IN THE COURT OF APPEAL OF BELIZE AD 2020

CRIMINAL APPEAL NO 18 OF 2011

FW Appellant

v

THE QUEEN Respondent

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BEFORE

The Hon Sir Manuel Sosa	President
The Hon Mr Justice Samuel Awich	Justice of Appeal
The Hon Madam Justice Minnet Hafiz Bertram	Justice of Appeal

L Banner and M Trapp Zuniga for the appellant.
C Vidal SC, Director of Public Prosecutions, and S Maharaj, Crown Counsel, for the respondent.

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9 June 2016 and 17 December 2020.

MAJORITY JUDGMENT

SIR MANUEL SOSA P

Introduction

[1] FW ('the appellant') is the father of CW, who, tragically, underwent the ordeal of being raped in her own home on numerous occasions during the period March 2005 to November 2006. Following a report made to them by CW, the police in Dangriga, Stann Creek District arrested the appellant in December 2007 and charged him with the crime of incest. On his arraignment on an indictment containing 10 counts of the rape of CW, he pleaded Not Guilty, thus rendering a trial necessary. At the end of his two-day trial before González J ('the judge') and a jury on 1 April 2011, the jury, after deliberating for less than two hours, found him Guilty on all ten counts. A memorandum dated 11 April 2011 from the Registrar to the authorities at the Hattieville Prison records that the appellant, referred to therein both by his correct name and, erroneously, by the name

Frederick Casimiro, was sentenced for convictions on ten counts of rape and that the ten sentences imposed were to be served consecutively and added up to a total of eighty years' imprisonment. The logical inference from this is that each sentence was for the statutorily prescribed minimum term of eight years' imprisonment.

[2] By the filing of the prescribed form headed 'Notice of Appeal or Application for Leave to Appeal' and dated 15 April 2011, the appellant appealed his convictions and purported to appeal his sentences. It is noteworthy that he disclosed in this form that no solicitor was acting for him at the time. As an unrepresented layman, he would not have known that which is trite law to any lawyer worth his salt in Belize, ie that in this jurisdiction there is no appeal as of right against sentence, in consequence of which an offender wishing to appeal his/her sentence must make application for leave to appeal. Because of the trite nature of the legal provision involved (section 23(1)(c) of the Court of Appeal Act), upon the case coming on for hearing on 9 June 2016, this Court proceeded as a matter of course not only to hear the appeal against convictions but also, without expressly so announcing, to treat the purported appeal against sentences as an application for leave to appeal. As to the Court's inherent power so to do there cannot be the slightest doubt.

Section 46 of the Criminal Code

[3] It is convenient to set out at this early stage in the present judgment the terms of section 46 of the Criminal Code, which creates the crime of rape and provides for punishment therefor. Those terms are, in relevant part, as follows:

> 'Every person who commits rape … shall on conviction on indictment be imprisoned for a term which shall not be less than eight years but which may extend to imprisonment for life.'

The record of the proceedings in the court below

[4] This is yet another case from a group of cases ('the group') tried before the judge in 2011 in regrettable circumstances where (a) no court reporter was present in court to

do what is normally done to be able later to prepare a transcript of the proceedings at the trial and (b) no audio recording could be produced when the time came to prepare a record of appeal for the assistance of all participants in the appeal. In strongly deprecating this disastrous and disgraceful occurrence once again, the majority of this Court incorporates by reference into this judgment the critical remarks the Court saw fit to make in its judgments in two previous appeals concerning cases from the group, viz *Pérez (Harrim) v R*, Criminal Appeal No 18 of 2012 (judgment delivered on 9 October 2018) and *Marín (Solomon) v R*, Criminal Appeal No 24 of 2011 (judgment promulgated on 2 November 2020). In the present case, the notes of the judge form the bulk of the slim record of proceedings in the court below.

The Crown case at trial

[5] The Crown's burden at trial was to prove to the required standard, ie beyond reasonable doubt, that the appellant at the ten different times in question in the town of Dangriga had non-consensual sexual intercourse with CW. The Crown set about discharging this onus by means of evidence given by CW herself. As the legal argument advanced for the respondent before this Court has indicated, although the allegation made by CW before the police did not limit the number of times she was raped to ten, a practical decision was taken in the chambers of the Director of Public Prosecutions to indict on the basis that there had been ten different rapes committed on ten different occasions (none of which was referable to a specific date) during ten different months in 2005 and 2006. (The use of periods of one month in respect of each count is consistent with the opinion expressed by the Supreme Court of Ireland in *DPP v EF* (Unreported, Supreme Court , 24 February 1994), as quoted in *DPP v Mc Neill* [2011] IESC 12, at para 24.) Faced with the resulting challenge, the Crown led evidence through CW which at times did not quite square with the fact that the indictment was for only ten counts of rape.

[6] It was the evidence-in-chief of CW that, in March 2005, when she was 21 years old, her mother was in the United States of America and she was living on the Rivas Estate in Dangriga with her father, ie the appellant, and four other named persons, two of whom were her brothers while the other two were females. (The judge's notes shed no

light on the relationship, if any, between these two females and C W.) The appellant was then a member of the Belize Defence Force. Referring to the rape the subject of the first count of the indictment, CW said it was perpetrated at a weekend and sometime after 9 pm. After her brothers had retired for the night, the appellant entered her room and awoke her, ordering her to go to 'the storeroom'. She saw him by the light which was entering her room from the bathroom. Whether she actually went into the storeroom is unclear from the judge's notes. The appellant thereafter held her by the hand and led her into 'the bedroom', where he ordered her to strip. She was unwilling so to do; but it is clear, by necessary implication, that she obeyed the order in part. The bedroom was dark. The appellant kissed her on the neck, breasts and stomach and took off the rest of her 'clothes', presumably sleeping apparel. Somehow, she ended up lying on the bed. The appellant proceeded to take off his clothes and to penetrate her vaginally with his penis. She wept during the ordeal.

[7] In further evidence-in-chief which obviously went beyond the ten counts of the indictment, she said that, after this incident, 'it happened every month', presumably if he was working. When, however, he was on holiday, it would happen twice a week. Things continued that way until November 2006.

[8] CW generalised, for the most part, with respect to the other nine occasions on which she was allegedly subjected by the appellant to non-consensual sexual intercourse with him. She stated under examination-in-chief that he would take her into the room, undress her, have intercourse with her and apologise to her, saying that he loved her and that he was preparing her for the experience of sexual relations with a boyfriend in later life. She described her claimed helplessness in the face of his unwanted advances, pointing to their relative body sizes and his steadfast refusal to take No for an answer.

[9] As regards the two counts relating to the month of November 2006, there was, however, a degree of specificity in her evidence. She testified concerning the first of these counts that, following sexual intercourse in her room, the appellant took her into his room and, telling her that he loved her, promised not to, in her words, 'do that anymore'. While

the notes of the judge refer to someone crying and praying that ‘one day this would stop’, they do not make clear who that person was. What is clear, however, is that it was the further evidence of CW that, despite the promise in question, she was subjected to a second outrage in November 2006.

[10] It was also the testimony of CW that she decided to make a report to the police in December 2007 because she ‘could not take it anymore’. She did not make a report earlier than that because she was scared of the appellant, whom she pointed out in court as her father.

[11] The judge’s notes reveal that part of the cross-examination of CW was directed at discrediting her testimony on the grounds of her not having made an earlier report of the alleged sexual abuse, whether to her mother or to the police. Her explanation for the delay remained her fear of the appellant, a fear not only that he would hurt her but also that he would hurt her mother (presumably if she reported to her mother and the latter acted on the report). They also reveal a discrepancy in her story to the extent that, having testified under direct examination that she had been raped in her bedroom in November 2006, she said in cross-examination that ‘sex took place in his bedroom all the time’. She also complicated matters somewhat during cross-examination by stating that the house had only two bedrooms, one of which was the appellant’s and the other for ‘us’, presumably the other members of the household excepting her mother (when she was in Dangriga). Her earlier testimony had suggested that she had a bedroom of her own.

[12] From the judge’s notes, it appears that the only other Crown witness was a police constable who testified that she arrested and charged the appellant with the crime of incest in December 2007.

The defence case at trial

[13] The judge's notes indicate that the appellant elected to give an unsworn statement from the dock and to call no witnesses. That statement, as recorded in those notes, was as follows:

> 'I want to say I was BDF for 18 years. I never had sex with my daughter. I never knew that I am here for rape. I would never have sex with my daughter. I don't understand why I am here. I have never touched my daughter. I am sincere and honest. I never had sex with my daughter. That is it.'

The defence raised was plainly denial.

The appeal against the convictions

Ground 1 – Verdict was unreasonable and could not be supported having regard to the evidence

1. Submissions

[14] In support of this ground (the only one of the three originally formulated not to be expressly abandoned at the hearing), counsel submitted, principally, that the evidence, as revealed in the judge's notes, was not enough to show that the prosecution had made out a *prima facie* case of rape in the months of March 2005 and November 2006. Furthermore, contended counsel, there was in those notes no indication that any evidence at all was adduced by the prosecution to prove that the appellant was raped during the seven remaining months, ie June 2005, September 2005, December 2005, January 2006, April 2006 July 2006 and October 2006. (In fact, counsel contradictorily included the month of November 2006 with these seven intervening months; but the Court considers that that could only have been the result of error.) The verdict of Guilty, said counsel, was thus legitimate cause for concern as to the content of the summing-up. He specified four reasons for concern in this regard.

[15] First, counsel drew the attention of the Court to the need for a trial judge, when directing a jury in a case involving an indictment containing more than one count, to remind them to consider the evidence relating to each count separately. He cited *Salam (Coyseme) v R*, Criminal Appeal No 5 of 2002 (judgment delivered on 27 March 2003) as an example of a case in which this Court (Rowe P and Mottley and Sosa JJA, as they both then were) had endorsed the giving of such a direction by a judge below. It should be noted, in passing, that counsel, instead of providing this Court with a copy of the judgment in *Salam*, provided it with one of the majority judgment in *NLN v R*, Criminal Appeal No 3 of 2012 (judgment delivered on 18 March 2016), in which *Salam* was indeed cited. (In the interest of the factual accuracy of its judgments in general, the majority of this Court points out that the majority in *NLN* erroneously indicated, at para [56] of their judgment in *NLN*, that Mr Hubert Elrington had appeared for the appellant before this Court in *Salam*, when, in fact, as shown on page 1 of the judgment in the latter case, it was Mr Oswald Twist, who represented Mr Salam before this Court.)

[16] Secondly, counsel submitted that there was no evidence on the issue of consent in relation to the rapes allegedly committed in March 2005 and November 2006. To compound matters, said counsel, the absence of the full summing-up of the judge meant that there was no way of telling how the judge had directed the jury on the issue of consent *vel non*. Counsel also repeated the contention that, as regards the other allegations of rape, there had been no evidence at all before the jury at trial.

[17] Thirdly, counsel, continuing to focus on the absence of a full record of the charge to the jury, said that it left the judge's treatment of the question of identification by way of recognition completely in the dark.

[18] Fourthly, counsel pointed to what in his submission was a 'grave inconsistency' between the evidence of CW and the indictment, viz that, whereas she indicated that she had been raped every month after March 2005, the ten counts of the indictment had reflected a lesser frequency.

[19] The Director of Public Prosecutions ('the Director'), in dealing with the first ground, began with the question of consent *vel non* which she treated as the chief concern of counsel for the appellant as regards the first and tenth counts of the indictment.

[20] The Director submitted with force that there was ample evidence of the absence of consent on the part of CW to intercourse with the appellant in respect not only of the two counts in question but also of the other eight counts. She painstakingly referred the Court to a total of eight different pieces of the evidence of CW which indicated, in her submission, that CW on no occasion gave, or acted as if she was giving, such consent. The law, she contended, distinguishes between consent and mere submission; and, in this connection, she directed the attention of the Court to the decision of the Court of Appeal of England and Wales (Criminal Division) in *R v Steven Olugboja* [1981] EWCA Crim 2 (17 June 1981). Developing this point, she submitted, quoting from *R v Malone* (1998) Crim LR 834, that there is no legal requirement for the prosecution to establish that a complainant said No, or offered physical resistance, to the act of intercourse. She further cited *R v Robinson* [2011] EWCA Crim 916, in which the same court saw fit to describe the Crown evidence as 'evidence of acquiescence rather than enthusiastic consent'.

[21] The Director dealt, secondly, with the contention made on behalf of the appellant that there was no evidence of rape perpetrated during the seven months of June, September and December 2005 and January, April, July, October and November 2006. She drew attention to testimony given by CW in examination-in-chief as well as under cross-examination with respect to the rapes allegedly committed upon her after March 2005. And she pointed out that, guided by the rule that an indictment should not be overloaded, the Crown had opted to prefer an indictment containing only ten selected counts representative of the allegedly criminal conduct of the appellant rather than one made up of, say, 22 counts. It was an understandable consequence of this approach, she said, that the evidence of CW ended up covering a period of some 19 months. In the final analysis, however, so went the submission, the fact that CW testified to being raped every

month between March 2005 and November 2006 sufficed to establish the pertinent counts, without any element of detraction.

[22] Thirdly, the Director responded to the complaint that there was wrongly placed before the jury evidence of the commission of offences not charged in the indictment. Relying on the authority of *R v W* [2003] EWCA Crim 3024 and *DPP v Mc Neill* [2011] IESC 12 (8 April 2011), the Director argued that that circumstance did not render the trial unfair. The jury could, and should, have been directed that there were only 10 counts in the indictment and that they, therefore, in arriving at their verdict, were required to limit their consideration to such evidence as had been led in regard to those counts. She submitted, in conclusion, that the appellant had neither complained nor demonstrated that the judge had omitted so to direct the jury.

2. Discussion

[23] The ground of appeal that a verdict was unreasonable and could not be supported having regard to the evidence is, when properly advanced, an attack on the sufficiency of the evidence as a basis for the findings of fact implicit in the verdict of a jury. As has already been noted above, however, in this case counsel sought to launch an attack, in mid-stream so to speak, against the summing-up itself on a point of law, viz the supposed omission therefrom of a direction that the evidence in respect of each count be considered separately.

[24] Putting aside for a moment the impermissibility of seeking to utilise a ground of appeal meant to afford an appellant a challenge on the facts as an instrument against a supposed error of law, the majority is unable to find any merit in Mr Banner's legal point. It is a point which immediately and inevitably flounders on the rock of the decision of the Privy Council in *Roberts and Anor v The State* [2003] UKPC 1. In that case, in which, as in the instant one, there was no record of the summing-up of the trial judge, and, in addition, there was a complaint of possible misdirection on identification, Lord Rodger of Earlsferry, delivering the judgment of the Board, said at para 7:

> '… [I]t is now impossible to tell what directions the judge did in fact give on identification. That does not in itself mean that the appellants' convictions should be set aside. On the contrary, it is well established that the loss of the transcript of a summing-up is not, without more, a ground for setting aside a conviction.'

That eminent judge proceeded to cite, with approval, pertinent passages from the judgments in *R v Elliott* (1972) 2 Cr App R 171 and *R v Le Caer* (1972) 56 Cr App R 727. He then said, *ibid*:

> 'These passages show that the lack of a transcript of the judge's summing up is significant only if the appellants can point to something to suggest that it contained a misdirection.'

Mr Banner did not, and could not, direct the attention of the Court to anything capable of suggesting that the summing-up in the present case was, in fact, as opposed to speculation, tainted with the misdirection the subject of his submission.

[25] With respect to Mr Banner's principal submission under ground 1, the majority is unable to find any substance in the argument that the evidence, as revealed in the judge's notes, was not enough to show that the prosecution had established a *prima facie* case of rape in the months of May 2005 and November 2006. Counsel's contention, noted at para **[16]**, above that there was no evidence of consent must categorically be rejected. The majority regards it as unnecessary to set out in the present judgment each and every piece of evidence given by CW and cited by the Director as going to proof of such consent. It considers allusion to one representative such piece to suffice for present purposes. That piece is to be found at page 4, lines 10 to 13, Record and is reproduced below:

> 'I could do nothing when he was having sex with me when he did this to me because he was bigger than me and "no" was not an answer for him. When there is an argument in the house if we answer him he would beat us.'

[26] As regards the relevant law, the majority accepts the submission of the Director that there is a valid legal distinction between mere submission to sexual intercourse and consent thereto. Support for that submission is found in *Olugboja*, where Dunne LJ, speaking for the England and Wales Court of Appeal (Criminal Division) on the topic of proper directions to a jury, said, at page 8:

> 'They should be directed that consent, or the absence of it, is to be given its ordinary meaning and if need be, by way of example, that there is a difference between consent and submission; every consent involves a submission, but it by no means follows that a mere submission involves a consent.'

Consistent with that view is the statement in the judgment in *Malone*, where Roch LJ speaking for the same Court, gave examples of possible factual situations in cases involving rape charges and went on to say, at para 7:

> '[These examples] suffice to demonstrate that it is not the law that the prosecution in order to obtain a conviction for rape have to show that the complainant was either incapable of saying no or putting up some physical resistance or did say no or put up some physical resistance.'

In the third case cited in this regard by the Director, viz *Robinson*, the Court, speaking of the inference of lack of consent, said, at para 24 of its judgment:

> 'Some 12 year olds plainly do not have the capacity to consent. Whilst this young girl did not fall into that category, in our judgment there was evidence on which a jury was entitled to find that her immaturity, coupled with the evidence of acquiescence rather than enthusiastic consent, particularly in the context of what could be perceived as grooming, meant that there was no proper consent.'

Accepting the above-cited statements in these authorities as accurately representing the current state of the law in Belize, and having due regard to the evidence to which the Director drew its attention, this majority of this Court is satisfied that the jury correctly found that the prosecution had established, to the requisite standard, lack of consent on the part of CW to rape in March 2005 and November 2006, and, indeed, in all of the other relevant months.

[27] This brings the majority to the sweeping contention made on behalf of the appellant that there was no evidence at all of rape in any of the other months in question. (As earlier pointed out, the majority regards as contradictory and erroneous counsel's inclusion of the month of November 2006 as one of the months falling into this group.) The majority is unable to accept this argument and has already expressed, in the immediately preceding paragraph of this judgment, its view that there was ample evidence to support the finding of the jury on the issue of consent in relation to all ten counts of the indictment. Moving on now beyond the issue of consent, the majority of the Court notes that the Director pointed out in the course of her submissions that it was the evidence-in-chief of CW in respect of the seven intervening months in question that –

> 'After [the episode of rape in March 2005] it happened every month. When he was on holiday from work it happened twice a week up until the month of November 2006. He would take me into the room and would take off my clothes and had sex with me and said he loved me as he apologized.'

And, as the Director further reminded this Court, CW, while under cross-examination, also gave evidence that –

> 'He had sex with me in March 2005 several times till November 2006 and sex took place in his bedroom all the time. He would have sex with me when my mother was not at home.'

Evidence was thus adduced by the prosecution of incidents of rape occurring every month during the period of 19 months which intervened between March 2005 and November 2006. The majority therefore agrees with the submission of the Director that the evidence of CW sufficed, once accepted by the jury, as it clearly was, to establish that the appellant raped CW during the seven material months of June, September and December of 2005 and January, April, July and October of 2006. (As shall be pointed out in para **[29]**, below, there was a way in which the judge could have properly directed the jury to deal with this evidence and the appellant has not complained that the judge omitted so to do.)

[28] Dealing now with Mr Banner's complaint, noted at para **[18]**, above, as to the adducing of evidence concerning offences of rape allegedly committed at times not covered by the ten counts of the indictment, the majority agrees with the Director that the question to be answered here is whether this resulted in an unfair trial. Such a result would mean that justice had miscarried. In *R v W*, to which, as already noted above, this Court was referred by the Director, the Crown evidence was given by a single complainant who was permitted by the trial judge, in the exercise of his discretion, to testify as to alleged offences with which the accused was not charged in the indictment. The England and Wales Court of Appeal (Criminal Division) held that the admission of the testimony in question was neither unlawful nor otherwise inappropriate. Pill LJ, reading the judgment of the court, said, at para 28:

> 'Giving the judgment of this court in *Pettman*, (unreported) 2 May 1985, Purchas LJ stated: "… where it is necessary to place before the jury evidence of part of a continual background or history relevant to the offence charged in the indictment, and without the totality of which the account placed before the jury would be incomplete or incomprehensible, then the fact that the whole account involves including evidence establishing the commission of an offence with which the accused is not charged is not of itself a ground for excluding the evidence."'

The learned judge further said, at para 30:

> ‘This was a question of exercise of discretion by the judge. He has explained his reasoning in his direction to the jury to which we have referred. We bear in mind that the evidence was that of a single complainant. This is not a case where conduct involving other people is sought to be relied on as background to the relevant events. In our judgment, the judge was entitled to admit this evidence on the principle described. Neither the earlier points raised nor the undesirability of permitting evidence other than that relating directly to specific charges can operate to render the judge’s ruling unlawful, or inappropriate.’

[29] *R v W* was considered, without criticism, in one of the two majority judgments, that of Denham J, in *Mc Neill*, at para 35 of which, that learned judge said as follows:

> ‘In *R v W* … the trial judge permitted in evidence a detailed account by a single complainant of events which occurred over several years. The trial judge followed *Pettman* stating that it would be false and misleading to give the jury the impression that only the events in the indictment took place. Not to adduce background evidence, it was held, would lead to a lack of understanding of the true relationship and real situation by the jury.’

The majority of this Court is of the view that, similarly, in the instant case, there can be no valid complaint against the giving by CW of evidence of alleged sexual abuse during periods other than those referred to in the ten counts of the indictment. It would not have been right for the judge to restrict her testimony to the periods the subject of those counts and thus permit the jury to form a false and misleading impression that the only episodes of alleged rape were those singled out in the indictment. As in *R v W*, an absence of background evidence would have militated in favour of a lack of understanding of the true relationship and real situation by the jury.

[30] There is, as the majority sees it, no sufficient answer to the closing submission of the Director, which, although not expressly invoking the authority of the Board’s enunciation of the relevant principle in *Roberts*, clearly derives abundant, albeit less than

complete, support therefrom. The jury could, and should, have been directed in the course of the summing-up that there were only ten counts in the indictment and that, in those circumstances, they were bound, in seeking to reach a verdict, to confine their consideration to the evidence led in regard to those counts. The appellant has not even complained that the judge failed so to direct the jury. The majority would not, however, agree with the suggestion of the Director, in this connection, that the appellant needed to demonstrate that there had in fact been a misdirection. The legal position, as explained in *Roberts*, would not require that. The appeals in that case succeeded because it was shown that there might have, not that there had, been a misdirection. What the majority of this Court would, however, say, keeping in mind the words of the Board in *Roberts*, is that the appellant in the present case certainly did not 'point to something to suggest' that there had been a misdirection.

[31] It is now convenient to deal with the appellant's submission that the absence of a transcript of the summing-up leaves everyone in the dark as to the direction, if any, on identification. The factual basis of that contention can hardly be questioned. But, here again, the relevant legal guidance is that, already referred to above, which was given in *Roberts*. As the judgment in that case makes crystal clear, the appellants there succeeded in their appeal not because of the mere absence of a transcript of the summing-up but because (i) they were able to show that, during the relevant period of time, trial judges in Trinidad and Tobago had frequently been misdirecting juries on the subject of identification and (ii) it was said that counsel who had appeared for one of the appellants at the trial had subsequently indicated, albeit other than by affidavit, that he had formed the view, at the time of the trial, that there had been a misdirection on identification. It is simply not enough of a complaint, as the law now stands, that the absence of a transcript of the summing-up leaves everyone in the dark as to what direction was given on any particular legal topic.

[32] Ground 1 accordingly fails.

Grounds 2 and 3

[33] Mr Banner informed the Court at the hearing that the appellant was abandoning the second and third grounds of appeal of which notice had originally been given and which had respectively read as follows:

> '(2) The [judge] erred when he allowed prejudicial evidence of no probative value to be before the jury.
>
> (3) The conviction is unsafe as the appellant was prejudiced and suffered a miscarriage of justice.'

Additional ground

[34] The appellant was at the same time granted leave to argue an additional ground of appeal, viz that the verdict returned by the jury was a nullity as it was not in compliance with section 21(2) of the Juries Act ('section 21(2)').

[35] Section 21(2) reads as follows:

> 'For the trial of the issue in every criminal cause in which the accused is arraigned for an offence not punishable with death, the jury shall consist of nine persons and that jury may, on or after the expiration of two hours from the time when it retired to consider its verdict, return a verdict whenever it is agreed in the proportion of eight to one or seven to two and that verdict when so delivered shall have the same effect as if the whole jury had concurred therein.'

[36] This is a ground wholly lacking in substance. As already adumbrated above, the transcript contained in, for want of a better word, the record in the present case is made up largely of the notes of the judge. That is clear from the certificate of the Court Stenographer Supervisor ('the stenographer') appearing on the unnumbered page immediately preceding page 1 of the transcript. Those notes appear to have been not only less than full but also in a state of some disarray when they reached the

stenographer. The lack of fullness is evidenced by, eg, the absence of any indication whether the verdict was unanimous or by majority. Evidence of the disarray is to be found at, eg, the top of the very page (page 9) where the return of the verdict of the jury is recorded. The first line on this page reads: 'Mr Welch addresses the jury.' But the next line begins not with something said by Mr Welch, defence counsel, but, rather, with a statement (repeated a few lines further down) that can only have been made by the judge himself, viz 'I will sum up tomorrow at 10.30 am.'

[37] With that consideration in mind, one comes to the recording of what occurred after the conclusion of the summing up at 12.05, obviously pm. The transcript reads:

> 'Jury retires at 12.05
>
> Retires at 1.54 p.m.'
>
> Verdict
>
> First Count - Guilty
>
> …' (underline added)

This extract strongly suggests that 'Retires' is in the transcript as the result of someone's error and that the word which was intended to be written there was 'returns'. Involved here is a single common sense assumption, viz that 'retires' was written instead of 'returns'. If the appellant's complaint is to be accepted as correct, however, two further assumptions of error must be made, viz, first, that there is an omission by someone, the judge or the stenographer, to state that the verdict was by majority and, secondly, that someone, the judge or the stenographer, omitted a reference to a return of the jury to the courtroom sometime between 12.05 pm and 1.54 pm. The majority does not consider that it should make those further assumptions of error. The appellant is, after all, a former member of a disciplined force. It is not unreasonable to expect that, as such, he would have been able to recall whether the jury in fact returned twice to the courtroom following their retirement at 12.05 pm and whether their verdict was by majority. If, in fact, the jury

so returned to the courtroom twice and the verdict was by majority, that should have been deposed to in an affidavit sworn to by the appellant and filed in this Court's registry for purposes of the instant appeal. Instead of doing that, the appellant has simply asked this Court to assume, in the absence of any evidence thereof, that the jury returned twice to the courtroom after 12.05 pm and that they returned a majority verdict. The majority of this Court is unable to accede to that request

Ground 4 – Sentence of eighty years is excessive

1. Submissions

[38] Mr Banner's sole submission with respect to this ground was that the judge was under a duty to take into consideration what was said in the skeleton argument for the appellant to be 'the excessiveness of the eighty years', the implication being that he did not discharge such a duty. Counsel placed reliance on what the majority (Awich and Blackman JJA) of this Court said at paras [86] to [89] of the judgment in *NLN v R*, Criminal Appeal No 3 of 2012 (judgment delivered on 18 March 2016). In essence, the majority of this Court held in the paragraphs in question that, despite the provisions of section 161 of the Indictable Procedure Act which allow a judge to order sentences to run consecutively in the circumstances there described, a judge is under a 'duty to review excessiveness of an aggregate of consecutive sentences' by virtue of 'the "totally (*sic*) principle"'. That principle, said the majority in *NLN*, was one 'preserved by statue (*sic*)' in England. In *NLN*, the majority, allowing the appeal against sentence in part, ordered that two minimum mandatory sentences of 12 years each which had been ordered by the sentencing judge below to run consecutively instead run concurrently but that a third sentence of two years' imprisonment run consecutively.

[39] Before this Court, the respondent conceded that the sentence imposed on the appellant by the judge was 'inappropriate' and commended a sentence such as that of 13 years' imprisonment which was substituted on appeal in *Thompson (Mark) v R*, Criminal Appeal No 18 of 2001 (judgment delivered on 28 June 2002). In that case, Mr Thompson was convicted of raping his god-daughter once.

[40] At the close of the oral argument on 9 June 2016, the Court invited further submissions from counsel on both sides on the relevance, if any, to this appeal against sentence of the provisions of section 160 of the Indictable Procedure Act and section 23(1)(c) of the Court of Appeal Act. Such submissions were filed in due course. For the reason which shall become clear as the Court, by majority, proceeds, it is not necessary to enter into their respective contents.

Discussion

[41] The majority of this Court is unable to accept the appellant's invitation to be guided by the decision of the majority in *NLN*. Briefly, the manifest difficulty with that decision is the absence of any explanation in the judgment for adopting the far-reaching position that the totality principle of sentencing is applicable in this jurisdiction. Apart from the fact that no local case law was referred to in support of the position in question, the majority simply observed at para [86] that this principle has been '**preserved** by statue (*sic*)' (original emphasis) in England. Its common law origin, implied in this quotation, was not identified, let alone expounded upon by the majority. Mr Banner, in the instant case, did not seek to fill the resulting gap.

[42] He might have, in this regard, at least directed attention to the subsequent decision of the Court (Awich, Blackman and Ducille JJA) in *Casimiro (Frederick) v R*, Criminal Appeal No 17 of 2011 (judgment delivered on 4 November 2016). (The majority of this Court must pause here to lament the fact that that judgment was not anonymised given the sexual nature of the crime involved and, even more seriously, the relationship between perpetrator and victim.) In that judgment, there is, again, no explanation for taking the position that the totality principle applies in Belize. But the Court went a little farther than it had gone in *NLN* by giving some consideration to section 151(1) of the Indictable Procedure Act (hereinafter 'section 151(1)') in the context of the discussion of this principle. It is also to be noted that, although the judgment, like the generality of unanimous judgments of this Court, was signed by all three members of the panel, at para [5] thereof, Awich JA wrote: 'It is also my view that s. 151 (1) permits the sentencing principle known as, "totality principle".' (underlines added). It is to be noted in respect of

this individualised view that to permit is, axiomatically, not the same as to create or give rise to. Put differently, this is not a view to the effect that section 151(1) creates or gives rise to a totality principle in Belize.

[43] Section 151(1) provides as follows:

> 'Where a person does several acts against or in respect of one person or thing, each of which is a crime, but all of which are done in execution of the same design, and in the opinion of the court before which a person is tried form one continuous transaction, that person may be punished for all the acts as one crime, or for any or several of those acts as one crime, and all the acts may be taken into consideration in awarding punishment, but he shall not be liable to separate punishments as for several crimes.'

It is plain from its judgment that the Court in *Casimiro* directed its collective mind to the consequent (as opposed to antecedent) requirement of section 151(1) that, in order that the offender may be punished thereunder as if he had committed, say, one single crime, the trial judge should have formed the opinion that his several acts formed 'one continuous transaction': see para [10] of the judgment, which, incidentally, is an almost verbatim reproduction of para [87] of the majority judgment in *NLN*. Finding that that requirement was satisfied, the Court proceeded to conclude that the way was clear for application of the totality principle. The principle was thus applied and the sentence of the court below materially varied to the advantage of the appellant.

[44] But it is equally plain that the Court in *Casimiro* did not address its collective mind to the antecedent requirement of section 151(1) that the offender's several acts should have been done in execution of one and the same 'design', a term not statutorily defined whose meaning, according to the Concise Oxford Dictionary of Current English 8th ed, is, bearing in mind the present context, 'plan'. And, as a matter of common sense, it does not follow that, because the acts in question formed one continuous transaction, they were also done in execution of a single design. That much is pellucid in a case such as

NLN, in which the panel member who did not participate in the judgment was Sosa P, also a member of the panel in the instant appeal. One may have no difficulty agreeing that the acts of sexual abuse perpetrated on the different dates in question there (in *NLN*) formed part of one transaction, as the majority found. But the evidence in that case was not such as to rule out the reasonable possibility that the several acts of sexual abuse played out other than in execution of one and the same design. In other words, who is there to say that before committing the first of these criminal acts the offender sat down and hatched a plan to subject his stepdaughter in question to repeated and frequent acts of carnal abuse over as long a period of time as possible? Is it not just as possible that there was no long term plan at all but that, instead, each act involved a surrender on the spur of the moment to a criminal urge presenting itself whenever the right opportunity arose?

[45] The impossibility of safely concluding that the fundamental requirement of section 151(1) that the offender's several acts should have been carried out in execution of a single plan is also a determining factor as regards application of the totality principle in the instant case. The reasoning deployed in the immediately preceding paragraph holds just as good in this case. On the evidence, the majority of the Court cannot properly conclude that the judge ought to have found that the various acts of the appellant in this case were all perpetrated in the execution of a single plan. For all one knows, each act may have been decided upon on the spur of the moment, without any advance planning at all. If, as the evidence indicates, the appellant was wont to apologise after each of his criminal acts, there is some basis for concluding that his next such act, if at all planned, was only subsequently planned. The majority of this Court cannot begin to be persuaded that section 151(1) applies in the present case.

[46] But that can hardly be an end of the matter, for the well-known provisions of section 7 of the Belize Constitution (hereinafter 'section 7') cry out for attention in any case involving a sentence under which a total of 80 years is required to be served. Those provisions are as follows:

'No person shall be subjected to torture or to inhuman or degrading treatment or other punishment.'

[47] In the relatively recent majority decision of this Court in *Bowen (Edwin) v PC 440 Ferguson (George)*, Criminal Appeal No 5 of 2015 (judgment delivered on 24 March 2017), Blackman JA, writing for the majority, accepted the argument of the appellant that a mandatory minimum sentence imposed under the Misuse of Drugs Act should be set aside as grossly disproportionate having regard to the provisions of section 7. This submission was urged upon the Court in substitution for an abandoned ground to the effect that the relevant mandatory sentence was unconstitutional. At para 12 of the judgment, Blackman JA, quoted paras 20 to 38 of the judgment of the Court of Appeal of the Commonwealth of the Bahamas in *Davis and Armbrister v Commissioner of Police* [2013] 1 LRC 213, in which the cases of *R v Smith (Edward Dewey)* [1988] LRC (Const) 361 at 378 and *Aubeeluck v The State* [2011] 1 LRC 627 are cited. Paras 28 and 29 of the judgment in *Davis* read as follows:

'28. The Privy Council [in *Aubeeluck*], after a review and discussion of the various provisions of Constitutions and Charters, affirmed the test for determining whether a minimum mandatory sentence amounts to inhuman or degrading punishment as that laid down by Lamer J in *R v Smith* (above), namely, that a sentence must not be grossly disproportionate to what the offender deserves.

29. When is a sentence grossly disproportionate such that it constitutes inhuman or degrading punishment? In *R v Fergusson* (above), Chief Justice McLachlin, at paragraph 14, adopted the statement in *R v Smith* (above) and said that for a sentence to be considered grossly disproportionate it must be more than excessive. She further commented: "the sentence must be so excessive as to outrage standards of decency" and disproportionate to such an extent that "Canadians would find the punishment abhorrent or intolerable".'

The majority of this Court considers that this test is passed in the present case not because a sentence of eight years' imprisonment in respect of a conviction on any one of the ten counts of the indictment is, taken by itself, so excessive as to outrage standards of decency and disproportionate to such an extent that Belizeans would find it abhorrent or intolerable but because all ten sentences, taken together as consecutive sentences, are both so excessive and so disproportionate. And they must be taken together as consecutive sentences because, for the reason already given above, section 151(1), with its closing words 'but he shall not be liable to separate punishments as for several crimes' (which in effect prevent a judge from ordering that relevant sentences run consecutively), has no application to the present case.

[48] Elsewhere in the lengthy passage quoted from the judgment in *Davis and Armbrister*, the question of the appropriate remedy for a successful appellant is addressed in the light of three main decisions viz *Smith*, cited above, *The State v Vries*, [1996] NAHC 53, in which *Smith* was followed by the High Court of Namibia, and *Aubeeluck*, in which *Vries* was cited with approval. In *Aubeeluck*, the Board said, at paras 36 to 37:

> '36. In the instant case, the DPP submitted that the Board should not strike down the statutory provisions which provided for a minimum period of penal servitude of three years. He accepted that, as explained in *Vries*, there may be cases in which it would be appropriate for the Supreme Court or the Board to declare that a provision was of no force or effect for all purposes or to declare it to be of force and effect in particular classes of case and to read it down accordingly. However, he submitted that neither approach would be appropriate here. He submitted that, if the Board concluded that the minimum sentence was grossly disproportionate on the facts of this case, the appropriate course would simply be to hold that such a sentence was not (or would not now be) compatible with section 7 of the Constitution, to quash the sentence and to remit it to the Supreme court for consideration of an appropriate sentence in all the circumstances of the case.

37. The Board accepts those submissions. The first course would plainly be inappropriate. There is a case for taking the second course. However, the Board has concluded that much the best course is the third …'

In *Bowen*, the majority took the view that the proper course, given the particular circumstances of that case, was to quash the sentence but itself to substitute a new sentence. The majority of this Court would adopt a similar course in the present case not least because of the inordinate amount of time that has elapsed since the filing by the appellant of his purported notice of appeal against sentence. Remitting to the court below, in the middle of the ongoing COVID – 19 pandemic which has significantly slowed down everything, is far from attractive in these circumstances. Moreover, it was not a course urged on this Court by the appellant at the hearing, when there was no pandemic and the delay concomitant on any remittal would not have loomed large.

[49] At para 38, the Privy Council decided the issue of proportionality in the circumstances of that case as follows:

'The Board has concluded that a sentence of three years imprisonment would be wholly disproportionate to the offences committed by the appellant. Although convicted as a drug trafficker, he was dealing in a small way in small quantities of gandia (ie cannabis). He was a person of good character and it is noteworthy that he would not now be charged as a trafficker under the DDA 2000. Having full regard to the fact that the legislature regarded trafficking in drugs, including gandia, as a serious matter, the Board has nevertheless concluded that to disregard all mitigation, including the fact that these were first offences by the appellant, and to impose a minimum sentence of 3 years would be grossly disproportionate.'

[50] In the instant case, it is clear that the appellant insisted to the bitter end that he was innocent and had been wrongly convicted, thus concentrating on the issue of guilt when the time had come to focus attention on mitigation of sentence. Moreover, apart from urging nothing upon the judge by way of mitigation, he said to the judge that he

would accept whatever sentence was imposed on him. He did admittedly call one Mr Guzman to speak to his character; but, while this witness was prepared unabashedly to commend him to the judge as 'a good father', such an endorsement can only have come across as facetious. And though it is also the case that the appellant had no previous convictions, the probability, in the view of the majority of this Court, is that this was not lost upon the very experienced judge, who, let it not be forgotten, imposed the mandatory minimum sentence for each count. As already indicated above, this is not a case in which the majority of this Court is prepared to say that such a sentence was excessive for a conviction on any of the ten counts, taken individually. It is only the inevitability of the order that they should be served as consecutive terms that compels the reduction of each of them under the principle of proportionality in order that the total number of years to be served should not be such as to outrage standards of decency for its excessiveness and strike Belizeans as abhorrent or intolerable for its disproportionality.

[51] The majority has given due consideration to the sentence of 13 years' imprisonment substituted for that passed by the court below in *Thompson*. It considers that a sentence of equal length in this case would send the wrong message to any man out there contemplating the commission of the crime of rape on his own daughter.

[52] In all the circumstances, this Court, by majority, has come to the conclusion that the appeal against sentence should be allowed to the following extent, viz: that each of the ten sentences of eight years' imprisonment should be set aside except as to date of commencement; that a sentence of one year and six months should be substituted for each such sentence; and that all ten sentences should run consecutively. This adds up to a total of 15 years' imprisonment. There is no reason to disturb the date of commencement fixed by the judge, ie 11 April 2011. Mr Banner did not ask the Court to take into account any time spent by the appellant on remand in custody pending trial; and it is taken for granted that he was free on bail throughout. As was foretokened by paras **[32]** and **[36]**, above, the appeal against conviction is dismissed.

[53] The principle of proportionality having unlocked the door to the proper determination of the instant appeal against sentence, the Court, by majority, considers that there is no need to discuss in the present judgment the further submissions of counsel adverted to at para **[40]**, above, for the provision of which it nevertheless records its gratitude.

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SIR MANUEL SOSA P

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HAFIZ BERTRAM JA