COURT OF APPEAL OF BELIZE AD 2021

CRIMINAL APPEAL NO 10 OF 2015

ALEX GUZMAN **Appellant**

V

THE QUEEN **Respondent**

BEFORE

The Hon. Mr. Justice Samuel L. Awich	Justice of Appeal
The Hon. Madam Justice Minnet Hafiz	Justice of Appeal
The Hon Mr. Justice Murrio Ducille	Justice of Appeal

L. Banner for the appellant.
C. Ramirez, Senior Crown Counsel, for the respondent.

15 March 2016 and 26 May 2021

AWICH JA

[1] At the end of hearing this appeal the Court indicated that, it was dismissed. It ordered that the appellant, Alex Guzman, be returned to prison. This is the judgment in his appeal against the conviction in the Supreme Court, on 6 July 2015, on **a charge of carnal knowledge of a female child contrary to s.47(1) of the Criminal Code, Chapter 101, Laws of Belize.** The particulars were that: "Alex Guzman on 5 August 2010, at Dump Area, Toledo District in the Southern District of the

Supreme Court, carnally knew A.S., a female child under the age of 14 years of age, to wit, 10 years of age."

[2] Alex Guzman was tried in the Supreme Court at Dangriga from 30 June 2015 to 6 July 2015, on indictment, before a judge, D. Hanomansingh J. and a jury. The jury having convicted the appellant, the learned judge sentenced the appellant to, "seven years imprisonment." The judge stated that, he credited the appellant with the time he had been held in custody on remand pending trial, which together with the seven years added to the mandatory minimum sentence of twelve years imprisonment for the offence of carnal knowledge of a female child, contrary to s.47 (1) of the Criminal Code.

[3] The appellant did not expressly appeal against the sentence imposed. If however, he succeeded in his appeal against conviction, the sentence would have been quashed as a matter of course.

The Facts.

[4] The evidence on which the appellant was convicted was this. In 2010, the appellant lived with B as common law husband and wife, at Dump Area, Toledo District. They lived with their children; some of them were children of B alone. Her children alone included E.F.S. aged 13 years in 2010; A.S. the virtual complaint, aged ten years in August 2010, she was born on 2 October 1999; and G.B. aged eight

years in 2010. The children of the appellant with B together included M.G. aged seven years in 2010, and A.G. aged three years in 2010.

[5] On 5 August 2010, the appellant requested B to allow E.F.S., A.S. and M.G. to go with him to the bush to gather "cohune leaves" for thatching a roof on their house. B allowed the children to go. The appellant and the three children went into the bush, a distance of about twenty minutes walk. At a particular point the appellant instructed E.F.S. and M.G. to remain there while he and A.S. would proceed further. A.S. did not want to proceed with the appellant. He held A.S.'s hand and helped her walk along with him.

[6] Once away from and out of sight of E.F.S. and M.G., the appellant stopped and asked A.S. to lie down. She refused. He held her by the neck and choked and punched her several times in the eyes and pushed her onto the ground. Then he removed her pants and pantie, and laid on her, inserted his penis into her vagina and had sexual intercourse with her, "for a long time and finished". At one point she was "knocked out". He got up and left her at the spot. She got up, wore her pantie and pants back on. She stated, "I felt something flow down between my thighs."

[7] At this point A.S.'s eyes were swollen, she could not see well. She shouted out in order to locate E.F.S. and M.G. She walked on and reached them. They walked back home.

[8] At home their mother, B, noticed that A.S.'s eyes were swollen. The mother asked her, what had happened to her. A.S. answered that, the appellant had beaten her. The mother massaged the eyes with ice and bathed her.

[9] On 10 August 2010, when A.S. was sitting outside the house, she bled from her vagina. Her mother noticed that, A.S. was sitting "in a pool of blood." The mother called her own mother to come over. A.S.'s mother asked A.S. what had happened to her. A.S. answered that, Alex had raped her. They took A.S. to Punta Gorda Hospital. A.S. explained in court that, she did not tell the mother on the 5 August 2010, that Alex Guzman had raped her because he had threatened that he would kill her if she ever told her mother.

[10] At the hospital Dr. Oyetola cleaned A.S.'s vagina and stitched a tear from the vagina to the anus. He made nine stitches. He ordered her admitted as an in-patient. The doctor prepared a report and gave it to Cpl. Santos. She tendered it as an exhibit at the trial. Dr. Oyetola had left Belize. Cpl. Santos arrested the appellant on a warrant of arrest. The appellant was charged with the offense of carnal knowledge of a female child under **s.47 (1) of the Criminal Code**.

[11] The above evidence was, of course, for the prosecution. At the close of the Prosecution's case, the trial judge explained to the appellant the three options opened to him in the proceedings at that stage. The appellant simply said: "I just want to say I am not guilty." The judge explained that, he could stand there and state so to

the jury. The appellant then again stated: "I just want to say I am not guilty." The judge asked if he would call any witness. He answered, "no." The judge further said, "All right, is there anything you want to tell the jurors, or you will just leave it at that?" The accused answered, "I shall leave it like that."

The Grounds of Appeal and submissions.

(i) The grounds of appeal

[12] The appellant, represented by learned counsel Mr. L. Banner, filed eleven grounds of appeal. At the hearing of the appeal however, Mr. Banner withdrew four of the grounds, and successfully applied for amendment and introduced one new ground. The final grounds of appeal were the following:

> **"GROUNDS OF APPEAL**
>
> **…**
>
> 2. The Learned Trial Judge erred and was wrong in law when he failed to assist the unrepresented Appellant in the presentation of his defence.
> 3. The Learned Trial Judge erred in law when he allowed highly prejudicial hearsay evidence to be adduced from [B], [E.F.S.] and Nora Santos Parham.

…

8. The Learned Trial Judge did not adequately direct the jury in his summation on the reason why they should approach the Virtual Complainant's evidence with caution.

9. The Learned Trial Judge failed to direct the jury on the weight to be attached to the unsworn and untested statement of Dr. Oyetola.

10. The learned Trial Judge erred in law when he accepted a guilty verdict from the jury without first inquiring from them whether it was a unanimous verdict or a majority verdict, and if so, in what proportions.

11. The trial of the Appellant when taken as a whole was an unfair one.

12. Added by amendment: "The learned Trial Judge erred when in his summation he directed the jury that the verdict must be guilty- pages 137 to 142."

(ii) submissions for the appellant.

[13] Learned counsel Mr. Banner made detailed submissions on each ground. About the ground that, the judge erred in that he did not assist the unrepresented accused in presenting his defence, counsel submitted first that, the judge, "should have elicited from the [accused] in the absence of the jurors, before any evidence was marshalled, what was his defence", and then proceeded to, "assist the [accused] in formulating the questions he desired to be put to the different witnesses for the prosecution." Mr. Banner cited in support, **Jose Ochoa v The Queen, Criminal Appeal No. 1 of 2007 (Belize)** and **R v Brown (Milton) [1998] Cr. App. R. 364**.

[14] Secondly, counsel submitted that, "the trial judge should have explained to the accused in simple language that, he had the right to address the jury after the close of the case for the defence. Further, the judge should have explained to the accused that, "there was nothing that the jury could rely on as contradicting the evidence that was before the court." Counsel relied on **Saturino Pop v The Queen Criminal Appeal No.9 of 2014**.

[15] Regarding the ground of appeal that, the judge erred in that he admitted into evidence inadmissible hearsay, Mr. Banner submitted that, it was an error that the judge admitted A.S.'s statement made to her mother on 10 August 2010 that, her dad had sex with her in the bush. It was not a statement of a recent complaint, and it was highly prejudicial, counsel argued. He also submitted that, the testimony of E.F.S.

was hearsay to the extent that he did not hear A.S. scream and did not see her eyes. Counsel relied on **Isaac Chan v The Queen, Criminal Appeal No. 12 of 2012**.

[16] In connection to the above submissions, counsel submitted that, the judge was required to direct the jury that, they needed to treat the testimony of A.S., the virtual complaint, with caution; the judge failed to do so.

[17] Mr. Banner also submitted that, the testimony of Corporal Nora Santos Parham about the medical report supposedly signed by Dr. Oyetola was hearsay, Cpl. Santos Parham was not present when Dr. Oyetola signed the report. The report was inadmissible in evidence, counsel submitted.

[18] In addition to the submission that, the medical report prepared by Dr. Oyetola was a hearsay, counsel submitted that, the trial judge did not direct the jury on, "how they should treat Dr. Oyetola's unsworn and untested statement", admitted as exhibit. Counsel submitted on that, the judge should have followed the guidelines given in **Grant v R [2007] 1A.C.1 at paragraph 21**, and in **Emmerson Eagan v The Queen, Criminal Appeal No. 10 of 2012 (Belize).**

[19] Counsel further contended to us that, the judge accepted the verdict of guilty from the jury without ascertaining whether the verdict was unanimous or by majority, and if by majority, the ratio thereof. That was partly a factual point, however, counsel did not file an affidavit to support the factual part of the contention.

[20] Regarding the ground added by amendment that: "The learned judge erred by directing the jury that the verdict must be guilty", counsel read lines 20 to 24 on page 137, and lines 21 to 25 on page 142 to illustrate his complaint.

[21] Mr. Banner summed up his submissions by stating that, the trial of the appellant, taken as a whole, was an unfair trial.

(iii) *The submissions for the respondent.*

[22] Learned Senior Crown Counsel Mr. Ramirez opposed the appeal. He submitted that, overall, the trial of Alex Guzman was a fair trial, and that the learned trial judge did not err on all the points raised by counsel for the appellant.

[23] First, Mr. Ramirez applied for leave to file an affidavit from the court marshall present and attending to the trial, Mr. Glen Banner, in which he deposed that, he put the three necessary questions to the jury before they returned their verdict of guilty. He stated the answers given by the foreman of the jury. Counsel Banner did not oppose the application for admitting the new affidavit evidence. He was not counsel at the trial in the Supreme Court. This Court granted leave, and admitted the affidavit of marshall Glen Banner as new evidence. The marshall's affidavit contradicted the contention of fact made by counsel Banner.

[24] Mr. Ramirez proceeded to submit that, the trial judge did assist the unrepresented accused all through the trial; he inquired at the end of the testimony

of each witness whether the accused had questions to put to the witness; each time the accused said that, he had no questions to ask. So, the judge could not say anything, counsel argued. He submitted further that, in **Ochoa v The Queen**, this Court directed that, the trial judge should assist an unrepresented accused in putting his questions to prosecution witnesses, however, in this case the accused did not have any questions to be assisted with in putting to the witnesses.

[25] Counsel refuted the ground that, at the close of the case for the defence the judge did not tell the accused that, he had the right to address the jury. Counsel pointed to page 131 of the record. He said, that was also one of the ways in which the judge assisted the unrepresented accused.

[26] Regarding prejudicial hearsay statements. Mr. Ramirez submitted that **s.96 (1) of Evidence Act, Cap. 95 Laws of Belize,** authorizes admission of hearsay from a person to whom a recent complaint in a sexual offence was made, as evidence. He submitted further that, in this appeal case, the complaint made to the mother after only five days was a recent complaint and admissible as evidence. Counsel also submitted that, the judge adequately directed the jury on that evidence.

Determination

[27] We commence our determination with examining the submissions that raised questions of mixed law and fact. We bear in mind that, the general rule is that, the

function of an appellate court is to correct errors that may have been made in the court or tribunal below, and that, an appellate court carries out this function largely by review, rather than by rehearing the case and making original findings of fact of its own. An appellate court must bear in mind that, the trial judge or arbiter will have seen the witnesses and heard them testify so, the trial judge or arbiter was better placed to assess the intelligence and demeanour of the witnesses, and therefore the credibility of the witnesses.

[28] The first submission that raised a question of mixed law and fact was that, the judge erred in admitting as evidence the report prepared by Dr. Oyetola because it was a hearsay. Out of that contention of law, a question of fact arises, whether Cpl. Nora Santos (who became Cpl. Nora Santos- Parham upon marrying) was present when Dr. Oyetola signed the medical report of the examination and treatment that he had carried out on A.S. on 10 August 2010.

[29] We note that, counsel Banner did not represent the accused at the trial in the Supreme Court**,** and therefore relied on the official record of the appeal. We have perused the record and concluded that, Mr. Banner was mistaken. He mixed up the testimony of Cpl. Pietra Avila and the testimony of Cpl. Nora Santos-Parham. On 10 August 2010, Cpl. Avila received a telephone call from a nurse at Punta Gorda Hospital. Cpl. Avila asked Cpl. Santos-Parham to go with her to the hospital. There both Women Corporals spoke to Dr. Oyetola. He had A.S. on the doctor's

examination bed. Both corporals saw A.S. Cpl. Avila then left Cpl. Santos-Parham, "to deal with it." This part of the testimony of Cpl. Avila is recorded on pages 80 to 83 of the record.

[30] The relevant testimony of Cpl. Santos-Parham was recorded on pages 119 to 129. She went with Cpl. Avila to the hospital. The two met and spoke with Dr. Oyetola. Cpl. Santos-Parham obtained the identity of A.S. who was on the examination bed. She had injuries in the eyes and was bleeding from the vagina. Cpl. Santos-Parham interviewed her. Cpl. Santos-Parham also obtained the identity of the mother of A.S. who was present, and obtained her signature for consenting to what the doctor would do in attending to A.S. Cpl. Santos-Parham stayed on and saw Dr. Oyetola carry out his work. She filled in a medical report form with the particulars of the police investigation and gave the form to Dr. Oyetola to write his report on. He wrote his report on the form and signed it in the presence of Cpl. Santos-Parham. So, the testimony of Cpl. Santos-Parham about what Dr. Oyetola did was not a hearsay. One might argue that, the medical report form that the doctor wrote on and signed, and which Cpl. Santos-Parham tendered to the court as exhibit was or was not a hearsay. The answer is that, it was properly admitted by the judge as evidence and exhibit by the authority of **s.105(1) of Evidence Act, Cap 95 Laws of Belize**.

[31] That leads us to the question of law, whether the trial judge was required to, and directed the jury on the medical report which was said to be an unsworn statement of Dr. Oyetola, and was untested by cross-examination. We accept the submission by Mr. Banner that, generally a trial judge is required to direct the jury that, an unsworn statement admitted as evidence has not been verified by oath and the maker has not been tested by cross-examination, and to point out the risk in relying on such a statement. The judge should direct the jury to scrutinize what is said and presented in the unsworn statement with special care. The two cases, **Emmerson Eagan v The Queen**, and **Steven Grant v R**, make that point. It must be noted however that, it does not necessarily follow in every case that, failure to give these directions will render the trial unfair and the appeal will succeed- see paragraph 22 in the **Steven Grant v R** case.

[32] We note that, the two cases, **Emmerson Eagan v The Queen (Belize Court of Appeal)**, and **Steven Grant v R (Privy Council)** concerned unsworn statements of ordinary witnesses, and not unsworn medical report made by a doctor, or any other unsworn report made by any other expert. So, the two cases are not direct guidance for the present appeal case. No case where a trial judge failed to give direction on a medical report tendered to the court by a witness who did not prepare the report was cited to us.

[33] We point out that, a statement is admissible under **s. 105 (1)** of **Evidence Act, Cap 95,** if it is made by a person who, among other conditions, "is outside Belize", at the time of the court trial, and the statement, "contains a declaration… signed by the maker before a magistrate or a justice of the peace…"-see **s.105(3)**. Some ranks of police officers are *ex officio* justices of the peace. It would be factually erroneous for a trial judge to assume and direct the jury, as a matter of course, that a statement such as a medical report signed in the presence of a police officer and admitted as evidence under **s. 105(1)** of **Evidence Act** is an unsworn statement, without having ascertained that fact.

[34] It would have been a brilliant thing if, the trial judge directed the jury that, Dr. Oyetola who made the medical report was not available for cross-examination and so the report was not tested by cross-examination. We concluded that, absence of that brilliant direction could not, in all the circumstances of this case, particularly the other very strong evidence, cause the conviction by the jury to be set aside on the ground of a wrong decision of a question of law, or on the ground that a miscarriage of justice was occasioned. -see **Freemantle v R [1994] 1WLR 1347**.

[35] It is appropriate to mention here that, **s.85 of Evidence Act** directs that: "in estimating the weight to be attached to a statement rendered admissible as evidence by virtue of this Part, regard shall be had to all the circumstances from which any

inference may reasonably be drawn as to the accuracy or otherwise of the statement …" It is advisable to include this or words to that effect in a direction to the jury.

[36] The second submission in which questions of law and fact were raised was that, the trial judge did not, at the close of defence case, explain to the accused that, "he can give a closing speech to the jury." Counsel submitted that, it was not enough for the judge to state: "All right, is there anything you want to tell the jurors, or you will just leave it at that?" The question of law implied there was whether that "failure" was an irregularity, an error of law, or occasioned a miscarriage of justice, so that the appeal should succeed.

[37] As a question of fact, the short sentence quoted by Mr. Banner presents a misleading meaning to the entire passage from which the sentence was taken. The communication by the judge to the accused starts at the top of page 130. The judge first set out, without any error, the options open to the accused at that stage of the trial. He then asked the accused, "which one of the three do you wish to do?" The accused answered: "I just want to say I am not guilty." Then this passage followed**:**

"THE COURT: You'll stand there and say you're not guilty, o.k.?

Do you have any witness you want to call?

ACCUSED: No.

THE COURT: So that means he closes his case. …2:08 you wouldn't address the jury

THE PROSECUTION: Yes, My Lord, that is the practice once the person is not represented.

THE COURT: All right, is there anything you want to tell the jurors or you'll just leave it at that?

ACCUSED: I'll leave it like that.

…"

[38] Interpreting the above objectively, we concluded that, the accused was left in no doubt that, the judge invited him at the close of his case, to address the jury beyond simply stating: "I just want to say I am not guilty." The contention by Mr. Banner was factually incorrect. Any consequence, as a matter of law, from a failure by the judge to inform the accused did not arise.

[39] We would like to mention, however, that as a matter of law, the judge in this case was not required to inform the accused at that stage that, he was entitled to address the jury. The relevant law is **s.106** of the **Indictable Procedure Act, Cap 96, Laws of Belize**. It states:

> The accused person or his counsel shall be allowed, if he thinks fit, to open his case and, after the conclusion of the opening, the accused person or his counsel shall be entitled to adduce evidence in support of the defence **and, when evidence is concluded, to sum up the evidence**.

The accused in this case declined to adduce evidence. There is no requirement to call on an accused who has not adduced evidence to address the court.

[40] The third submission which raised a question of mixed law and fact was that, the trial judge erred in that he accepted the verdict of guilty returned by the jury, without ascertaining whether the verdict was unanimous or by majority, and if by majority, the ratio thereof. The marshall, Mr. Glen Banner, who attended to the trial swore an affidavit on behalf of the respondent, which affidavit this Court admitted as new evidence. The appellant did not support his allegation with an affidavit. The affidavit of Mr. Glen Banner stated as follows:

> "AFFIDAVIT
>
> I, GLEN BANNER, c/o Supreme Court Registry, Belize City, a Marshall of the Supreme Court MAKE OATH AND SAY as follows:

1. That I was the presiding Marshall at the trial of Alex Guzman which was held at the Session of the Supreme Court in Dangriga Town from the 30th June to 6th July, 2015.

2. That the case was presided over by Mr. Justice D. Hanomansingh and a jury.

3. That on the 6th July, 2016 after the learned trial judge summed up the case the jury deliberated from 10:58am to 12:07pm.

4. That I then on the instruction of the learned trial Judge proceeded to take the verdict, and in answer to my question "is your verdict unanimous?" the Foreman of the jury replied "yes".

5. That in answer to my question "is the verdict of all of eight of you?" the Foreman answered "Yes".

6. That the Foreman thereafter answered that the prisoner is guilty.

SWORN by me Glen Banner at Belize City,

This 15th day of March, 2016,

Before me,

Julie T. Staine

_____

Commissioner of the Supreme Court

[41] We accept the contents of the affidavit of marshall, Mr. Glen Banner, and reject the allegation of fact made by counsel Mr. L. Banner on behalf of the appellant. Accordingly, the question of law, as to whether an error of law was made by the judge in receiving and accepting the verdict of the jury, which error would nullify the verdict, did not arise.

[42] The remaining submissions were about the grounds of appeal that raised straight questions of law. The first question of law was raised in ground of appeal No. 3. It was whether the judge erred by admitting items of "hearsay" as evidence from B, the mother, E.F.S., the brother, and Cpl. Santos- Parham. If the judge erred, the appeal should succeed as a consequence of the error of law. We have already decided that, the testimony of Cpl. Santos- Parham did not contain hearsay, we rejected submissions to the contrary and gave the reasons.

[43] Regarding the statement of A.S. to her mother B, on 10 August 2010 that, "my dad had sex with me in the bush," or that, "Alexander raped me," we concluded that, the statement qualified under **s. 96** of **Evidence Act** as a complaint made soon after

the commission of the sexual offence, the so called, "recent complaint". It is really a "soon after complaint." The statement was admitted to show any consistency of the conduct of A.S. and to support her credibility. The judge did not err in law; the appeal cannot be allowed on this ground. **Section 96** states as follows:

> 96 (1) The particulars and details of a complaint made soon after the commission of an alleged offence in the absence of the accused person by the person in respect of whom the crime is alleged to have been committed, may be admitted in evidence in the prosecution for rape, indecent assault, other offences against women and boys and offences of indecency between male persons.
>
> (2) Such particulars and details are not to be taken in proof of the facts in issue, but merely as showing consistency of the conduct of the person complaining and supporting his credibility.

[44] Regarding the testimony of E.F.S., there was simply not a single hearsay in it. He never testified about anything he was told by or heard from A.S. or anybody else. Although he said that his mother told him what had caused the injury to A.S.'s eyes, he was not asked to repeat in court, what the mother had told him. Moreover, his testimony never implicated the accused in any crime. Again, the judge did not err

in admitting the testimony of E.F.S. as evidence. The appeal cannot succeed on this sub-ground of appeal.

[45] The question in ground of appeal No. 8 was whether the judge did not adequately direct the jury about the reason for approaching the evidence given by the complainant with caution. The judge's direction to the jury on this point is recorded on page 139 and over on page 140. This is what the judge stated to the jury:

> "In this case the only evidence of any carnal knowledge **[having] taken place on the 5th of August, 2010, is that of the alleged victim A.S. that, being so, I am going to advise you to approach her evidence with caution before accepting it, and added to that is the fact that she is a child; for we all know that children love to fantasize and to exaggerate and to make up stories, and to make believe that stories are real**. In this case, the accused in his defence said he is not guilty. So please look carefully at A.S.'s evidence as hers is the only evidence we have for intercourse taking place on the 5th August, 2010, as such I am asking you to look at all the surrounding circumstances to see if they support A.S.'s story before acting on it.

> Now do not get me wrong, there is no need for there to be corroboration of A.S.'s evidence. **All I am saying is that, as you have only her word, then you should carefully scrutinize her evidence**, and if it seems to you that she is telling the truth, then by all means go ahead accept it, and act on it.
>
> Looking at the surrounding circumstances, we can say that from her birth certificate, that is an exhibit in this matter which you can take into the room with you, that A.S. is a female and she was ten years old on the 5th of August 2010. There is also the medico-legal form that was tendered by Cpl. Santos-Parham; this also you can take into the room with you as exhibit. This bears out her story with the injuries around her eyes that she was punched. An inference could be drawn that they were as a result of the punching that she said the accused administered to her on 5th August…."

[46] In the above portion of the summation by the judge, he gave two reasons for the jury to exercise special caution when considering the evidence given by A.S. The first was that, A.S. was the victim, and her evidence about the sexual intercourse stood alone, it was the only evidence. The second reason was that, she was a child, and that children fantasise, exaggerate and make up stories. We consider these to be

adequate and proper reasons. We also consider that, the direction about the circumstances to be taken into account is a very good direction. Ground of appeal No. 8 fails.

[47] The question in ground of appeal No. 12, added by amendment was that, the judge erred by simply directing the jury that the verdict must be guilty. The passage on which the complaint is based was given as from page 137 to page 142.

[48] The complaint is based on a general impression that counsel got from that part of the summation by the judge, not on a particular direct sentence. We indeed perused that part of the summation with a view to verifying the complaint by counsel. We concluded that objectively, the jury could not have understood from that part

of the summation, indeed from any part, that the judge was instructing them to simply convict the accused.

[49] We derived our conclusion from part of the summation by the trial judge recorded on pages 140 to 143 of the record. We reproduce it here and indicate in bold letters the significant sentences as follows:

> "There is no evidence of any bleeding on the fifth, sixth, seventh, eighth or ninth of August, could this type of injury have been there for five days without bleeding. What caused it to suddenly start bleeding on the tenth? Is it possible for A. S. to have bowel

motions and cleaned herself. With that open wound there for the five days, the doctor said the vaginal examination revealed a deep tear extended from the vagina mucosa to the anus. **Did A.S. receive this injury on the tenth and was afraid to disclose to her mother how and at whose hands she got it, and so used the assault by the accused on the fifth and added in this carnal knowledge to the scenario to protect the real perpetrator?**

Please bear in mind that if you accept the evidence of the physical punching on A.S. by the accused; that is, the choking and cuffing her in her eyes, that in no way is proof of the offence of carnal knowledge of a female child which is what he is charged for. The medical evidence supports the punching, but that by no means establishes the carnal knowledge. There must be penetration; even the slightest will satisfy this requirement.

Another aspect of this case that I think you should bear in mind is that A.S. complained about the choking and the punching on her eyes to her mother on the fifth, if there was carnal knowledge would you not expect her to complain about the more serious aspect of her confrontation with the

accused, especially the way she pointed to the accused and her tone of voice when she gave that bit of evidence in this court before you. There was no complaint on the sixth, or seventh, eighth, or the ninth. You have some female amongst you on this panel, I do not know if any of them have give birth. If so, they would know how that area feels when it is torn during the delivery of a child.

In this case the tear extended all the way to the anus, **so use your own life experience to judge whether A.S.'s story that she got that injury at the hands of the accused on the fifth. If you do not believe that or are in doubt then it means that you are not accepting her story or you are in doubt that the accused had penetrated A.S.; and as such, you will have to find him not guilty. It is a question for you to decide on whether you believe A.S.'s evidence of the fact that accused carnally knew her on the 5th of August, 2010, and she received that injury at the time and it started bleeding five days after. If you believe it so that you feel sure, then you have to find the accused guilty. If on the other hand you are not sure or you are in doubt then you have to find him not guilty**. When asked to

lead a defence, the accused chose the second option and said he is not guilty; that is, he is denying the allegation by A.S. **If you do not believe him, the only way you can convict him is if you are satisfied so that you feel sure of his guilt from the evidence led by the prosecution**.

There is no obligation cast on the accused to account to you for how A.S. got the injury to her genital area. **It is up to you ladies and gentlemen to look at the evidence and decide which you accept and which you reject and then using the evidence that you accept come to a decision regarding the guilt or innocence of the accused**.

Now, ladies and gentlemen, as I told you, you can take those exhibits into your jury room during your deliberation. I am going to ask you to retire and consider your verdict. If you are coming back with a verdict in less than two hours it has to be unanimous; that means, all eight of you have to agree. **Doesn't matter whether it is guilty or not guilty that's your opinion but it has to be unanimous**. But you can after two hours of deliberation come back with a majority verdict…

143”

[50] The question in ground of appeal No. 4 was, whether the trial judge was required, as a matter of law, to assist the accused who was not represented by an attorney, in presenting his defence, and if the judge was required, did he err in that he did not assist the accused? This is an area of law which developed comparatively recently, and continues to develop. It is derived from the common law principle of the right to a fair trial. In Belize, the right to a fair trial is now recognized **by s.3 of the Constitution, Cap. 4, Laws of Belize**, as a fundamental constitutional right, and protected by **s.20**- compare the Privy Council case, **Allie Mohammed v The State [1992] 2 A.C 111**.

[51] The submissions by Mr. Banner about ground No.4 were these. 1. The judge did not assist the accused in the cross-examination of witnesses, the judge simply asked of the accused at the end of examination in chief: “Do you wish to ask any questions?” 2. The judge did not elicit from the accused in the absence of the jury, what his defence would be. 3. The judge did not explain adequately to the accused that, he could give a closing speech to the jury. 4. The judge did not explain to the accused that, “there was nothing that the jury could rely on, anything [that could] contradict the evidence that was before the court.”

[52] We concluded that, in the circumstances, the judge did not fail to assist the accused in understanding the case against him, in understanding his right in the trial and in understanding each opportunity to present his defence, if any. By all that, the judge conducted a fair trial of the accused.

[53] The law as stated in **Jose Ochoa v The Queen** is that: "**the duty of a trial judge where an accused is unrepresented is to assist him to ensure that the jury understands the defence being put forward**." This does not mean that, the judge has to come up with the defence in the first place; that is for the accused, if he chooses to do. The judge, "**is not to act as defence counsel**"- see **Jose Ochoa v The Queen**.

[54] Regarding the submission that, at the end of each examination in chief the judge did not assist by putting questions to the witnesses in cross examination, our decision is that, the judge had no duty to originate questions in cross-examination, it is for the accused, if he chooses, to put forward the original question, which the judge may assist him with in putting it in a way that conveys his defence- see **R v Brown (Miller)**.

[55] Regarding the submission that, the judge did not elicit from the accused, in the absence of the jury, what his defence would be, we would like to observe that, it is a fine line between merely assisting the accused in order to ensure a fair trial, and

acting as a defence counsel. A judge is an umpire, he must be careful not to descend onto the arena. How far a judge can assist an accused depends on the particular circumstances in the proceedings. In this case, the accused did not intimate at all, what his defence might be. The judge would be crossing the line by initiating a defence for the accused. The trial judge in this case did not err.

[56] We also concluded that, given that the accused preferred to remain silent about any defence, the trial judge, if he initiated questions and possible defence, would have been exerting undue pressure to get the accused to abandon his right to silence. That would be improper. The judge did not err in not pointing out to the accused that the evidence for the prosecution remain uncontradicted.

[57] We have already dealt with the allegation that, the judge did not explain adequately to the accused that he could give a closing speech to the jury. The accused had no right to do so because he did not adduce evidence.

[58] It was for these reasons that this Court dismissed the appeal and confirmed the conviction and sentence.

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AWICH JA

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HAFIZ BERTRAM JA

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DUCILLE JA