IN THE COURT OF APPEAL OF BELIZE AD 2017

CRIMINAL APPEAL NO 10 OF 2014

ARTIE MEYERS Appellant

v

THE QUEEN Respondent

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BEFORE

The Hon Mr Justice Sir Manuel Sosa	President
The Hon Mr Justice Christopher Blackman	Justice of Appeal
The Hon Mr Justice Murrio Ducille	Justice of Appeal

H E Elrington SC for the appellant.
C M Ramírez, Senior Crown Counsel, for the respondent.

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5 October 2015 and 27 February 2017.

SIR MANUEL SOSA P

Introduction

[1] At the close of the hearing on 5 October 2015, the Court intimated that, for reasons which it would give in writing at a later date, the appeal was being allowed, the conviction quashed, the sentence set aside and a retrial ordered in the interests of justice. The Court also offered bail to the appellant on the recognizance of two sureties,

each in the amount of $4,000.00, that is to say, in the total amount of $8,000.00, and on the condition that the appellant should (a) report every Friday between the hours of 8 am and 5 pm to the police station at Gales Point, Manatee and (b) stay away from the virtual complainant VR and all members of her family as well as from all of the Crown's witnesses in the case, such bail to be taken before the Deputy Registrar. The promised reasons for judgment shall be given below.

The circumstances

[2] The circumstances, as material for present purposes, are, as far as the record goes, that the instant case came up for trial before Moore J and a jury on 18 March 2014, whereupon Artie Meyers ('the appellant') was arraigned on a charge of carnal knowledge of a female child under the age of 14, a jury of nine was empanelled, the appellant was placed in the charge of the jury and prosecuting counsel, Mr Linbert Willis, having first informed the judge that he would not be opening the Crown case to the jury, proceeded to call his first witness, viz the virtual complainant VR, who thereupon purported to take the oath. Prosecuting counsel then went on to attempt to conduct his examination-in-chief of VR. The latter, however, though prepared to tell the Court her name and age, ie 13 years, gave early signs that she did not propose to cooperate with prosecuting counsel in the trial. Thus, she claimed not to know things as elementary as the name of the place in the Toledo District in which she was living in 2012, the name of the street on which she was then living, her mother's occupation or place of work and the place where her best friend lived in 2012. When she went even further and claimed, on the one hand, not to remember things as important as where she was on 6 November 2012, while asserting, on the other, that she never used to speak to the appellant and that she could not say whether he had ever visited her house or for how long she had known him, prosecuting counsel sought from the judge, and was granted, leave to show VR a document purporting to be a statement given by her to the police on 3 December 2012 ('the previous statement'). When, even after having been allowed to refresh her memory by reading the previous statement, VR continued to evince no desire to cooperate with prosecuting counsel, daring, for example, to tell him that she still could not remember where she was on 6 November 2012, and finally

condemning the previous statement in its entirety as untrue, he applied for and was given permission to treat her as a 'hostile' witness. (The relevant provision of section 71(2) of the Evidence Act ('the Act') speaks of a witness who is considered 'adverse', rather than hostile, to the party by whom he or she is called.) Prosecuting counsel then went on to cross-examine VR, as he was entitled to do under the provisions of section 71. Thereafter, in accordance with the provisions of section 73A of the Act, Corporal Santos Parham was called to the witness box and gave evidence to the effect that the previous statement was recorded from VR by her on 3 December 2012. The previous statement, in which VR alleged that the appellant had indeed carnally known her on or about 6 November 2012, was next read aloud in court, after which it was purportedly tendered, and admitted, in evidence.

[3] There is no indication in the record that the judge took the steps dictated by long established practice in this jurisdiction to demonstrate that she formed, at the proper time, the opinion that VR, being then a child of only 13 years, understood the nature of an oath. The witness was nevertheless, as already indicated above, purportedly sworn, a fact clear from page 13 of the record.

Section 103(1) of the Act

[4] The provisions of section 103(1) of the Act are as follows:

> '103. –(1) Where a child or other person is tendered as a witness in a civil or criminal cause and in the opinion of the court that child or other person does not understand the nature of an oath, the evidence of that child or other person may be received without the oath being taken if, in the opinion of the court, the child or other person is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth.'

In the instant case, of course, the witness in question, VR, gave evidence at trial purportedly under oath. This, then, is manifestly not a case where the judge received the evidence of a child without the oath being at least purportedly taken. However, the fact that VR was purportedly sworn as a witness raises the twofold question whether the judge took the trouble of actually forming an opinion that the former understood the

nature of an oath and, if she did, whether she went about so doing in the proper manner.

The first ground of appeal

[5] The first ground of appeal of the appellant is that –

> '[the judge] erred and was wrong in law to permit [VR], the virtual complainant a child then 12 (*sic*) years old to give sworn evidence, before ascertaining that she satisfied the requirements of Section 103 of [the Act].'

The submissions on the first ground

[6] Mr Hubert E Elrington SC submitted, relying on the absence of anything suggesting otherwise in the record, that the judge 'wholly omitted to test the child to ascertain her capacity to give sworn testimony as is requested (*sic*) by Section 103 of [the Act]'.

[7] Mr Ramirez, in reply, noted that, contrary to what Mr Elrington had stated, VR was 13 at the time of trial, as she (improperly) and her mother (properly) both testified. He contended, moreover, that it was to be inferred from the fact that the judge took the sworn evidence of VR that the former 'was not of the opinion that [VR] did not understand the nature of an oath'. Although Mr Ramirez did not say so in so many words, the Court proceeds on the logical basis that it was implicit in his submission that the judge was also of the opinion that VR understood the nature of an oath.

Discussion

[8] The Court notes, first of all, that the Crown took no steps on the hearing of this appeal to prove that the judge took any overt measures to satisfy herself that VR understood the nature of an oath. (It might well have done so by, for example, filing an affidavit as to the pertinent facts sworn to by Mr Willis.) The argument of the Crown proceeded on the basis that it should suffice that the judge must have formed the opinion in question, such argument thus failing entirely to address the question whether, before forming such an opinion, a judge must follow a particular procedure. The Court took it, therefore, as not being in dispute that the purported swearing of VR was an

isolated step, no different from the swearing of any other witness in the trial, rather than only the final step of a special procedure adopted by reason of the fact that she was a child at the time.

[9] As has just been seen, the Crown sought to persuade this Court that the judge did go to the trouble of forming an opinion as to whether VR understood the nature of an oath before purporting to permit her to take the oath and give sworn evidence at trial. But the Court found the sole submission advanced by the Crown in this regard utterly unconvincing. It does not follow from the mere fact that the witness was purportedly permitted to take the oath and give evidence that the judge had previously formed an opinion that she (ie the witness) understood the nature of an oath. This Court would have been inclined more seriously to consider this argument if there had been some indication that the judge's mind was directed to the provisions of section 103 of the Act at the material time. But there is not the slightest such indication and, in those circumstances, the Court is left with irresolvable doubts as to whether the judge (a) had section 103 in mind when VR first stepped into the witness box on 18 March 2014 and (b) formed the relevant opinion at that or indeed any other time during the trial. Therefore the Court is not satisfied that the judge formed such an opinion, viz that VR understood the nature of the oath, before allowing her purportedly to take the oath and testify, let alone that she (ie the judge) followed any particular procedure applicable to the situation with which she was faced.

[10] The Court remarks, in this last connection, that neither side referred in argument to its well-known decision in *Winswell Williams v R*, Criminal Appeal No 2 of 1992, a decision delivered on 15 September 1992. In that case, a panel comprising Henry P, Liverpool JA and Robotham JA, considered the necessity, in this type of situation, for the judge to hold a *voir dire* to assist him or her in the forming of an opinion one way or the other.

[11] Writing the judgment, Henry P, as luminous a legal mind as any that has ever presided in this Court, stated, at page 7:

> 'The next ground of appeal argued was that the learned trial judge erred in receiving the testimony of Gilbert Pike, aged 12 years, without a voir dire. There

is merit also in this complaint. In *Fazal Mohammed v The State* (1990) 37 WIR 438 the Privy Council, after referring to the decision of the Jamaican Court of Appeal in *R v Whitely* (1978) 27 WIR 247 and to the decision of the English Court of Appeal in *R v Lal Khan* (1981) 73 Cr App Rep 190 as well as to the failure of a judge to make any note of an inquiry made as to a child's understanding of the oath, observed at p 442:

> "The lesson to be learned is that in future the judge should record in his note the whole inquiry he makes of a child under fourteen before allowing the oath to be taken, as is now done in England by the shorthand writer, see *R v Lal Khan*. Their Lordships also indorse the clear rule of practice in Trinidad and Tobago that inquiry should be made of any child under fourteen before he or she is permitted to take the oath."

The learned President went on to say, *ibid*:

> 'In the present case there is no record of any inquiry having been made by the learned trial judge as to Gilbert Pike's understanding of the oath. The record of his evidence indicates that he was 12 years old. That evidence ought not to have been given in the absence of such an inquiry and must therefore be treated as inadmissible.'

[12] The Court pauses here to note that the practice in the years that have followed since the decision in *Williams*, as known to the President of this Court, has been to include in the record of appeal a transcript of the proceedings in a *voir dire* of the kind here under consideration in every case where one has been held.

[13] Fortunately for the Crown in *Williams*' case (albeit in regard only to the battle and not to the war), this Court considered that the nature of the evidence given by the child Gilbert Pike ('Pike') was such that it could hardly have materially advanced the Crown case and therefore the pertinent ground of appeal was not a factor in the decision to allow the appeal.

[14] In the instant case, however, the position is more complex in that, rightly or wrongly, there was before the jury at the end of the day not only that which purported to

be the evidence under oath of VR but also the previous statement, regarded on both sides as well as by the judge as a previous inconsistent statement. What, then, was the effect, if any, on the admission of these two separate items of evidence of the failure to hold a *voir dire*?

[15] The first such item, ie the supposedly sworn evidence of VR, was unquestionably, like the evidence of Pike in *Williams*, inadmissible.

[16] The second item, viz the previous statement was, as already noted above, admitted in evidence by the judge purportedly under the provisions of section 73A of the Act. That section provides as follows:

> 'Where in a criminal proceeding, a person is called as a witness for the Prosecution and–
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> (a) he admits to making a previous inconsistent statement; or
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> (b) a previous inconsistent statement made by him is proved by virtue of section 71 or 72;
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> the statement is admissible as evidence of any matter stated in it of which oral evidence by that person would be admissible and may be relied upon by the Prosecution to prove its case.' (emphasis added)

These are limpid provisions. They impose three prerequisites for the admissibility of a previous inconsistent statement. The first of these is that the maker of such statement shall have been 'called as a witness for the prosecution'. The second and third are those respectively set out at paras (a) and (b) of the section. It is clear from the use of the conjunction 'or' immediately following para (a) that each of these last two prerequisites is an alternative to the other. And it is equally clear from the use of the conjunction 'and' immediately following the statement of the first prerequisite that it (such prerequisite) applies in addition to whichever of the other two that applies in any particular case. In the present case, therefore, to decide whether section 73A would have applied to render the statement in question admissible in evidence at the appellant's trial, one can conveniently begin by asking whether satisfaction of the first

prerequisite was possible given the failure to hold a *voir dire*. In the opinion of this Court, the entire effort made in the court below to place sworn evidence by VR before the judge and jury was an utterly futile and meaningless exercise and, for that reason, she (VR) cannot be said to have been called as a witness for the prosecution. It follows, as the Court sees it, that the very first prerequisite of section 73A was not satisfied and that, accordingly, the previous statement was just as inadmissible as VR's sworn evidence.

[17] The Court may now briefly address the question whether, in the particular circumstances of the present case, what purports to be the sworn evidence of VR is, like the purported evidence of Pike in *Williams'* case, inconsequential. This question may be considered in two different contexts, viz (i) that of the proof of guilt and (ii) that of the admissibility of the previous statement. In the first context, such purported evidence, having contributed nothing at all to the Crown case against the appellant, cannot be considered to be of any consequence. After all, VR said nothing from the witness box to implicate the appellant in the crime allegedly committed upon her. Indeed, she roundly condemned the previous statement as untrue from beginning to end. In the second of these two contexts, however, the purportedly sworn evidence of VR might, in the view of the Court, have been of some consequence had it not been for one circumstance. VR, as has been noted earlier, admitted from the witness box that she gave the previous statement to the police. And such an admission would have put the Crown in a position to contend that the prerequisite contained at para (a) of section 73A had been satisfied. But, as has been seen above, the first prerequisite of that section could not have been met anyway; and it is not, unlike the other two prerequisites, an alternative one. Therefore such purportedly sworn evidence as was given by VR in the instant case is itself inconsequential in the second context.

[18] It only remains to consider whether the previous statement, for its part, was of any consequence to the Crown case against the appellant. If it had been correctly treated as inadmissible at the trial, how would that have impacted the Crown case? The Court is of the view that it would have fatally impacted the Crown case in that proof that it was the appellant who had carnal knowledge of VR would have become impossible.

No admissible evidence as to that element of the offence had been adduced through any other witness. The judge, it is true, referred the jury in the course of her summing-up (record, p 51) to what purported to be a note of certain information given by VR to the doctor who examined her and she (the judge) directed them that they could take it into account in deciding whether it was the appellant who had had sexual intercourse with VR. That information was to the effect that one Artie Myers had had sexual intercourse with VR on 6 November 2012. But, with the greatest respect to the judge, such note, written by the doctor, could not constitute admissible evidence other than as a previous inconsistent statement within the meaning of section 73A. (It – the note – had no place in a report which should be, in the language of section 36(1) of the Act, 'upon any matter or thing duly submitted to [the relevant expert] for examination or analysis and report'.) But the Crown did not at any point in the trial endeavour to have the note in question admitted pursuant to the provisions of section 73A. At any rate, as has already been pointed out above, it is a prerequisite to admissibility under section 73A that the maker of the statement should have been 'called as a witness by the prosecution' and VR was not, in the view already expressed above by this Court, so called.

[19] Accordingly, the failure to hold a *voir dire* resulted in an absence of vital admissible evidence in the Crown case. In the face of that critical absence, the appellant could not have properly been convicted of the carnal knowledge of VR. He was wrongly convicted on the strength of material which ought never to have been put before the judge and jury in the absence of a duly conducted *voir dire*. The Court was therefore constrained to allow the appeal. In the circumstances, there was, and is, no need to consider any of the appellant's other grounds of appeal.

[20] But nothing that has been said above suggests that a trial judge presiding at a *voir dire* held on a retrial could not properly rule either that VR understands the nature of an oath and can therefore give evidence on oath or that, though she does not understand the nature of an oath, she can by virtue of the provisions of section 103(1) already discussed above give evidence without first taking an oath. Moreover, the inexplicable decision not to stand by the previous statement was not that of an adult,

defined in section 3 of the Interpretation Act as ‘any person who has attained the age of eighteen years’. It was the decision of a 13-year-old child, born on 8 May 2000, who did not even seek to explain it. For these reasons, the Court considered it to be entirely in the interests of justice to order a retrial.

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SIR MANUEL SOSA P

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BLACKMAN JA

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DUCILLE JA