trial of the three counts unfair trial; or the other way round that, in the joint trial of the four counts, evidence intended to prove the first three counts, which evidence was irrelevant and prejudicial in deciding the fourth count was admitted, and

rendered the trial of the fourth count unfair. The appellant described the evidence as, “inadmissible evidence.” The first response is unsatisfactory in our view.

[39] In deciding that the first response by the DPP was not a satisfactory answer in law to the complaint, we first reminded ourselves and the parties that, the object of proceedings in criminal cases and any rules of criminal case trial is the attainment of a fair trial of the accused. A fair trial is a constitutional right – see ***s. 6 of the Constitution of Belize Cap 4, Law of Belize,*** which guarantees a fair trial. So, the meaning that we would give to ***s. 73 of the Act*** and ***rule 4 of the Indictment Rules,*** would be a meaning that would be consistent with ***s.6 of the Constitution.***

[40] We proceeded to look at the relevant legislation. ***Section 73 of the Indictable Procedure Act*** states:

> **73. –(1) Subject to subsection (2), any number of counts for any crimes whatever may be joined in the same indictment, and shall be sufficiently distinguished.**
>
> **(2) Where there are more counts than one in an indictment, each count may be treated as a separate indictment.**
>
> **(3) If the court thinks it conducive to the ends of justice to do so, it may direct that the accused person be tried upon any one or more of the counts separately.**
>
> **(4) That order may be made either before or in the course of the trial and, if it is made in the course of the trial, the jury shall be discharged from giving a verdict upon the counts on which the trial is not to proceed.**

> **(5) The counts in the indictment which are not then tried shall be proceeded upon in all respects as if they had been contained in a separate indictment:**
>
> **Provided that, unless there are special reasons for so doing, no order shall be made preventing the trial at the same time of any number of distinct charges of theft, not exceeding five, alleged to have been committed within six months from the first to the last of those crimes whether against the same person or not.**

[41] About the section, we point out that, whereas ***s.73 (1)*** and ***rule 4*** permit joinder of counts in one indictment, the subsection and the rule are subject to the discretion of the trial judge under ***subsection (3)***, to order that any of the counts joined in an indictment may be tried separately, "***if the court thinks it is conducive to the ends of justice***". In our view, the ends of justice will include the need for a fair trial. That is a meaning which is consistent with s. 6 of the Constitution. The complaint in the seventh ground of appeal was founded on ***subsection (3)***. It is primarily that, the judge ought to have exercised ex *mero motu*, the discretion authorised by ***subsection (3)*** and ordered a separate trial of the fourth count so that evidence intended to prove the count would not influence the decisions on the other three counts.

[42] ***Rules 4 and 5 of the Indictment Rules*** in the First Schedule to the Act simply complement ***s.73***. They state the following:

> **4. Charges for any crimes, whether felonies or misdemeanours, may be joined in the same indictment if those**

charges are founded on the same facts, or form or are a part of a series of crimes of the same or a similar character.

5.(1) A description of the crime charged in an indictment or, where more than one crime is charged in an indictment, of each crime so charged, shall be set out in the indictment in a separate paragraph called a count.

…

[43] Having examined the legislation, and the seventh ground of appeal, it is our view of the ground that, the appellant, in formulating the ground of appeal, acknowledged that, under ***s. 73 (1) of the Act*** and ***r.4,*** several counts of offences could be charged in one indictment, and that, under ***s. 73 (3) of the Act,*** a trial judge had discretion to order separate trials of counts charged in one indictment, if the judge thinks it is conducive to the ends of justice. The appellant then proceeded to complain that, because the judge did not order a separate trial of the aggravated assault count, and further, because the judge did not give the necessary direction to the jury, prejudice was occasioned to the appellant in the trial. We reject the first response and submission by the DPP about the seventh ground of appeal, they were not to the point of the complaint in the ground.

[44] The second response by the DPP to the seventh ground of appeal included, albeit not wholly directly, the important point of a fair trial. It was that, the appellant did not identify the evidence for proving the fourth count (of aggravated assault) which evidence the appellant said was prejudicial to the trial of the charges in the first, second and third counts of carnal knowledge, or the other way round; there was no such evidence, and which was left to the jury without a warning. We accept this response. We add our explanation.

[45] The explanation is the following. First we concluded that, the joint trial of the count of aggravated assault which was said to have occurred on a different date, together with the three counts of carnal knowledge could lead to prejudice. It was probable that, some of the jurors would be influenced by the evidence that, the appellant inappropriately touched EN on the buttocks and vagina without agitation from her on 26 September 2010. They would likely conclude that the appellant must or might have had sexual intercourse with EN before 26 September 2010.

[46] About this point that, evidence regarding one count could influence a verdict on another count tried together in one indictment, we were persuaded by the reasoning in the judgement in ***Regina v Fitzpatrick [1962] 1 WLR 7***, and the judgement in ***Dennis Gabourel***, cited by Mr. Elrington – see also ***R v Brooks 92 Cr. App. R 36 CA, DPP v P [1991] 2 AC (HL),*** and ***Christou [1997] SC 117.***

[47] In ***Fitzpatrick***, the Court of Appeal (England and Wales) held that, in the trial together of two counts in one indictment, one of indecent assault, the other of indecent exposure, alleged to have occurred on different occasions, the prejudicial effect on one count, of evidence to prove the other count exceeded the probative value for that other count; a separation of trial of the counts which had been applied for should have been ordered.

[48] In ***Dennis Gabourel***, the point was raised at the trial and on appeal. This Court (Motlley P, Sosa and Morrison JJA) decided the appeal on the reason that, the trial judge erred in refusing the application for separation of trial of the counts for the wrong reason that, established precedent had been that, judges exercised their discretion to sever indictment on rare occasions. The correct reason was, the Court stated, whether in all the circumstances, separation of the trial of the counts would be conducive to the ends of justice. The Court did not examine and point out any possible prejudicial evidence in the case that would cause it to conclude

that in the circumstances separation of trial of the counts was conducive to the ends of justice, but in the end it concluded at paragraph 14 in these words:

> ***"We are satisfied that the exercise by the trial judge of his discretion resulted in <u>unfairness</u> to the appellant."***

[49] The facts of ***Dennis Gabourel*** were these. Gabourel was charged in one indictment with two counts of rape of YM and one count of causing grievous harm to her, all three incidents were said to have occurred on the same date. He was also charged in the same indictment with a fourth count of aggravated assault (of indecent nature) on SS, the daughter of YM, which occurred ten days before the incidents of the first three counts. He was indicted and tried on all four counts in the single indictment and convicted.

[50] The evidence was this. Gabourel and YM were partners. Gabourel moved in and lived with YM in her house. Her children also lived there. It was alleged that on 9 September, 2004 Gabourel indecently assaulted SS. Because of that, the relationship was said to have ended, Gabourel returned to his house. Ten days after, when YM left work she saw Gabourel. He offered and took her in his car to her home. At her home she asked him to take her to a casino. He took her and left her at the casino. Later she called him to go to the casino and take her home. He went and took her in his car. He asked to have sex with her. Although she refused, said YM, he drove to a place around an airfield hanger and had sexual intercourse with her without her consent. He then took her to her house. There he again had sex with her without her consent, and assaulted her causing grievous harm. Gabourel denied the four incidents.

[51] At the trial Mr. Elrington made an application for a separate trial of the fourth count of aggravated assault on the daughter. He made the submission that, the fourth count should not be tried with the first two counts of rape of YM, and the

third count of doing grievous harm to YM because the fourth count did not have, “any relationship” with the first three counts; the fourth count arose out of completely different facts. He argued that, if the fourth count was tried with the first three, evidence to prove the fourth count would also tend to show that Gabourel had been involved in a criminal conduct prior to the date of the alleged incidents of the first three counts, and that would be highly prejudicial in the minds of the jury when considering verdicts on the first three counts. The trial judge dismissed the application. The appellant was convicted on all four counts.

[52] On appeal, this Court (Motlley P, Sosa and Morrison JJA) held that, the trial judge erred in rejecting the application for a separation of trial of the fourth count. The Court stated that, the trial judge correctly recognised that in order for the judge to exercise discretion under the Indictable Procedure Act and the Indictment Rules to order a separate trial of the fourth count, he was required to consider the interest of the prosecution, and the interest of the accused. We take that to mean, “the ends of justice.” The Court also stated that, the judge posed the correct question that: he had to ask himself whether the jury would be able to act fairly when directed that each count was indeed separate, and that the evidence for the fourth count was independent of the evidence for the other three counts.

[53] The Court, however, held overall that, the judge, despite posing the correct questions, decided the application on the wrong reason that, most authorities he had read had stated that it was on rare occasions that judges had exercised their discretion to sever indictment, the judge in error, refused the application on that reason. Gabourel’s appeal was allowed. A retrial was ordered.

[54] Although our first conclusion on the facts was that, the refusal by the judge to exercise discretion to order a separate trial of the fourth count would occasion prejudice, we concluded further, however, that in this case the probable prejudice that we have mentioned and any other were cured and the trial ended as a fair

trial. That is based on the approval by this Court in ***Gabourel*** that, one of the correct questions to ask was, whether the jury would be able to act fairly when directed that each count was indeed separate and that evidence for each count was independent. It is also based on ***Coyseme Salam v The Queen Criminal Case Appeal No. 5 of 2002***, an earlier appeal case in this Court where this Court held that a proper direction excluded the possibility of prejudice, and the trial was fair.

[55] By the close of evidence for the defence, Gonzalez J had become fully aware that, the joint trial of the four counts could result in prejudicial application of some of the evidence intended to prove one count, to deciding a verdict on another count. He gave very clear directions to the jury about it. He directed them not to speculate, and to act only on evidence. Then he further directed them that, when considering their verdict on one count, they should not act on evidence intended to prove another count. In our view, these directions would leave the jury able to act fairly.

[56] In ***Salam*** Mr. Elrington was also the counsel for the appellant. The appellant had been charged in two counts in a single indictment, with carnal knowledge of a girl under 14 years old. The two counts were tried together. Mr. Elrington did not make an application for separation of trial of the two counts. The appellant was convicted on both counts and sentenced to 12 years imprisonment, and 15 years imprisonment. He appealed against the convictions and sentences. Mr. Elrington's submission in the appeal was that, because the two counts were tried together, the appellant had been, "both embarrassed and prejudiced in his defence". His reason was that, it was highly probable that the appellant would have been acquitted on one of the counts, if the counts had been tried separately, because the appellant had a good *alibi* regarding the count. He stated: "by hearing both counts together, it immediately created prejudice and bias in their [the jury's] mind." He relied on ***R v Fitzpatrick***.

[57] This Court (Rowe P, Motlley and Sosa JJA) having noted that, no application had been made at the trial for separation of the trial of the two counts, and that, the two counts were properly joined under s. 73 Cap. 96 in one indictment because they were a series of crimes of the same nature, held that no prejudice was occasioned to Salam in the trial. The final reason that the Court gave for the decision was this:

> "***the trial judge was mindful of the requirement of adding a warning to the jury that they must not add all the counts together and convict… or use the evidence of one count as evidence on the other."***
>
> ***… "the judge reminded the jury that they should consider the evidence in relation to each count separately***."

The appeal of Salam was dismissed.

[58] The directions that Gonzalez J gave in this case were recorded on pages 50 and 72. On page 50 it was recorded that the judge stated the following:

> "But as I said, Madam Forelady and members of the jury, what you must not do is speculate about evidence that might have been. You cannot go into the jury room and say, oh, you know, I think this is what may have happened; this is what might have happened. If you think this is what might have happened – if you go in there and you say this is what may have happened, this is a sure sign that you are beginning to speculate, and you stop and ask yourselves: Where is the evidence? Go back to the evidence. Okay."

[59] Then on page 72 it was recorded that the judge stated this:

> "Members of the jury, I must tell you that you must consider each of the charges against the accused separately. When you consider the evidence, you must look at the evidence in relation to each charge by itself and you will do that when deciding if the accused is guilty. I tell you this, members of the jury because the evidence for each of the charges may be different and so you heard it by hearsay."

[60] The last bit: "…so you heard it by hearsay", is meaningless in the context. These directions were far stronger and clearer than the "reminder" in ***Salam***. From them the jury would have been able to act fairly by applying only the evidence for each count to that count. Our view is that, in all the circumstances, any prejudice that might have arisen by applying evidence to prove aggravated assault count to the counts of carnal knowledge was cured by the above directions given by the judge. This is also our view on the submission that, evidence for proving the counts of carnal knowledge influenced conviction on the aggravated assault count.

[61] The directions also show that the second complaint in the seventh ground of appeal that, the judge left no warning to the jury about misuse of evidence intended to prove one count, for convicting on other counts, was factually mistaken. We reject the complaint.

[62] From our decision in the above four paragraphs it is obvious that we have rejected the submission by Mr. Elrington that, a trial judge has a duty to raise the question of separate trials of multiple counts in a single indictment, so in this case the trial judge erred in not raising the question. It would not be consistent with the trial judge's merely discretionary power under ***s.73 (3) of the Indictable Procedure Act*** to order separate trials of multiple counts in an indictment – also note ***Ludlow v Metropolitan Police Commissioner [1971] AC 29***.

[63] We accept, however that, given that the appellant was unrepresented by counsel, the judge could have raised with the prosecutor, the question whether the trial of the fourth count charging aggravated assault (of indecent nature) said to have occurred on a different date, together with the first three counts charging the offence of carnal knowledge on different dates, could not lead to adducing some evidence which could have probative value for one or the other count, but which could be prejudicial in proving another count . That, however, is perfection which readily comes to mind with the benefit of hindsight. The issue of prejudice which a joint trial of several counts in an indictment presents is not a frequent occurrence at trial in this jurisdiction; it takes a very thoughtful attorney to raise it. The issue can easily be overlooked until noticed by the keen eye of the trial judge at summing - up. Overall, we reject the seventh ground of appeal in as far as the final determination of this appeal is concerned.

The third ground of appeal (the successful ground).

[64] We accept the third ground of appeal. It is against the conviction and sentence on the second count of carnal knowledge. We allow the appeal against the conviction and sentence on that count.

[65] In short, the third ground of appeal was that, the trial judge erred in that he left all the three counts of carnal knowledge in the indictment to the jury for their verdicts when the prosecution evidence adduced covered only two of the counts in the indictment. The ground was based on the view that, the evidence adduced was about only one, not two, acts of sexual intercourse with EN in the period 1st July to 31st August 2009. The appellant had been indicted on two counts of carnal knowledge in that period, and one count of carnal knowledge in the period 1st to 31st August, 2010. This is the view advanced by counsel, despite the fact that evidence was instead adduced for two, not only one act of carnal knowledge in the

period 1st July to 31st August, 2010 that followed, and therefore for three acts of sexual intercourse in all.

[66] The submission by Mr. Elrington was that, since the evidence covered the periods (i.e. dates) for two of the counts of carnal knowledge only, the trial judge had a duty to leave to the jury only the two counts of carnal knowledge, that is, the first count and the third count, and to outline to the jury only the evidence relevant to those two counts.

[67] The response by the DPP was a submission that conceded that, there was variance between the date of the offence stated in the second count and the dates given in the evidence adduced, and then to advance three arguments to persuade this court to uphold the conviction and sentence on the second count, notwithstanding that there was no evidence that more than one sexual intercourse with EN took place during the period 1st July to 31st August 2009.

[68] The first argument was that, in all, the evidence adduced was about three, not two, acts of sexual intercourse, although the date in the evidence for the second act of sexual intercourse was different from the date in the second count; there was evidence for all three counts of carnal knowledge to be left to the jury. The DPP argued further that, the fact that the date in the evidence was different from the date in the second count did not matter because on the later date given in the evidence EN was still a child under 14 years old, sexual intercourse with her on that later date was still an offence of carnal knowledge.

[69] The second argument was that, the judge summed - up to the jury evidence for three acts of sexual intercourse, and directed them, “to treat the counts separately, and to consider whether they found each [count] individually proved.” We understood the submission to urge that any prejudice to the appellant due to the variance in the dates was eliminated by the summing- up and direction.

[70] The third argument was that, the law did not require that the date given in a charge be proved in order for the jury to convict an accused on the charge. The DPP referred the Court to ***paras. 1-204 to 1-205 of Archbold, Criminal Pleadings, Evidence and Practice, 2012***, in support of this argument. The paras. state as follows.

> *"Despite the old authorities to the effect that the date of the offence must be shown in the indictment, it never seems to have been necessary for the date shown to be proved by the evidence unless time is of the essence of the offence.*
>
> *In other cases, if the time stated were prior to the filing of the indictment, a variance between the indictment and the evidence of the time when the offence was committed was not material: 2 Co. Inst. 318; 3 Co. Inst. 230; Sir H. Vane's Case (1662) Kel. (J.) 16; R. v. Aylett, ante; R. v. Dossi, ante. In Dossi it was held that a date specified in an indictment is not a material matter unless it is an essential part of the alleged offence; the defendant may be convicted although the jury finds that the offence was committed on a date other than that specified in the indictment. Amendment of the indictment is unnecessary, although it will be good practice to do so (provided there is no prejudice, post) where it is clear on the evidence that if the offence was committed at all, it was committed on a day other than that specified."*

[71] We note that, the authors of the passage stated that, in ***R v Severo Dossi (1918) 12 Cr App R 158***, it was held that, "*a date specified in an indictment [was] not a material matter unless it [was] an essential part of the alleged offence*; *and the defendant may be convicted although the jury finds that the offence was*

committed on a date other than that specified in the indictment." We emphasize the word '***may'***. The flip side of the clause, "the defendant may be convicted," is, "the defendant ***may not*** be convicted."

[72] So, it is our view that, the precedent in ***Dossi*** that: although the date of an offence should be alleged in an indictment, the jury are entitled, if there is evidence to convict the accused of the commission of the offence, to convict him even though they have found that the offence was not committed on the actual date specified in the indictment, does not require that the jury may not decline to convict where the circumstances warrant that they do not convict. Put another way, the precedent does not require that the jury must always convict, despite variance between the date of the offence in the evidence and in the count.

[73] The precedent in ***Dossi*** is about evidence (a set of facts) that proves the commission of the particular offence alleged to have been committed by an accused, but charged in a count that states a date other than that borne out by the evidence. The precedent is not about two or more separate offences of the same kind committed by an accused on different dates, so that the criminal act in one of the offences may be substituted for the criminal act in another offence in the event of gaps in the evidence to prove that other offence.

[74] Our view of the evidence is that, the act of sexual intercourse in the second count appears to be a different act from any of the two acts of sexual intercourse in August 2010, testified to by EN. ***Dossi*** does not apply to the evidence of this case.

[75] In ***Dossi,*** the point taken on the 'appeal', apart from corroboration, was that, the court had no authority under the applicable Act, to amend the indictment, other than before or during the trial. So, the contention proceeded, when the jury found

that the offence of indecent assault was committed on a date that was not the date in the indictment, they actually acquitted the accused, but the court erred when on the application of the prosecution, the court amended the date in the indictment to the same date borne out in the evidence, and the accused was convicted. The question in ***Dossi*** was slightly different from the question in this appeal. But the decision of Atkin J on the point there is apposite to the question in this appeal. On pages 159 and 160 Atkin J sated:

> ***"It appears to us that that is not a correct contention of the law. From time immemorial a date specified in an indictment has never been a material matter unless it is actually an essential part of the alleged offence. 'And although the day be alleged, yet if the jury finds him guilty on another day, the verdict is good, but then in the verdict it is good to set down on what day it was done in respect of the relation of the felony; and the same law is in the case of an indictment.'***
>
> ***…Thus, though the date of the offence should be alleged in the indictment, it has never been necessary that it should be laid according to the truth unless time is of the essence of the offence. It follows therefore, that the jury were entitled, if there was evidence on which they could come to that conclusion, to find the accused guilty of the offence charged against him even though they found that it had not been committed on the actual date specified in the indictment."***

[76] We reached the view that, the act of sexual intercourse (and thus the carnal knowledge) alleged in the second count appears not to be the same act as any of the two acts of sexual intercourse in the summer of 2010, based on the record of

the evidence. In the record of proceedings on page 21, it is recorded that EN testified as follows:

> "I do remember the summer of 2009. July and August are the summer months. During that time something happened to me. During the summer of 2009 I was going to my mother's room, twice. My stepfather pushed me on the bed and took off all of my clothes. Then he pulled down his pants and got on top of me. Then his private part got hard. Then he placed it inside of me. Private part is also known as penis. He placed it in my vagina. This was in the afternoon. He was inside of me for two to three minutes. Then he got off and left the room."

[77] This testimony started with a statement that, "twice" in July and August of 2009 when the witness was entering her mother's bedroom "something happened" to her. But she proceeded to relate only one incident of sexual intercourse, not two. The second was skipped. Perhaps according to how the witness' account was being presented by the prosecution. After questions and answers regarding the details of one act of sexual intercourse in the summer of 2009, which began by the appellant pushing EN onto her mother's bed, the witness was led to testify about an incident in the summer of 2010, and thereafter, about another incident in the same period, the summer of 2010. So, the second part of something happening "twice" in the summer of 2009 was skipped.

[78] On page 22 it is recorded that the witness testified as follows:

> "For the summer of 2010, I was lying on my mother's bed and had the door open and Lyn came in the room and put me on the bed and took down my pants. Then he took his penis and put it inside of me i.e. in my vagina. I can't recall what day of the week it was.

> This was in the afternoon around 4:00 pm. School was not open at that time. It was summer vacation. I know it was summer because we did not have school several days in a row. I know it was he because I saw his face and the room was clear.
> (Adjourned at 1:15 pm.)
> (Court resumed at 1:30 pm.)
>
> I remember the month of August 2010. In August 2010 I was in my mother's room when Lyn came to my room and he took off all my clothes. Then he pulled down his pants and got on top of me and then put his penis inside my vagina. I saw his face. I could tell it was Lyn because I saw him and I know what he looks like i.e. his face. The light at the time was bright. This was around 4:30 pm. I was not going to school. We were on vacation. At that time Lyn did not speak to me."

[79] The differences regarding the incidents that were said to have occurred in 2009, and the incidents in 2010, are the following. The incidents in the summer of 2009, described as twice, commenced when EN was going to her mother's bedroom. She was pushed onto her mother's bed. The first incident in the summer of 2010, commenced when EN was lying on her mother's bed. The second was when EN was already in the mother's bedroom. Given the evidence, it cannot be assumed that the first or second sexual intercourse in the summer of 2010, was one of the two acts of sexual intercourse which began by the witness going to her mother's room twice, and was intended to be charged in the second count. The judge should have given a clear direction to the jury to decide whether the evidence of the sexual intercourse, the subject of the second count, was omitted or whether that sexual intercourse was actually the first or even the second sexual intercourse in the summer of 2010, testified to.

[80] Besides, we were concerned that, about the evidence in regard to the second count a sense of prejudice obtained for the reason that the judge did not mention to the appellant who did not have counsel, that the date in the second count was different from the date given in evidence. He also did not mentioned this to the jury in his summing-up. We say this well aware that a judge has no duty to mention in summing-up to the jury all the evidence adduced or to mention to unrepresented accused all the evidence adduced. But the variance in dates in this case could be significant in the defence.

The sentences.

[81] The trial judge sentenced the appellant to 12 years imprisonment on each of the first three counts of carnal knowledge, and to two years imprisonment on the fourth count of aggravated assault. 12 years imprisonment is the statutory minimum punishment for carnal knowledge of a girl under 14 years old. The judge then ordered all the sentences to run consecutively; the total term of imprisonment imposed on the appellant was 38 years.

[83] We have allowed the appeal against conviction on the second count, accordingly we quash the sentence of 12 years imprisonment for the conviction on the second count.

[84] The appellant was a first offender which was a good record. On the other hand he was a *de facto* step- father to EN, and should have been her protector. The offence of carnal knowledge is regarded in Belize as a serious offence, for which a mandatory minimum punishment has been legislated in ***s. 47 (1) of the Criminal Code***. The offence of aggravated assault (of indecent nature) is also regarded in Belize as a serious offence, although no mandatory punishment has been legislated for it.

[85] No submission was made to us that, in arriving at 12 years imprisonment for each of the conviction for carnal knowledge, and 2 years imprisonment for the conviction for aggravated assault count, the judge erred by applying the wrong principle, or by omitting to apply the correct principle. We have not on our part spotted any error of principle of law by the judge so, we cannot interfere with the discretion of the judge to impose 12 years imprisonment for each of the first and third counts of carnal knowledge, and 2 years imprisonment for the conviction on the count of aggravated assault. We confirm the three sentences.

[86] However, we have reached the conclusion that, the judge erred when having formed the view that the four sentences run consecutively, he did not avert his attention to the aggregate sentence of 38 years in order to assess whether it was excessive, or just and appropriate, taking all the offences as a whole. If 38 years was not just, the judge had a duty to review the aggregate. He did not record that he did. We are aware that, ***s.161 of the Indictable Procedure Act*** provides that a judge may order that sentences of imprisonment of a convicted person may commence to run one after the other, that is, consecutively. That does not exclude the duty to review excessiveness of an aggregate of consecutive sentences. What we have described became known as the “totally principle.” In England it has been ***preserved*** by statue.

[87] Generally offences that have been committed as, or form part of the same transaction or incident are punished by separate sentences of imprisonment, if imprisonment is called for, and the terms of imprisonment are ordered to run concurrently. Where the offences are not part of the same transaction or incident, generally the imprisonment terms are ordered to run consecutively, but subject to a review by the sentencing judge himself as to whether their aggregate is just and proper, taking the offences as a whole.

[88] In our view, had the judge averted his mind to the aggregate of 38 years in this case, he would have reviewed it and applied one of the measures of sentencing that would have produced a just outcome. In this exercise one of the permissible measures is to order the sentences to run concurrently. Accordingly we vary the manner in which the remaining sentences shall run. The sentences for carnal knowledge on the first and third counts shall run concurrently; the sentence for the aggravated assault on the fourth count shall run consecutively to concurrent sentences on the first and third counts.

[89] We do not consider that, making the two sentences for carnal knowledge run concurrently render the effect of the mandatory minimum sentence in s. 47 (1) of the Criminal Code nugatory. The section does not provide that multiple minimum sentences under the section may not be made to run concurrently. We illustrate our argument by this example. More than one mandatory minimum life imprisonment sentences can run only concurrently.

The orders.

[90] We make the following orders:

1. The appeal against convictions on the first, third and fourth counts is dismissed.

2. The appeal against the conviction on the second count is allowed, the conviction and the sentence therefor are quashed, and an acquittal is entered on the count.

3. The sentences for the first, third and fourth counts are confirmed; the sentences of imprisonment on the first and third counts shall run concurrently.

4. The sentence of imprisonment on the fourth count shall run consecutively to the first two concurrent sentences.

5. The concurrent sentences shall start to run on the first day the appellant was taken into custody.

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SAMUEL. L. AWICH JA

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CHRISTOPHER BLACKMAN JA