IN THE COURT OF APPEAL OF BELIZE, A.D. 2023

CRIMINAL APPEAL NO. 6 OF 2020

VIRGILIO BANEGAS **Appellant**

v

THE KING **Respondent**

_____

BEFORE

The Hon Madam Justice Minnet Hafiz-Bertram,	-	President
The Hon Madam Sandra Minott-Phillips	-	Justice of Appeal
The Hon Mr. Peter Foster	-	Justice of Appeal

Mr. Leeroy Banner for the appellant.
Mrs. Cheryl-Lynn Vidal SC, Director of Public Prosecutions, for the respondent.

_____

Hearing: 28 October 2022
Date of promulgation/handing down: 28 March 2023

FOSTER, JA

Introduction

[1] The appellant, Virgilio Banegas, was indicted and tried for the offence of Unlawful Sexual Intercourse contrary to section 47(2) of the Criminal Code, Chapter 101 of the Substantive Laws of Belize (Revised Edition) 2011, as amended by the Criminal Code (Amendment) (No.2) Act No. 12 of 2014. He was acquitted of unlawful sexual intercourse but unanimously convicted by the jury of the lesser offence of sexual assault and was sentenced to six years' imprisonment. He has appealed his conviction and sentence on three grounds, alleging defects in the trial judge's direction to the jury.

The Crown's case

[2] The prosecution's case was that sometime during the month of September 2016, the appellant had sexual intercourse with the complainant, a female, who was 14 years and 9 months at the time. At the trial, the prosecution relied on evidence from five witnesses – the complainant, her mother, a medical practitioner and two police officers - but only the complainant gave an account of the alleged incident. The complainant testified that she had known the appellant for 13 years and that he lived next door to her grandmother whom he often visited.

[3] The evidence of the complainant was as follows. On an unknown date in September 2016, she signaled to the appellant to go behind a board shop near her grandmother's house. She then followed him and found him there. The appellant unbuttoned her pants and pulled down her underwear. He then unbuttoned his pants and pulled it down to his knees. Meanwhile she was lying down on a pile of pallets and he inserted his penis into her vagina and moved it in and out and up and down for five to seven minutes. Afterwards she pushed him off and pulled up her pants. She then went back to the veranda and he went back to his yard. At the time of the incident, she was just over 14 years old. The complainant testified that although the incident happened in September 2016, she did not tell her mother of the incident until December 2016.

[4] During cross examination, the complainant stated that the incident had happened in the appellant's yard. She stated that while the appellant was standing, he inserted his penis into her vagina and moved front and back for about five to seven minutes. She confirmed that the appellant's penis was not hard as she was looking at it and it was not hurting her. The complainant agreed with the suggestion that the appellant would pay her to expose his penis to her. He would throw money across the fence and she would pick it up. The complainant also agreed that she wrote a letter to the appellant indicating that she would reveal his biggest secret, which is that he would show his penis to her.

[5] The complainant's mother stated in her evidence that she knew the appellant who was her mother's neighbour. She confirmed that the complainant informed her of the incident on 24th December 2016. She also stated that on 28th December 2016, she took the complainant to the independence Police Station to file a report and to have a medical done.

[6] WPC Estrada, attached to the Independence Police Station, was the investigating officer. She testified that on 28th December 2016, whilst working diarist duties, the complainant accompanied by her mother visited the police station and informed that they wanted to give a report. She recorded statements from both persons.

[7] WPC Ordonez testified that on 28th December 2016, while at work at the Domestic Violence Unit in the Independence Police Station, she was visited by the complainant and her mother. The complainant's mother requested that a medical examination be done on the complainant. She then called a social worker. Thereafter, she completed a consent form and a Medico Legal Report for sexual offence and with the social worker, escorted the complainant and her mother to the Independence Polyclinic. Subsequently, they visited the office of Dr. Samantha Parham.

[8] The evidence of Dr. Parham was that on 28th December 2016, she medically examined the complainant. The results of the examination were that there were no external injuries and in terms of genitalia, the hymen was not intact. On cross examination, Dr. Parham stated that at the point of examination, it was not possible to determine whether or not the hymen was recently removed.

[9] On 7th day of February, 2017, WPC Estrada swore to an Information and Complaint, arrested and charged Virgilio Banegas for the crime of "Unlawful Sexual Intercourse". This was done in Spanish with the assistance of WPC Ordonez as this was the language the appellant spoke and understood.

The appellant's case

[10] During the trial the appellant opted to give unsworn testimony from the dock. He stated that he never touched the complainant. She used to send him letters asking him for money and that sometimes he would give it to her. He further stated that "he cannot function". His defence was therefore one of a complete denial of the offence with which he was charged.

[11] On the 12th February, 2020, the appellant was found guilty of the lesser offence of "Sexual Assault." He had been initially charged with "Unlawful Sexual Intercourse. On 11th March 2020, the trial judge sentenced the appellant to six years imprisonment.

Judge's summation

[12] During the summation, the learned trial judge directed the jury on the burden and standard of proof regarding the offence of unlawful sexual intercourse. The learned judge identified the elements of the offence of unlawful sexual intercourse and directed the jury accordingly. On the lesser offence of sexual assault, the learned judge stated:

> "*… if a crime was charged under Section 47, and remember I told you that 'Unlawful Sexual Intercourse' is under 47(2) of our Criminal Code, it says that if a crime is charged under 47 and the jury is satisfied that the person didn't commit that crime, so if you determine that you don't think that person committed that crime, Mr. Banegas, but through the evidence you have become satisfied that he committed a different crime, and I will tell you what that crime could be, then you may acquit the accused person of 'Unlawful Sexual Intercourse' and find him guilty of what used to be called an 'Indecent Assault'. Now, it is called a "Sexual Assault." And it is completely up to you, but I must tell you this is one of the things you must consider*.
>
> *So because of the evidence that came out in this trial is a bit of a hiccup in this trial, there was evidence of the accused exposing himself to the victim, you may also believe that there is evidence that he touched [the complainant] in the back of the shop but did not actually penetrate her because of his statement that he does not function and her statement that his penis was soft, you might conclude that there was not penetration, therefore, there is not 'Unlawful Sexual Intercourse'.*
>
> *You might also conclude that from the evidence of [the complainant] you would believe that he touched her, that he exposed first himself over a period of time to her, then that he touched her. That would mean that he would be guilty of what's called a sexual assault, not 'Unlawful Sexual Intercourse' but a 'Sexual Assault' under section 45(a) of our law, a new relatively new amendment in which it talks about every person who intentionally touches another person, that touching being sexual in nature, and this talks about without the person's consent. But, when the person is under the age of 16, they can't give consent. When they touch the person's vagina or other parts of that person's body, then they have committed an offence, so this is, as I said, a bit of hiccup. This now brings in a different crime that the accused is not charged with on an*

indictment. But, the law says you must now consider because of the evidence that came out, so I leave that you."[1]

[13] At the end of the summation the learned judge instructed the court marshal to insert on the indictment the lesser offence of sexual assault. Her directions were:

> *"If you believe her, if you believe the totality of her evidence or generally her evidence about Mr. Banegas penetrating her with his penis, then you would return a verdict of guilty of 'Unlawful Sexual Intercourse'. <u>But if you don't believe that but you do believe that he sexually assaulted</u> her, all right, a different crime that is not going to be on the indictment, I think Mr. Lind is going to actually endorse the back of the indictment to put on there now, then you could find him guilty of that offence. So, there is going to be an additional wording put on the back of the indictment. It is for you to determine. You may find him not guilty of both or guilty of one and not guilty of the other or as I said not guilty of both. So, it is for you to determine based on the evidence that you accept what verdict you will return."*

<u>The appeal</u>

[14] In the main, the appellant seeks to impeach the directions of the learned trial judge to the jury and has advanced three grounds of appeal:

1. The learned trial judge did not give clear directives to the jury as it relates to the lesser count of sexual assault, nor were they directed as to the elements of the offence and the evidence that was marshalled to support it. ("Summation on lesser offence")

2. The lack of a propensity direction has affected the fairness of the applicant's trial and the safety of his conviction on the basis that such a direction should have been given.

3. The summing-up was not balanced as the appellant's case was not sufficiently put to the jury.

[1] Transcript of proceedings page 188 and 189 of the record of appeal.

Ground 1 – Summation on lesser offence

[15] Counsel for the appellant, Mr. Banner, submitted that the learned trial judge did not give proper and sufficient directions in respect of the offence of sexual assault. He contended that she failed to direct the jury on the elements of the offence of sexual assault and failed to identify the evidence required to support this charge.

[16] Counsel further submitted that the trial judge's direction was prejudicial to the appellant as a result of the recitation of the evidence by the trial judge. In this regard, counsel submitted that the learned trial judge suggested to the jury that because there was evidence that the appellant had exposed himself to the complainant over a period of time and paid her money, they may believe or could conclude that the appellant was guilty of sexual assault.

[17] Mr. Banner argued that there was no evidence on the Crown's case of any touching of the complainant in a sexual manner when the appellant would have exposed himself to her. He argued that the manner in which the jury was directed was unfair to the appellant and that some of the jurors who may have been influenced by the learned trial judge were likely to come to a conclusion that the appellant must or might have sexually assaulted the complainant because he inappropriately exposed himself to her for money.

[18] Mr. Banner went on to state that the learned trial judge informed the jury on two different occasions that the evidence on sexual assault "came out in a bit of a hiccup", but she did not explain why she came to that conclusion and how the jury were to resolve that issue. He told the court that the jurors were left to figure it out on their own.

[19] Counsel, in essence, submitted that when the judge's summing-up on the lesser count of sexual assault is examined, it is apparent that she did not give a clear, comprehensive and detailed direction to the jury as required. He argued that the leaned trial judge's failure to do so prejudiced the safety of the appellant's conviction.

Respondent's submissions

[20] In response, learned Senior Counsel, Mrs. Vidal, argued that the judge fell into no error. Relying on ***Ted Armstrong v The Queen***,[2] she submitted that there is no universal formula for

[2] Criminal Appeal No 19 of 2010 .

a summation and that it must be tailor-made to suit the facts of the case. She asserts that the learned trial judge adequately tailored her directions to the jury to suit the facts and issues raised in the case and that there was no ensuing miscarriage of justice.

[21] Ms. Vidal SC submitted that proof of the offence of unlawful sexual intercourse under the new section 47 of the Code requires, as identified by the learned trial judge, proof of sexual intercourse with the complainant, proof that the complainant was under the age of 16, and proof that it was the accused who engaged in the act of intercourse with the complainant. She further submitted that proof of the offence of sexual assault, on the instant facts, would have required proof that the appellant intentionally touched the vagina of the complainant and that that touching was sexual in nature. She argued that by the time the learned trial judge gave the direction to the jury on the alternative offence of sexual assault, she had already directed the jury on the elements of age, identification and the *act of intercourse.*

[22] According to learned Senior Counsel, the issue which gave rise to the possibility of an alternative verdict of sexual assault was the issue of whether or not there was penetration during the act. It was only if the jury accepted that part of the complainant's account that an incident had taken place, but were either of the view that there was no actual penetration, or were in doubt as to whether there was actual penetration, they could have considered the alternative offence of sexual assault. Mrs. Vidal SC submitted that the only element remaining for the jury's consideration if they had reached that point therefore, was whether, while there was no penetration, he actually touched her. She asserted that clearly, the act described by the complainant would have involved "touching" and it was of a sexual nature.

[23] Learned Senior Counsel's submission is that the judge clearly directed the jury on the issue and directed them that if they conclude from the evidence that there was no penetration, but that the appellant touched her, it was open to them to find the appellant guilt of sexual assault.

Discussion

[24] It would be useful at this stage, to set out the principles governing a trial judge's summation to a jury. It is well-settled that there is no formulaic summation. A judge's summation must be carefully crafted to the particular circumstances of the case which the jury

is being invited to consider. Support for this proposition is found in ***R v Lawrence***,[3] where Lord Hailsham stated that:

> "*A direction to a jury should be custom-built to make the jury understand their task in relation to a particular case. Of course it must include references to the* ***burden of proof*** *and the* ***respective roles of jury and judge****. But it should also include* ***a succinct but accurate summary of the issues of fact*** *as to which a decision is required,* ***a correct but concise summary of the evidence*** ***and arguments on both sides, and a correct statement of the inferences which the jury are entitled to draw from their particular conclusions about the primary facts."*** **(emphasis mine)**

[25] This principle has been consistently applied by this Court in ***Ted Armstrong v The Queen***,[4] ***David McKoy v R***,[5] and ***Jose Maria Zetina v R***.[6]

[26] In ***Junior Meade v The Queen***, the Eastern Caribbean Court of Appeal citing ***R v Huard***[7] noted that:

> "*A charge must leave the jury with an understanding of: (i) the factual issues to be determined; (ii) the legal principles relating to the factual issues and the evidence adduced at trial; (iii) the position of the parties and; (iv) the evidence relevant to the position of the parties on the various legal issues. Further, the directions to the jury must set out the position of the Crown and the defence, the legal issues involved and the evidence that may be applied in resolving the legal issues and ultimately in determining the guilt or innocence of the accused*."

[27] In reviewing the directions of the learned judge, this appellate court is enjoined to look at the thrust of the directions and consider whether they have adequately put the several issues before the jury and given them a proper explanation of their task in relation to those which they have to decide. The Eastern Caribbean Court of Appeal decision of ***Shonovia Thomas v The***

[3] [1981] 1 All ER 974 at p. 977.
[4] Criminal Appeal No.19 of 2010.
[5] Criminal Appeal No. 30 of 2007.
[6] Criminal Appeal No. No. 9 of 2008
[7] 2 2013 ONCA 650 at para. 49.

Queen[8] is instructive on this point. It is the law as set out in ***Jay Marie Chin v The Queen***[9] and ***Knowles v R***[10] on the trial judge's omission to state or do certain things could be fatal only if it undermines the safety of the conviction and a denial of justice ensues. Indeed, it bears repeating that where a judge falls into error, the appellate court would only hold that the consequence of that error should result in the quashing of the conviction if the error undermines the safety of the conviction.

[28] Further in ***Daniel Dick Trimmingham v The Queen***,[11]the Privy Council at paragraph 12 stated that:

> "*There are few cases in which the judge's summing up could not be criticised in some respects and submissions advanced that the content or wording could have been improved upon. The present case is no exception. It is possible in various places to say that the judge should have spelled matters out more fully or in a different fashion, but what an appellate tribunal must do is to look at the thrust of the directions and consider if they have adequately put the several issues before the jury and given them a proper explanation of their task in relation to those which they have to decide. In particular, the Board must determine whether, if there has been any defect, there has been any miscarriage of justice which requires their intervention. Their Lordships are fully satisfied that the trial judge's careful summing up stated the law adequately and put the issues properly and fairly before the jury. They consider that any deficiencies to which exception might be taken were minor and that they fall well short of a miscarriage of justice which should cause them to set aside the verdict."*

[29] Bearing in mind the above principles, I now consider the summation, in particular the complaint that the learned judge did not give clear directions to the jury as it relates to the lesser count of sexual assault, nor were they directed as to the elements of the offence and the evidence that was marshalled to support it. The learned judge commenced her summation in the usual way directing the jury on the respective functions of the judge and the jury in a criminal trial, the burden and standard of proof. She then explained to the jury the elements of "unlawful sexual intercourse" being that the complainant was carnally known, she was between

[8] HCRAP 2010/006 at para.45.
[9] ANUHCRAP2012/0005.
[10] (2022) 100 WIR 51.
[11] [2009] UKPC 25.

the age of 14 and 16 and that it was the appellant who had sexual intercourse with her. The learned judge then invited the jury to consider the offence of "sexual assault". She stated that:

> ***because of the evidence that came out in this trial is a bit of a hiccup in this trial,*** *there was evidence of the accused exposing himself to the victim, you may also believe that there is evidence that he touched [the complainant] in the back of the shop but did not actually penetrate her… therefore, there is not "Unlawful Sexual Intercourse."*

The learned judge went on to direct that:

> *"Sexual Assault" under section 45(a) of our law, … talks about every person who intentionally touches another person, that touching being sexual in nature, and this talks about without the person's consent. But, when the person is under the age of 16, they can't give consent. When they touch the person's vagina or other parts of that person's body, then they have committed an offence, so this* ***is, as I said, a bit of hiccup.*** *This now brings in a different crime that the accused is not charged with on an indictment. But, the law says you must now* consider because of the evidence that came out, so I leave that you."

[30] The learned judge was right in inviting the jury to consider the lesser offence of sexual assault as the indictment alleging an act of unlawful sexual intercourse included sexual assault on that same complainant.[12] She quite rightly directed the jury on the elements of unlawful sexual intercourse and the evidence adduced in relation to that offence. She cannot therefore be criticized for her direction on the offence of unlawful sexual intercourse. However, the learned trial judge failed to engage in a similar exercise regarding the lesser offence of sexual assault. Although she directed the jury that the offence of sexual assault required touching in a sexual nature, she failed to explain the evidence led in relation to sexual assault. She repeatedly stated to the jury that "the evidence came out in this trial as a bit of hiccup". It is not at all clear what the learned judge meant by this. Indeed the jury was left with the task of unravelling the evidence in relation to unlawful sexual intercourse to determine whether it met the requisite standard of proof for sexual assault.

[12] [1969] 3 All ER 371 at 373.

[31] Further, the learned judge directed the jury that if they "believed" that the appellant touched the complainant then he would be guilty of the offence of sexual assault. The learned trial judge ought to have directed the jury of the standard of proof in relation to the offence of sexual assault – that the Crown must show beyond a reasonable doubt that the appellant sexually assaulted the complainant or that they must be satisfied so that they are sure. Simply "believing" is not sufficient to establish guilt. To use the term "believe" without more is, in my view akin to a standard of proof on a balance of probabilities. Having correctly directed the jury on the standard of proof required for the offence of unlawful sexual intercourse, it was incumbent on the learned judge to also properly and fully direct the jury on the standard of proof for sexual assault. Accordingly, I find the argument of counsel for the appellant that the learned judge erred in her direction to the jury on the lesser offence of sexual assault to be persuasive. The learned judge ought to have identified for consideration by the jury, the evidence in support of that specific offence.

[32] The learned judge then went on to direct the jury on the issue of credibility. She stated that:

> *"the issue of credibility becomes very important in a case where everything rests on who you believe. Incredibility, when we say something is incredible, that means you can't believe it. That is just incredible. Credible means something you can believe, something that is believable."*
>
> *"On cross-examination by the accused, [the complainant] agreed that she had written a letter to the accused. She says the letter was in English, but he spoke Spanish which seems to be somewhat confusing. In the letter, she agreed that she had implored for money. Now, it appears that both sides don't seem to argue about this happened or not. But, if you do believe, I have to direct you that is not completely relevant. It doesn't really relate to the main point of the trial which is, did the accused have sex with [the complainant] when she was under the age of 16 years."*

[33] I am of the view that the learned judge, fell into error in failing to highlight to the jury the inconsistencies in the complainant's evidence relating to the location of the offence, 'where' as she had stated in her summation. The complainant in her evidence-in-chief had stated that the location was:

"… *at my grandmother's house behind the board shop*".

In cross examination the question was asked:

"So, you said that you lay down on the pallet that is on Ms. Anita's yard?'

and the complainant answered –

"No, Sir. It is in his yard".

The learned judge also failed to direct the jury on the apparent inconsistency of the complainant's account of what took place and that if they did not believe that account, that this non-belief would be relevant in a consideration of the lesser offence of sexual assault and would necessarily impact her credibility. This error was further compounded by the judge's failure to direct the jury on the relevance of the letter which would go to the credibility of the witness. The judge stated in relation to the letter that:

> "*I have to direct you that it is not completely relevant. It doesn't really relate to the main point of the trial which is, did the accused have sex with 'the complainant' when she was under the age of 16*".

The judge was correct in this direction to the jury, but ought to have further directed them on the relevance of the letter as it regarded the credibility of the complainant; the appellant having denied having sexual intercourse with the complainant. The learned trial judge did not address the jury on the defence of the appellant which was simply that he did not commit the offence of having unlawful sexual intercourse with the complainant. The case for the Crown was that the appellant had penetrative intercourse with the complainant for 5 to 7 minutes. This was her clear evidence. The learned judge did not direct the jury that if they disbelieved this evidence in relation to the offence of unlawful sexual intercourse because they may have come to the conclusion that the appellant was incapable of carrying out the act of penetrative intercourse, then this would be relevant in their consideration on the credibility of the complainant as to whether she was telling the truth which would consequently impact on whether the elements of the lesser offence of sexual assault had been made out; that alternative charge being introduced for the first time in the summation of the trial judge. The learned judge failed to direct the jury that if they disbelieved this evidence (because it was not possible for him to do

so) that this would impact her credibility and account of what happened, especially in a case where it is one word against the other without any other direct evidence.

[34] The omissions of the learned trial judge are sufficient to undermine the safety of the conviction. This finding is dispositive of the appeal and makes it unnecessary to consider the remaining grounds of appeal.

Conclusion

[35] I am of the view that the learned judge's summation in relation to the lesser offence of sexual assault is not what is countenanced by the learning and undermines the safety of the conviction. I am further satisfied that the learned judge's failure to highlight the inconsistencies in the complainant's evidence could have impugned the complainant's credibility and was sufficient to undermine the safety of the conviction. In the circumstances, the appeal is accordingly allowed, the conviction is quashed, the sentence is set aside and a retrial ordered.

_____
HAFIZ-BERTRAM, P

_____
MINOTT-PHILLIPS, JA

_____
FOSTER, JA