IN THE SENIOR COURTS OF BELIZE

CENTRAL SESSION-BELIZE DISTRICT

IN THE HIGH COURT OF JUSTICE

INFERIOR APPEAL (CRIMINAL) NO.: IC20230014

BETWEEN

DAGOBERTO GARCIA

Appellant

and

LYNETTE ORDONEZ, P.C. 1930

Respondent

Appearances:

Mr. Hubert Elrington S.C. and Mr. Orson J. Elrington for the Appellant.

Mr. Glenfield Dennison, Crown Counsel, for the Respondent.

2023: October 17th

December 15th.

JUDGMENT

INFERIOR APPEAL-CHILD OF TENDER YEARS- UNDERSTANDING THE NATURE OF THE OATH- DOCK IDENTIFICATION- QUALITY OF IDENTIFICATION EVIDENCE- STANDARD OF APPELLATE REVIEW- SENTENCING METHODOLOGY

[1] **PILGRIM J**.: Dagoberto Garcia ("the appellant") was convicted on 23rd March 2023 of two charges of sexual assault, contrary to section 45A(1)(a)(ii) of the **Criminal Code**[1] ("the Code") before the Learned Magistrate ("TLM") sitting in the Toledo District and sentenced to 78 weeks imprisonment. He has appealed both convictions to this Court, pursuant to section 112 of the **Senior Courts Act, 2022** ("the SCA"). The Appellant has also appealed the sentence.

[2] The evidence in brief outline is that the appellant kissed S, a child then 9 years old, on her lips and bit her on the ear whilst at his shop on 17th June 2022. The evidence demonstrated that both touchings were sexual in nature. The case against the appellant was based solely on S's oral testimony.

[3] The appellant challenges his conviction on the following grounds, as the Court best understands them and re-formulated to properly reflect the permissible exclusive statutory grounds of appeal at section 116 of the SCA[2]:

i. Inadmissible evidence was wrongly admitted and there was not sufficient evidence to sustain the decision[3]: The enquiry into the propriety of taking S's evidence on oath, as S was a 10-year-old child by time of trial, was deficient and therefore TLM wrongly admitted her sworn testimony. It was submitted that the deficiency arose in that TLM never probed S in her enquiry as to whether she understood the consequences of not telling the truth. This omission, it was submitted, was fatal to the conviction as S's evidence was the sole and decisive evidence[4].

ii. Another ground under this heading was that TLM wrongly admitted S's dock identification of the appellant, when hers was the sole and decisive evidence[5]. It was submitted that an identification parade should have been held in this case[6].

[1] Chapter 101 of the Substantive Laws of Belize. Revised Edition 2020.
[2] See also **Zetina v McKoy** VLEX-792635981.
[3] S. 116(g) SCA.
[4] Submissions dated 13th October 2023.
[5] Para. 9 of appellant's submissions filed on 14/8/23.
[6] Para. 17 of appellant's submissions filed on 14/8/23.

iii. The decision to convict was unreasonable or could not be supported having regard to the evidence[7]: The identification evidence of S was so poor that it was unreasonable for TLM to have convicted the Appellant thereon[8].

iv. The decision was based on a wrong principle or was such that TLM viewing the circumstances reasonably could not properly have so decided[9]: TLM's use of the failure of the Appellant's witnesses to attend to give evidence the same day the Appellant testified to draw adverse inferences against their credibility was legally wrong[10].

v. The sentence of TLM was unduly severe[11].

[4] The respondent's reply to these submissions were as follows:

i. TLM's enquiry was adequate in that it established that S had sufficient intelligence to receive her evidence and she was aware of her duty to speak the truth[12].

ii. There was no useful purpose for holding an identification parade as there was uncontested evidence that S knew the appellant[13].

iii. The identification evidence was sufficient to allow TLM to safely convict[14].

iv. The finding with regard to the appellant's witnesses by TLM should be looked at in their context.

ANALYSIS

GROUND 1: The reception of inadmissible evidence: The oath enquiry.

[5] The **Evidence Act[15]** (the "EA") where relevant, provides as follows:

> *"53. All persons are competent to give evidence in all causes and matters, whether civil or criminal, except as provided in section 54.*

[7] S. 116(h) SCA.
[8] Para. 8 of appellant's submissions filed on 14/8/23.
[9] S. 116(j) SCA.
[10] Para. 10 of appellant's submissions filed on 14/8/23.
[11] S. 116(l) SCA.
[12] Ibid. p 4.
[13] Ps 1-3 of the respondent's undated submissions.
[14] Ibid. ps. 1-3.
[15] Chapter 95 of the Substantive Laws of Belize. Revised Edition 2020.

54.–(1) A witness is incompetent to give evidence if, in the opinion of the judge, he is prevented by extreme youth, disease affecting his mind, or any other cause of the same kind, from recollecting the matter on which he is to testify, from understanding the questions put to him, from giving rational answers to those questions, or from knowing that he ought to speak the truth.

…

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.****" (emphasis added)*

[6] The case against the appellant stood or fell on S's testimony. S was 10 years old and consequently a child of tender years whose testimony on oath required inquiry before reception on the authority of the Court of Appeal decision of **Coyseme Salam v R**[16]. In that case, that court interpreted sections 54 and 103 of the EA and adopted the dicta in a case of *Whitely* that there was no requirement for an enquiry, generally speaking, into the competency of children 14 years old and above[17]. However, in the case of children below that age, per Mottley JA, "the requirement for holding a voir dire arises where the Court is of the opinion that the child is of tender years."[18]

[7] This Court interprets the plain words of section 103(1) of the EA in conjunction with *Salam* to mean that a court should hold an enquiry into the evidence of children under 14 years old and that enquiry should seek to ascertain if the child understands, "the nature of the oath". The Court is of the view if that enquiry was deficient then that evidence was inadmissible on the authority of the Court of Appeal decisions in **Winsell Williams v R**[19] and **Artie Meyers v R**[20]**.**

[16] Criminal Appeal No. 5 of 2002.
[17] Paras 35-36.
[18] Para 34.
[19] Criminal Appeal No. 2 of 1992 at p 7.
[20] Criminal Appeal No. 10 of 2014 at para. 15.

[8] The question then is how an enquiry into the "nature of the oath" is conducted. The Court accepts as the test that adopted by the Eastern Caribbean Court of Appeal in **Nelson Abraham v R**[21], per Byron JA, as he then was:

> *"…where the child has had no religious education and does not know about or believe in God, the child could still be sworn if the judge is satisfied that the* ***child understands the added responsibility to tell the truth which is involved in taking an oath over and above telling the truth as an incident of the ordinary duty of normal social conduct****…. In my view the fact that a person believes in God and understands the significance of the divine sanction provides a reasonable basis for concluding that he understands the nature of an oath, which is the statutory test which the witness must satisfy." (emphasis added)*

[9] The Court understands *Abraham* to be saying that the enquiry into "the nature of the oath" is a determination of if the child understands, whether he or she is religious or not, the added responsibility of telling the truth in court over and above what is required in normal social interaction.

[10] In the case at bar TLM conducted the following enquiry of S[22]:

> *"Question: How old are you?*
> *Answer (S): I am 10 years old.*
> *Question: What date were you born?*
> *Answer: I can't recall my birthday, but it's close to when school finishes.*
> *Question : Do you know why you are here today S?*
> *Answer: I know why I am here today- to talk about what happened to me.*
> *Question : Do you believe in God?*
> *Answer: Yes I believe in God.*
> *Question: Do you know a truth different from a lie?*
> *Answer: Yes I do*
> *Question: Do you understand that by putting your hand on the bible you are making a promise to God and everyone here to tell the whole truth?*
> *Answer:* ***I understand what it means and it is saying that I will be telling the truth here today.***

[21] (1992) 43 WIR 142 at p 146.
[22] P 21 of the Record of Appeal.

Question: So you understand that everything you say today must be the truth, not what anyone, mom or daddy included, tell you to say. Only the truth of what happened correct?
*Answer: **I will only tell the truth and I understand what it is to tell the truth**.*
***The Magistrate is satisfied that the Complainant, S, understands the difference between a truth from a lie and allows the witness to be sworn in**."(emphasis added)*

[11] What strikes the Court firstly from the record is that TLM applied the wrong test to admit the evidence. The test under section 103(1) of the EA is not whether S could tell the difference between the truth and a lie but that S understood the nature of the oath. That is, the **added** responsibility of speaking the truth in the courtroom setting. In the Court's view it must involve some understanding by the child witness of some sanction for speaking untruths, or to put it more plainly in children's language, that S knew she would get in trouble if she told a lie. The evidence at the enquiry at its highest established that S believed in God and knew that by putting her hand on the bible that she was under a duty to speak the truth. It did not cover an awareness in her mind that if she told a lie that she knew there could be punishment. That fact is presumed in adults because all adults are presumed to know the law and that when they testify if they lie, they can face at least the earthly sanction of perjury charges. The Court cannot presume that when S testified that she knew the legal or even the moral consequences of lying. In that regard the Court views the enquiry as fatally deficient in this regard.

[12] On this point the Court finds the Malaysian High Court case of **Yusaini Bin Mat Adam v Public Prosecutor**[23]instructive. That court considered section 133A[24] of the then Malaysian Evidence Act which was very similar to section 103 of the EA. The court adopted the "added responsibility" test in *Abraham* and provided further clarification. KC Vohrah J held that the lower court should have held an enquiry of a child witness, and that the child should have been:

[23] [1999] 3 MLJ 582.
[24] "*Where, in any proceedings against any person for any offence, any child of tender years called as a witness does not in the opinion of the court understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court, he is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth; and his evidence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 269 of the Criminal Procedure Code of the Federated Malay States shall be deemed to be a deposition within the meaning of that section:*
Provided that, where evidence admitted by virtue of this section is given on behalf of the prosecution, the accused shall not be liable to be convicted of the offence unless that evidence is corroborated by some other material in evidence in support thereof implicating him."

"…examined as to whether she had sufficient appreciation of the solemnity of the occasion and the added responsibility of telling the truth over the ordinary duty to tell the ***truth upon pain of punishment*** *for perjury under s 14 of the Oaths and Affirmation Act 1949. Only after the sessions court judge had satisfied herself on the above should the child then have proceeded to take an oath or make an affirmation to tell the truth under the Oaths and Affirmation Act 1949."*[25] *(emphasis added)*

[13] The Court is not at all suggesting that witnesses of tender years should be probed about perjury or abstract legal questions. The Court is of the view that the law as set out in *Abraham* requires that such witnesses should be aware, and the record should reflect with necessary evidence, that before taking the oath that there would be some punishment if they tell a lie from God or otherwise. In this Court's view understanding the "nature of the oath" means not only understanding the words of the oath, namely a duty to speak the truth, but an understanding that there are consequences of breaching an oath, either a divine sanction or that there would be some earthly trouble that would follow.

[14] In support of this proposition the Court notes the two scenarios set out in section 103(1) of the EA. The first is that if the judicial officer wishes to take sworn evidence from the child, he or she must be satisfied that the child understands the nature of the oath. If the judicial officer is taking unsworn evidence, which is a lower quality of evidence in that it requires corroboration for a conviction by section 103(2)[26] of the EA, he must be sure of the child has sufficient intelligence and "understands the duty to speak the truth." The National Assembly must be presumed to be rational, and in that regard if the lower threshold required for unsworn evidence is understanding the duty to speak the truth, then the requirement of understanding the nature of the oath must require more. This, in the Court's mind, reinforces the point that understanding the nature of the oath means not only understanding the requirement to speak the truth in the oath but that there would be consequences for breaching the oath by lying.

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[25] P 586.

[26] "*103(2) The evidence of that child or other person, although not given on oath but otherwise taken in accordance with the provisions of the law, shall have the same effect as the evidence of a person duly given upon oath, however, no accused person in a criminal cause shall be liable to be convicted of any offence upon the unsworn evidence of a child or such other person unless that evidence is corroborated in some material particular implicating the accused person."*

[15] In this regard the Court accepts the guidance of the Guyanese Court of Appeal in **R v Cecil Cyrus**[27]. In that case the court considered whether a trial judge's enquiry of a child witness was sufficient. That court did note the need for the understanding of the child that a sanction would follow from telling lies, though following *Abraham* there is no need for the child to believe that there is a divine sanction, per Luckhoo JA:

> *"The judges for over a century, before swearing children of tender years, particularly directed their attention to the person's notion of eternity, or of a future state of rewards and punishments in which a Supreme Being will reward or punish them according to their deserts. The child must feel the binding obligation of an oath, perhaps arising from some course of religious instruction or education. The child's intelligence will have to be tested; so also its understanding of the duty of speaking the truth generally, and in relation to the evidence about to be given;* ***and there must be an appreciation of consequences which will come from false testimony, of a kind which will inhibit falsehood and encourage truthfulness****. As, for example, the belief in a creator, a hereafter, and the power of the creator to mete out punishment for misdeeds of falsehood.* ***Supernatural sanctions of this kind give such added value to testimony that the law formerly made it essential to the competency of every witness that he should know and accept the religious obligation of an oath;*** *the Christian, Mohamedan, and Hindu each according to his own religious code; different in form, perhaps, but serving the same purpose in binding the conscience of the believer to his faith, so that mortals in the exercise of functions of judgment may hope for some responsible reaction to truth. Statute, however, later allowed for a solemn affirmation in certain circumstances.*
>
> *…*
>
> *It is not so much what the court asks, but what the answers reveal. It may well be that a judge may not ask a single question in the voir dire relating specifically to the nature of an oath, but answers given may show that the child has not only a sufficient notion of religious or moral duties,* ***but faith in the power of the divinity to punish any disregard therefor, which will amount to an understanding of the necessity for speaking the truth on oath,***

[27] (1968) 12 WIR 97.

and the consequences which will follow from not doing so. *The question really is: Is the child's mind sufficiently prepared to receive the oath to speak the truth before God?" (emphasis added)*

[16] It may be helpful to note the enquiry approved by the Guyanese Court of Appeal in *Cyrus*:

"Questions Answers
How old are you? I am fourteen years old.
What school do you attend? I attend the Indian Trust College.
In what form are you? I am in second form up to today.
How long have you been attending Indian Trust College? For three months.
Have you taken any exams? No.
What primary school did you attend? I attend Campbellville Government primary school.
How long did you attend Campbellville Government School? I attend Campbellville Government School for eight years
Do you go to Church? Yes I do.
What Church? St Theresa Catholic Church.
Do you know about God? Yes I do.
Do you know what it is to tell a lie? Yes sir.
Do you know what will happen to you if you tell a lie? Yes sir.
Is it a good thing or a bad thing to tell a lie? A bad thing.
Do you know about sin? Yes sir.
If you were to tell a lie is it a sin or not? It is a sin.
If you were to tell a lie do you know what will happen to you? Yes, I would be punished because it is a sin. God will punish me*." (emphasis added)*

[17] The Court relies on *Meyers* and *Williams*, quoted above, as support for the proposition that evidence wrongly taken sworn is inadmissible, even though those cases are factually distinguishable in that no enquiries were held in those cases at all. The Court finds that even if that argument is wrong in this case, and one wished to say that TLM's enquiry was sufficient to have the evidence of S received unsworn because it met both the sufficient intelligence test and the understanding the duty to speak

the truth test in section 103(1) of the EA, in the instant case there is no corroboration of S's evidence and consequently a conviction was legally impossible in the face of section 103(2) of the EA.

[18] The inadmissibility of S's evidence means that there was simply no evidence against the appellant, which means his conviction has no basis.

[19] The Court finds merit in this ground of appeal.

GROUND 2: The reception of inadmissible evidence: Dock identification.

[20] The evidence in this case is that S came to a shop on the date of the incident where a person she identified as the appellant tended to her. While at the shop the appellant kissed her lips and bit her ears. No identification parade was held but S testified that she knew the appellant before trial.

[21] The issues of dock identification were considered extensively by the Privy Council in its landmark decision in **France et al v R**[28] which was adopted by the local Court of Appeal in **Kevaughn Staine v R**[29]. The Board in *France* opined, per Lord Kerr:

> *"[33]…**A dock identification in the original sense of the expression entails the identification of an accused person for the first time by a witness who does not claim previous acquaintance with the person identified.** The dangers inherent in such an identification are clear and have been the occasion of repeated judicial warnings… The inclination to assume that the accused in the dock is the person who committed the crime is obvious.*
>
> *[34] There has been a tendency to apply the term 'dock identification' to situations other than those where the witness identifies the person in the dock for the first time. **This is not necessarily a misapplication of the expression but it should not be assumed that the dangers present when the identification takes place for the first time in court loom as***

[28] 82 WIR 382.
[29] Criminal Appeal No. 4 of 2018 at paras 40-48.

large when what is involved is the confirmation of an identification already made before trial*. Nor should it be assumed that the nature of the warning that should be given is the same in both instances****. Where the so-called dock identification is the confirmation of an identification previously made, the witness is not saying for the first time 'This is the person who committed the crime'. He is saying that 'the person whom I have identified to police as the person who committed the crime is the person who stands in the dock'****."(emphasis added)*

[22] The Board in *France* also considered when an identification parade should be held. Again, Lord Kerr opined:

"[28] ***It is now well settled that an identification parade should be held where it would serve a useful purpose****…In John v The State [2009] UKPC 12, (2009) 75 WIR 429, addressing the question of how to assess whether an identification parade would serve any useful purpose, Lord Brown considered three possible situations: the first where a suspect is in custody and a witness with no previous knowledge of the suspect claims to be able to identify the perpetrator of the crime;* ***the second where the witness and the suspect are well known to each other and neither disputes this****; and the third where the witness claims to know the suspect but the latter denies this. In the first of these instances an identification parade will obviously serve a useful purpose. In the second it will not because it carries the risk of adding spurious authority to the claim of recognition. In the third situation, two questions must be posed. The first is whether, notwithstanding the claim by a witness to know the defendant, it can be retrospectively concluded that some contribution would have been made to the testing of the accuracy of his purported identification by holding a parade. If it is so concluded, the question then arises whether the failure to hold a parade caused a serious miscarriage of justice—see Goldson (2000) 56 WIR 444 at 450." (emphasis added)*

[23] The Court also found helpful the decision of the Court of Appeal in **Krismar Espinosa v R**[30] on when an identification parade should be held, per Awich JA:

[30] Criminal Appeal No. 8 of 2015.

"[26] While bearing in mind fairness and transparency, it is important to note that, holding an identification parade is a very important step in the investigation of a crime. ***It is held when a police officer considers it to be useful in the investigation, and the suspect consents to participating in the parade; moreover, it must be held when a suspect has demanded that it be held****." (emphasis added)*

[24] The Court interprets the requirements in *France,* which again have been adopted in Belize in *Staine*, as well as in **Rosales et al v. R**[31], and *Espinosa* as establishing the following propositions:

i. An identification parade is not held in every case where the correctness of an identification is in issue but will be done where it would serve a useful purpose.

ii. A dock identification, strictly speaking, is one where the identifying witness is asked to identify for the first time in court someone who they do not know before. An identification parade would always serve a useful purpose in those cases otherwise the witness would naturally and very likely incorrectly identify the person sitting in the dock in court.

iii. In a case where the identifying witness does know the suspect before and identifies them in court is not, strictly speaking, a dock identification. The witness is simply confirming in court the person they know previously. In these circumstances unless the suspect denies knowledge of the identifying witness, following the second scenario in *France,* an identification parade is likely to be misleading in that it will establish the uncontroversial fact that the parties know each other.

[25] The Court is of the view that this was not a dock identification in the sense that S testified that she knew the appellant before. S stated that she would go to the shop for about four days out of the week. She also saw him three out of the five days that she would go to school. She also stated that there was only one person who sold at the shop when she went. She said that she had seen the person at the shop clearly as the sun was shining and that she was close to him. S identified the appellant as the shopkeeper without objection from him.

[31] Criminal Appeal Nos. 8-12 of 2011 at paras 8-9.

[26] The appellant cross-examined S, after assistance was given by TLM, but never suggested to her that she did not know him. Also, the investigator, P.C. Ordonez testified that she told the appellant of "the report made against him"[32], which as a matter of irresistible inference would include the name of his accuser. There is no evidence from the investigator nor from the appellant's own testimony that he requested an identification parade.

[27] The Court finds this case as falling within the second scenario as laid out in paragraph 28 of *France* which did not require an identification parade. The Court considers that even if retrospectively there might have been some utility in having an identification parade, in this case there was no serious miscarriage of justice in not holding one. The Court would deal with that issue under the third ground. This ground of appeal is without merit.

GROUND 3: The decision to convict was unreasonable or could not be supported having regard to the evidence: The poor identification evidence.

[28] The requirements of making out that a conviction was unreasonable or could not be supported having regard to the evidence was considered in the Belizean Supreme Court decision in **Rosales v Gibson**[33], considering the legislative predecessor to the SCA, per Graham J:

> *"These grounds of appeal are based upon Section 130 (h) (j) of the Supreme Court of Judicature Ordinance Chapter 5 of the Laws of this territory the wording of which follows the original wording of Section 4 (1) of the Criminal Appeal Act 1907 in providing that the verdict of a jury, the tribunal of fact, may be "set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence." Decisions on appeals brought under that Act are therefore relevant as showing how these words have been interpreted and applied.*
>
> ***Notwithstanding the power vested in a court of appeal under this provision, where, as in the instant case, the appeal is really against a finding of fact, for an appellant to succeed it is not sufficient merely to show that the case against him was a very weak***

[32] P 24 of the Record of Appeal.
[33] VLEX-794031573.

one*…. **Nor is it enough that the Court of appeal itself feels some doubt as to the correctness of the verdict**. **The appellant must go further and show that under all the circumstances of the case the verdict is unsatisfactory. A court of appeal does not lightly interfere with decision of a Magistrate when that decision turns upon findings of fact*[34]*.*

…

*It is now necessary to look at the case as a whole in relation to the duty of a Court reviewing a case on the alleged ground that the Magistrate's decision "is unreasonable or cannot be supported having regard to the evidence." The words quoted have received judicial interpretation. In the case of R. v. Barnes (1942) 28 Cr. App R. 141 at page 142 Humphreys J referring thereto said in the Court of Criminal Appeal. "**These words have been interpreted in more than one case in this Court as amounting to this: if the Court thinks that the verdict is, on the whole, having regard to everything that took place in the Court of trial, unsatisfactory."** The learned judge then went on to adopt as the criteria which the Court would apply for testing whether the decision was unsatisfactory the following words of the Lord Chief Justice (Lord Hewart) in the case of R. v. Wallace (1931) 23 Cr. App R. 32 at page 35:*

*"I should like to add that there is not, so far as we can see, any ground for any imputation upon the fairness of the police, but the conclusion at which we have arrived is that the case against the appellant, which we have carefully and anxiously considered and discussed, was **not proved with that degree of certainty which is necessary to justify a verdict of guilty**, and therefore that it is our duty to take the course indicated by the Statute to which I have referred. The result is that the appeal will be allowed and the conviction quashed." (emphasis added)*

[29] The *Barnes* test adopted in *Rosales* was confirmed as correct by the Court of Appeal in **Robinson v R**[35]**.** The Court also found assistance in the Court of Appeal decision of **Nevis Betancourt v R**[36] in terms of the approach of an appellate court when treating with findings of fact by TLM, per Foster JA:

[34] P 4.
[35] Criminal Appeal No. 14 of 1980 at p 4.
[36] Criminal Appeal No. 6 of 2019.

"[47] … The general appellate approach in relation to the findings of a trier of fact is so well established as to merit only brief recitation. ***Where a lower court, whose function it is to make findings of fact has done so and there is evidence which shows that these findings may be justified, it is not the function of an appellate court to interfere by substituting its own view of the facts.*** *The cases of Peters v Peters and Vere Bird and Others v The Commissioner of Police are instructive.*

[48] As stated in Henderson v Foxworth Investments Ltd and Another:

"…. ***the duty of the appellate court was to ask itself whether it was in a position to come to a clear conclusion that the trial judge had been 'plainly wrong'****… .* ***The phrase 'plainly wrong' can be understood as signifying that the decision of the trial judge could not reasonably be explained or justified. An appellate court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration****.* ***It follows that, in the absence of some other identifiable error, such as a material error of law, the making of a critical finding of fact which has no basis in the evidence, a demonstrable misunderstanding of relevant evidence or a demonstrable failure to consider relevant evidence, an appellate court would interfere with the findings of fact made by the trial judge only if it was satisfied that his decision cannot reasonably be explained or justified****."*

[49] ***Given the constraints attendant upon challenging factual findings, the appellant must satisfy this Court that the findings of fact made by the learned judge cannot reasonably be explained or justified and that the learned judge was plainly wrong****."*

(emphasis added)

[30] The question in the Court's mind then is whether there was evidence sufficient to justify the findings of TLM or whether the findings of fact by TLM are plainly wrong.

[31] TLM correctly identified the elements of the offence of sexual assault and the evidence that satisfied those elements[37]. TLM gave the following reasons for accepting the identification evidence of S: (i) she accepted this was a case of unchallenged recognition, and that both S and the appellant lived in the Bella Vista area; (ii) the lighting condition was clear; and (iii) S's description of the appellant as a

[37] Paras 3 and 4 of the findings of TLM at ps 40-41 of the Record of Appeal.

"big big man" and "fair skin" matched the description of the appellant, who had previously been screened off from S in court. TLM said she addressed her mind to the Turnbull guidelines. However, as was noted by the Jamaican Court of Appeal in **Patrick Williams v R**[38], "it is not enough that the learned magistrate states the law, she must demonstrate that she applied it as there can be no presumption that she did."

[32] TLM did not address (i) the issues of period of observation by S of the appellant; (ii) nor distance of S from the appellant in terms of being able to make a proper observation; and (iii) whether anything obstructed her view of the face of the appellant.

[33] Though it would have been better for TLM to state her findings on these issues, there is evidence in the record which would support her conclusion that S correctly identified the appellant. In the record there is evidence that in terms of distance S's unshaken testimony was, "he was very close to me". The Court finds that the very nature of the evidence that the appellant held her, kissed her on the cheek, lips and then bit her ears it would have been open to TLM to make the finding that S was sufficiently close to the appellant to observe his face and that there was nothing blocking her. There was no time estimate given by S of her observation, which the Court of Appeal has usually found to be unreliable unless the witness is looking at a watch in any event in the decision of **Chadrick Debride v R**[39]. This Court finds that for the time taken for her to chat with the appellant, hug, kiss and bite her ears it would have been open to TLM to find that this would have provided a sufficient opportunity for S to make a proper identification, as is the real issue as noted by the Privy Council in **Michael Rose v R**[40]. It is to be noted that Turnbull guidelines are most significant in the case of "fleeting glance" cases, as noted by the English Court of Appeal in **R v Oakwell**[41], and the instant case was clearly not one of these.

[34] The Court finds that it was open to TLM to accept the unchallenged recognition evidence of S. TLM also found S to be credible and reliable and there is no evidence that she was plainly wrong in that assessment.

[38] [2016] JMCA Crim 22 at para 115.
[39] Criminal Appeal No. 13 of 2007 at para 71.
[40] (1994) 46 WIR 213 at p 216.
[41] 66 Cr. App. R. 174.

[35] There is no merit in this ground of appeal.

GROUND 4: The decision was based on a wrong principle or was such that TLM viewing the circumstances reasonably could not properly have so decided: The drawing of adverse inferences against the appellant's witnesses.

[36] The Court on this ground recalls the guidance of the Court of Appeal in *Betancourt* that it ought to pay due regard to TLM's findings of fact unless they are "plainly wrong".

[37] The Court, with respect, finds that under this ground TLM's factual findings are plainly wrong. TLM in her review of the case for the appellant rejected the evidence of his witnesses, who were family to him, who sought to establish an alibi for the appellant. After the appellant had testified, he asked for an adjournment to call those witnesses as he was unaware, he being unrepresented, that he could have called his family as witnesses. TLM granted the adjournment saying:

> *"With the Defendant being unrepresented and stating his confusion to how the court system operates I want to give Mr. Garcia the benefit of getting another opportunity to call any witnesses he may have. As such I will be adjourning this matter to the next convenient date awaiting your witnesses."*[42]

[38] TLM, however, then goes on to find in her reasons:

> *"12. The court questions the credibility of the Defence's witnesses and their interest to serve as both witnesses are related to the Defendant and are reliant on the Defendant for their livelihood.* ***The court took into consideration that the witnesses did not present themselves to give evidence on the initial trial date****." (emphasis added)*

[39] The Court concludes from the first sentence of that paragraph that TLM is giving her reasons for rejecting the evidence of the appellant's witnesses and why she found them not to be credible. The

[42] Ps 20-31 of the Record of Appeal.

irresistible inference from the second sentence is that TLM used the fact that the witnesses did not testify on the same date as the appellant to undermine their credibility.

[40] The Court notes firstly that the appellant was the beneficiary of the presumption of innocence by virtue of section 6(3)(a) of the **Constitution** and that he needed not call any witness at all. As far as the Court is aware there is no statutory or common law requirement that the appellant's witnesses were bound to testify on the same day that he did. There was simply no legal basis for TLM to have drawn this adverse inference against the appellant's witnesses, particularly in light of her granting an adjournment for him to do so. This was the making of a critical finding of fact which had no basis in law or the evidence. It was speculative for TLM to conclude that because the appellant's witnesses did not testify on the same day that there was some collusion. This is a crucial finding as this was one of the key bases that TLM used to deem the defence case unreliable. In the Court's view this error makes the conviction of the appellant unsafe.

[41] The Court also finds merit in this ground.

GROUND 5: The sentence of TLM was unduly severe.

[42] The Court notes the guidance of the apex court, the Caribbean Court of Justice ("the CCJ") on the proper approach of an appellate court to reviewing sentencing in a lower court in the Guyanese case, **Linton Pompey v DPP**[43], per Saunders PCCJ:

> *"[2] Appellate courts reviewing sentences must steer a steady course between two extremes. On the one hand, courts of appeal must permit trial judges adequate flexibility to individualise their sentences. The trial judge is in the best position to fit the sentence to the criminal as well as to the crime and its impact on the victim. But a reviewing court must step in to correct discrepancies, reverse excesses or aberrations, secure consistency and promote observance of the rule of law.*
>
> *…*

[43] [2020] CCJ 7 (AJ) GY.

[29] The principles which must guide an appellate court in reviewing a sentence are well known. An appellate court will not alter a sentence merely because the members of the court might have passed a different sentence…. the court will not interfere with a sentence unless it is manifestly excessive or wrong in principle."

[43] The Court also notes the guidance on the sentencing process given by the CCJ in the Barbadian case of **Teerath Persaud v R**[44] , per Anderson JCCJ:

> *"[46]* ***Fixing the starting point is not a mathematical exercise****;* ***it is rather an exercise aimed at seeking consistency in sentencing and avoidance of the imposition of arbitrary sentences.*** ***Arbitrary sentences undermine the integrity of the justice system****.* ***In striving for consistency, there is much merit in determining the starting point with reference to the particular offence which is under consideration,*** ***bearing in mind the comparison with other types of offending, taking into account the mitigating and aggravating factors that are relevant to the offence but excluding the mitigating and aggravating factors that relate to the offender****.* ***Instead of considering all possible aggravating and mitigating factors only those concerned with the objective seriousness and characteristics of the offence are factored into calculating the starting point****.* ***Once the starting point has been so identified the principle of individualized sentencing and proportionality as reflected in the Penal System Reform Act is upheld by taking into account the aggravating and mitigating circumstances particular (or peculiar) to the offender and the appropriate adjustment upwards or downwards*** ***can thus be made to the starting point. Where appropriate there should then be a discount for a guilty plea****.* ***In accordance with the decision of this court in R v da Costa Hall full credit for the period spent in pre-trial custody is then to be made and the resulting sentenced imposed****." (emphasis added)*

[44] The Court is also guided by the decision of the CCJ in **Calvin Ramcharran v DPP**[45] on this issue, per Barrow JCCJ:

> *"[15] In affirming the deference an appellate court must give to sentencing judges, Jamadar JCCJ observed that* ***sentencing is quintessentially contextual, geographic, cultural, empirical, and pragmatic. Caribbean courts should therefore be wary about***

[44] (2018) 93 WIR 132
[45] [2022] CCJ 4 (AJ) GY.

importing sentencing outcomes from other jurisdictions whose socio-legal and penal systems and cultures are quite distinct and differently developed and organised from those in the Caribbean.

[16] Jamadar JCCJ noted that in 2014 this Court explained the multiple ideological aims of sentencing. ***These objectives may be summarised as being: (i) the public interest, in not only punishing, but also in preventing crime ('as first and foremost' and as overarching), (ii) the retributive or denunciatory (punitive), (iii) the deterrent, in relation to both potential offenders and the particular offender being sentenced, (iv) the preventative, aimed at the particular offender, and (v) the rehabilitative, aimed at rehabilitation of the particular offender with a view to re-integration as a law abiding member of society***.

[18]… ***to find the appropriate starting point in the sentencing exercise one needed to look to the body of relevant precedents, and to any guideline cases (usually from the territorial court of appeal)***.*" (emphasis added)*

[45] In the instant case it appears that the sentencing process as contemplated by the CCJ was not followed in that TLM merely cited two sentencing factors and arrived at the final custodial sentence[46]. In the Court's respectful view that was not the transparency in sentencing anticipated by the authorities of *Persaud* and *Ramcharran*. Also, the Court takes the opportunity to note the requirements of the provisions of the **Penal System Reform (Alternative Sentences) Act[47]** ,(the "PSRASA") in a case like the present where a minimum custodial sentence was not fixed by law. Section 28 of the PSRASA reads, where relevant:

"28.-(1) This section applies where a person is convicted of an offence punishable with a custodial sentence other than one fixed by law.

(2) Subject to subsection (3) of this section, the court shall not pass a custodial sentence on the offender unless it is of the opinion,

(a) that the offence was so serious that only such a sentence can be justified for the offence; or

(b) where the offence is a violent or sexual offence (as defined in section 7 of this Act), that only such a sentence would be adequate to protect the public from serious harm from the offender.

[46] P 43 of the Record of Appeal.
[47] Chapter 102:01 of the Substantive Laws of Belize, Revised Edition, 2020, see section 25.

(3) Nothing in subsection (2) of this section prevents the court from passing a custodial sentence on an offender if the offender refuses to consent to a community sentence which is proposed by the court and requires that consent.

(4) ***Where a court passes a custodial sentence it is the court's duty****,*

(a) ***in a case not falling within subsection (3) of this section, to state in open court that it is of the opinion that either or both of paragraphs (a) and/or (b) of subsection (2) of this section apply and why it is of that opinion****; and*

(b) ***in any case, to explain to the offender in open court and in ordinary language why it is passing a custodial sentence on the offender****." (emphasis added)*

[46] In light of the Court finding merit in two grounds of appeal and finding that this conviction is unsafe it does not go further than the comments above in terms of assessing whether the sentence is unduly severe.

DISPOSITION

[47] The Court has found merit in two grounds outlined above which in its view makes the conviction of the appellant unsafe and unsatisfactory. The appeal is allowed, and the conviction and sentence are quashed. The Court has considered the principles governing the discretion to order a retrial set out in the Jamaican Privy Council case of **R v Reid**[48] and is of the view that the interests of justice require a retrial owing to the following facts:

i. This is a serious and prevalent charge;
ii. The charge is a relatively recent allegation; and
iii. The case is of moderate strength.

[48] The Court orders that the matter be remitted for trial before a different magistrate.

[49] The Court orders each party to bear its own costs.

[48] (1978) 27 WIR 254.

Nigel C. Pilgrim
High Court Judge
Criminal Division
Central District
Dated 15th December 2023