IN THE COURT OF APPEAL OF BELIZE AD 2017

CRIMINAL APPEAL NO 8 OF 2016

ANTONIO GUTIERREZ Appellant

v

THE QUEEN Respondent

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BEFORE

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

A Sylvestre for the appellant
J Chan along with S Smith, Senior Crown Counsel, for the Respondent

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6 June 2017 and 27 October 2017

DUCILLE JA

[1] The Appellant was tried for the offence of rape before Lord J. and a jury. He was convicted and sentenced to imprisonment for eight years. The Appellant filed five grounds of appeal, one of which was immediately dispositive of the appeal. We did not require argument on any of the remaining grounds. In the circumstances, Counsel for the Respondent stated that he could not defend the summing-up and accordingly, we

allowed the appeal, quashed the conviction and set aside the sentence. We were also of the opinion that a retrial was necessary in the interests of justice, and so ordered. Retrial is to take place before a judge other than the trial judge herein.

[2] The single ground on which this Court decided to allow the appeal was that

> [t]he learned trial judge having exercised his discretion to give a direction for the need for special caution before acting on the evidence of the complainant erred in failing to give a proper/adequate direction to the jury (in accordance with section 92(3)(a) of the Evidence Act as to the factual reasons in the given case for the need for such caution …

The facts as presented at the trial

[3] The Appellant and the Complainant, who was 16 years old at the time, were both employees at a store called Bellagio. According to the Complainant, on August 4, 2011, before they both left work at the end of the day, the Appellant asked her if they could talk and she said yes. They walked and talked for about 10 to 15 minutes. He asked her if she had a boyfriend or if she was dating. She replied in the negative. She then described that he put his hand over her shoulders and after she removed his hand on three separate occasions, he opened the button and zip on her pants. She said that she pushed him but he put her against a shop called Rumba (apparently next door to Bellagio) and started to touch her about the body. He then put her to lie on the floor, removed her pants and underwear and had sex with her.

[4] At the time, the other store employees had gone into a nearby Chinese restaurant and there was no one around. The Complainant said that she asked the Appellant not to hurt her and said that she did not want to get pregnant by a person like him. The Appellant told her not to tell her father or her friends. Afterwards, the Appellant and the Complainant boarded the Bellagio employee bus and went home. When she arrived at her home, the Complainant showered and washed her pants and underwear.

Her father noticed that her behaviour was strange and questioned her. She initially denied that anything had happened, but later admitted to her father that the Appellant had touched her in intimate parts but that she had rejected him. The Complainant's father then asked her for the Appellant's phone number, which she gave to him. He called the number and had a conversation, after which he escorted the Complainant to the police station and they made a report. He handed over to the police the blouse and underwear that the Complainant had been wearing at the time of the incident. Under cross-examination, the Complainant admitted that she told her father what had happened only after he threatened to take off his belt and flog her.

[5] The Appellant, in a caution statement and in an unsworn statement from the dock, gave a slightly different account of what took place. He claimed that the sex was consensual, that he and the Complainant had pre-arranged their tryst, and that the incident took place not where the Complaint said it did (between Rumba and Bellagio), but behind Iguanas, a bar and restaurant that was immediately opposite Bellagio. He said that the Complainant was worried about getting pregnant and they had a conversation about when she had her menstrual cycle. He further claimed that the Complainant called him that night and told him that her father was going to call him. The Appellant claimed that she also called him the next day.

[6] Although this incident took place in August, 2011, the Appellant was not formally charged until April, 2012, some eight months later. The trial took place in May, 2016.

Discussion

[7] It is unfortunate that this Court is once again compelled to reiterate an important factor to be taken into consideration by trial judges when summing-up to a jury in this type of case. Not only is the statute clear, but so are the authorities that explain in detail the obligations of the trial judge when applying said statute.

[8] Section 92(3)(a) of the Evidence Act states that

> Where at a trial on indictment –
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> (a) a person is prosecuted for rape, attempted rape, carnal knowledge or any other sexual offence, and the only evidence for the prosecution is that of the person upon whom the offence is alleged to have been committed or attempted; …the judge shall, where he considers it appropriate to do so, warn the jury of the special need for caution before acting on the evidence of such person and he shall also explain the reasons for the need for such caution.

This Court has consistently held that this section gives a discretion to a trial judge to determine the cases in which a caution is required. However, in some circumstances, it becomes more "necessary" to point out to the jury those aspects of the evidence led that might undermine the credibility or reliability of the witness.

[9] In Mark Thompson v The Queen, Criminal Appeal No. 18 of 2002, this Court, applying the section and citing Makanjuola and Easton v R [1995] 2 Cr. App. R. 469 stated that "[t]here must be an evidential basis for suggesting that the evidence of the victim was unreliable thus giving reason for such a warning." In Makanjuola, it was stated that

> [w]here, however, the witness has been shown to be unreliable, the judge might consider it necessary to urge caution. In a more extreme case, if the witness was shown to have lied, to have made previous false complaints, or to bear the defendant some grudge, a stronger warning might be thought appropriate and the judge might suggest it would be wise to look for some supporting material before acting on the impugned witness's evidence.

[10] In the instant case, the Complainant admitted that she had lied. She had also never made a complaint. These facts were not pointed out to the jury in the summing-up as reasons to exercise caution. It was further stated in Thompson that "suggestions by

the defence in cross-examination of the victim, which are denied, cannot be the sufficient basis for the exercise of a sound judicial discretion to give the warning that it is unsafe to act on the uncorroborated [evidence] of a rape victim and then to explain the reasons therefor." Unlike Thompson, in the present case, there is actually a suggestion by the defence that was *admitted* by the victim. Her very admission makes it one of the items of evidence that constitute "reasons for the need for … caution" under section 92(3)(a). We refer to the Complainant's admission that it was only after her father threatened her that she told him what had happened. The trial judge in this case neglected to associate this admission with the special need for caution.

[11] In Nicholas Keme v The Queen, Criminal Appeal No 9 of 2015, this Court again reviewed the requirements of the judge's discretion under section 92(3)(a). We held that

> [a]n appellate court would be slow to interfere with the exercise of such a discretion except in the circumstances where the exercise of such a discretion was unreasonable. In the exercise of such a discretion, "he learned trial judge would be expected to give reasons in a meaningful way so as to create a link with the evidence. For the benefit of the jury the reasons given should be of great assistance for them to arrive at a proper conclusion.

In this case, although the discretion was exercised, there were no reasons given that linked any of the anomalies in the evidence with the need for caution. Strangely, the trial judge instructed the jury as follows:

> Now members of the jury, I must warn you of the special need for caution before convicting the accused on reliance of the evidence of Abigail Gonzalez alone. The reason you must be careful is because there is a danger that a witness could be lying or may be deluded, it is also possible for an honest witness to make a mistaken identification. There have been wrongful convictions in the past as a result of such mistakes, sometimes an apparently convincing witness can be mistaken and so can a number of apparently convincing witnesses. And also I

> remind you that mistakes in recognition and identification of even close friends and relatives are also sometime made.

Identification was never the issue in this case, and this Turnbull-like direction was completely inapposite. Also, mere regurgitation of the evidence, as was done in this case, without relating particular parts of the evidence to the special need for caution, is not sufficient.

[12] Conversely, in Jimmy Jerry Espat v The Queen, Criminal Appeal No. 3 of 2009, the Court found that there was nothing in the circumstances of that case that "warranted a warning to the jury of the special need for caution." In that case, the court reasoned that "[t]he victim in [that] case was a 31 year old woman, a visitor to this country. She was not a child who could be influenced by some family member. There was no evidence that she had any reason to concoct a story against the appellant whom she was meeting for the very first time on the night of the incident."

[13] In this case, however, the Complainant was a young woman who knew and worked with the Appellant before the incident occurred. She seemed to be intimidated by her father, and there are suggestions that she may have had some kind of relationship with the Appellant that was beyond that of fellow employees at Bellagio. There are certain other suggestions in the evidence that the Complainant might have been untruthful, for example as to the exact location where she had sexual relations with the Appellant. These are some of the "reasons" that the trial judge should have brought to the attention of the jury as he exercised his discretion in favor of issuing a warning as to a special need for caution.

[14] In the circumstances, we allowed the appeal and ordered a retrial in the interests of justice.

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SIR MANUEL SOSA P

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BLACKMAN JA

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DUCILLE JA