IN THE COURT OF APPEAL OF BELIZE A.D. 2002

CRIMINAL APPEAL NO. 18 OF 2001

BETWEEN:

MARK THOMPSON	**APPELLANT**
AND	
THE QUEEN	**RESPONDENT**

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BEFORE:

The Hon. Mr. Justice Rowe	**President**
The Hon. Mr. Justice Mottley	**Justice of Appeal**
The Hon. Mr. Justice Sosa	**Justice of Appeal**

Mr. B. Simeon Sampson, S.C. for the Appellant.
Mr. Rohan Phillip for the Crown.

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2002: February 25 & 26 and June 28.

JUDGMENT

ROWE, P.

1. The appellant was convicted of the rape of his 20 year old "god-daughter" (the victim) and he was sentenced to 28 years' imprisonment. We dismissed his appeal against conviction but upheld his appeal against sentence and reduced it to 13 years' imprisonment for the reasons stated below.

2. A native of Belize, the appellant had distinguished himself in the airline industry and was a Captain of a Boeing 747 aircraft with office headquarters in Dallas Fort Worth, Texas. On February 7, 2001, the victim who lived in New York, flew to Houston Texas and joined a flight with the appellant and together they flew to Belize. They arrived in Belize at about 3:00 p.m., were met at the airport by separate persons and traveled in separate cars to the home of the victim's mother at Buttonwood

Bay. After dinner in Belize City, the appellant had a business meeting and then along with his brother and the victim they drove to Dangriga, to the home of the appellant's mother, who is the grandaunt of the victim. It is common ground that on the following day, the appellant, his brother and the victim visited the appellant's citrus farm in the Stann Creek District and then had dinner. That Thursday night the appellant and the victim attended the Round House Club in Dangriga where the appellant had a couple of drinks and he brought one drink for the victim. It is also common ground that on the Friday following, the appellant, his brother and the victim went swimming at Hopkins Village Beach in the Stann Creek District and later that day the appellant and the victim returned to Belize City by Maya Airlines. There is severe dispute between the appellant and the victim in relation to some events that the appellant testified occurred between them in the Stann Creek District.

3. Upon their return to Belize City, the appellant and the victim went to the home of the victim's mother at Buttonwood Bay. There was no other person staying in that home. They did minor repairs to the victim's mother's van which was at that home, bought food and had dinner at the home. At about 11:30 p.m., the appellant and the victim went to Eden Night Club near the Princess Hotel in Belize City. According to the victim, although she was tired and wanted to go to bed, the appellant prevailed on her to go with him dancing at the Eden Club as he wished to have fun. They returned to Buttonwood Bay about 1:00 a.m.

4. On their return from the Eden Club, the victim showered and dressed for bed. She bade the appellant, who was watching television in the living room, good night and retired to her bedroom where she closed and locked the door. A few minutes later the appellant knocked on the victim's bedroom door. She opened the door and he came in. The victim lay on her bed covered in a comforter. She testified to the following facts: the appellant sat on the edge of her bed and talked to her about his business plans in Belize and about his father. She was dozing while he talked and the appellant got up from the bed, took a few steps towards the doorway and she, thinking that the appellant had left the room, turned her face to the wall and was about to go to sleep. Suddenly she felt the appellant on top of her. At that time she was lying on her back under the comforter with her hands at her side. She tried to move but could not do so, because of his body weight on top of her, and her hands were pinned at her side under the comforter. She felt the appellant reach under her nightgown and pulled her panties off. She felt him touching her breasts. She was shaking and she started to cry. Then she felt the appellant place his penis

at the entrance of her vagina and thrust it very hard into her. She testified that she was frozen in shock, she was shaking and she was crying. The victim said that the ordeal started about 4:00 a.m. and lasted 20 – 25 minutes. She felt the appellant move to the side and was able to free one hand and one leg. She pushed him to the side and ran into the bathroom, locked herself inside and collapsed to the floor. She heard the appellant knocking on the bathroom door, which she refused to open.

5. The victim further testified that she observed that the appellant's shadow had removed from the door of the bathroom, whereupon she opened the bathroom door, ran into her room, searched for and found the keys for the van, put on footwear and ran from the house. She drove the van as far as Freetown Road in search of a police station or a police officer but, finding none, she drove towards her home. As she approached the home, she saw the appellant walking away from the home with his luggage. She cursed at him and ordered him into the van and drove him to the house. There she found the keys for her stepmother's home at Belama and collapsed in the house crying. She saw the appellant coming towards her, so she got up and ran out of the house locking him inside.

6. The victim drove to Belama and awakened her stepmother. She made contact with a police officer and together they returned to the home of the victim's mother. The appellant was still there. He was arrested. The victim was medically examined.

7. At trial, the appellant raised the issue of consent. He gave sworn evidence. He testified that he had known the victim for the greater part of her life and prior to February 2001 they had no romantic relationship whatever. The appellant testified to the following further facts. The victim learned that he would be travelling to Belize at about the same time that she had planned to be in Belize and voluntarily changed her travel plans so that she could fly down to Belize on the same flight on which he was scheduled to travel. After their arrival in Belize, she voluntarily decided to accompany him to his mother's home in Dangriga. On the following day the victim went with him to his citrus farm in the Stann Creek District. There they were hugging and touching each other. That night at the Round House Club in Dangriga, he had a couple drinks and she had one drink. They danced and continued to touch each other. On this score, the victim admitted the visits to the citrus farm and the night club in Dangriga but denied absolutely that there was any hugging or touching of each other at the citrus farm or that there was dancing and touching of each

other at the Round House Club. She admitted that the appellant bought her a drink which she deliberately spilled.

8. It was the appellant's testimony that on Friday February 9, 2001, he went to the very secluded Hopkins Village Beach in the Stann Creek District with the victim and his brother. During the absence of his brother to procure food, while he and the victim were in the sea, they continued touching, cuddling and straddling and there was no objection whatever from the victim. He and the victim had sexual intercourse in the sea. To these allegations of extreme consensual intimacy on Friday February 9, 2001, the victim testified that these events did not take place. She testified that the appellant's brother was with them at all material times while they were at the beach and that the appellant made no overtures of intimacy whatever to her on that visit to Hopkins Village Beach.

9. In relation to the events of the night of Friday February 9, 2002, the appellant testified as follows:

> "Upon arriving in Belize City we went to the complainant's home, we had dinner. Later on that evening we went to the Eden Club. We later returned home about 2:00 o'clock in the morning. At home, we prepared for bed. I began to talk to the complainant about things we had to do on that day. The complainant was laying in the bed, the light in the room was on.
>
> Q. Where were the lights situated?
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> A. In the centre of the room from the ceiling, ceiling light. The complainant had her left arm over her forehead to keep the light out of her eyes, her right hand was just free and she had a cover which was above her waist line and below her breast line.
>
> The Court: The cover was where?
>
> Witness: Above the waist line, below the breast line.
>
> Q. What was happening now while chatting with her about the next day's events with you and her?
>
> A. I began to touch her breast, I kissed her breasts, I touched her vagina, and we had oral sex.
>
> Q. Who doing what?
>
> A. I was performing oral sex and the complainant was responding in a positive manner. She had her underwear on, she raised up so that I could remove the underwear. We continued the oral sex, I performing.
>
> Q. How long did oral sex last, more or less?

A. About 20 minutes. After which we had intercourse.

Q. How long did the intercourse last, more or less?

A. About 15 minutes.

Q. During the oral sex was she in any way manifesting or showing signs of resentment re refusal or willingness on her part to have you suck her private part?

A. There was no negative response, her hands were loose, her feet were loose, she could have screamed, she could have scratched, she could have kicked, there was never, ever any of that. I felt in my heart that she consented because of her body action, language, the way she performed. I had no negative response in any form.

Q. You did not threaten her?

A. I did not threaten her. I did not gag her, she was not tied up, she was not locked up, she free to do what she wanted to do."

10. On behalf of the appellant Mr. Sampson argued six grounds of appeal. His first and third grounds were taken together and in these grounds the complaints were that the learned trial judge failed to give the mandatory warning to the jury of the need for caution before acting on the sole evidence of the victim and that he failed to explain the meaning of corroboration when he told them at page 133 of the Record that the evidence of the accused corroborated that of the victim. Section 92(3) of the Evidence Act provides that:

"Where at a trial on indictment –

(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 if alleged to have been committed or attempted; or

(b) an alleged accomplice of the accused gives evidence for the prosecution,

the judge shall, when 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 such caution."

11. In our view a trial judge is given a discretion to determine the cases in which a caution is required under section 92(3)(a). If the section were to

be interpreted that it becomes mandatory to give the warning in every case in which the prosecution evidence comes solely from the victim, the words "when he considers it appropriate to do so" would be meaningless, and the statute would have made no change whatsoever to the rule at common law, which prior to the statute, required a mandatory warning to be given in such cases.

12. Where a similar problem has arisen in England on similar legislation in the Criminal Justice and Public Order Act of 1994, the Court has repeatedly held that the trial judge has a discretion as to whether or not he will give the warning to the jury. There must be an evidential basis for suggesting that the evidence of the victim was unreliable thus giving reason for such a warning. 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 given of a rape victim and then to explain the reasons therefor. Given the variety of circumstances in which a rape may be alleged to have taken place, if it was mandatory to direct juries that it is unsafe to act upon the uncorroborated evidence of the woman or girl in the same terms as before the amending statute was enacted, that would, in our view, be contrary to the policy and purpose of the legislature. See **Makanjuola and Easton v R [1995] 2 Cr. App. R. 469**; **R v R [1996] Crim. L.R. 815**. We respectfully adopt the approach taken in that case to the interpretation of section 92(3) of the Evidence Act (Belize).

13. Blackman, J. summarized the differences between the evidence given by the appellant and the victim at their various points of contact in the Stann Creek District and in Belize City. Then he drew attention to one important area of the victim's evidence with which the appellant agreed. He highlighted the evidence on which there was that agreement in this way:

> "However, his evidence then corroborates that of the complainant. 'On completion of sexual intercourse, she cried and ran to the bathroom'. She said that on Wednesday, he says that here today."

In that passage the trial judge was not using the word corroboration in any technical sense and in any event he confined the relevance of the word "corroboration" to the fact that both the victim and the appellant testified that upon completion of sexual intercourse, the victim cried and ran to the bathroom. A choice of language that avoids the use of the word "corroboration" in rape cases, unless it is being used in a technical sense, is much to be desired, but in the context of this case, there was absolutely

no possibility that the jury could have been misled into giving some general meaning to this word. We therefore found no merit in the first and third grounds of appeal.

14. Grounds IV and V of the grounds of appeal complained as follows:

> IV. The Learned Trial Judge failed to put the defence adequately, or at all, and in particular it was put in a manner which was fundamentally unbalanced and unfair to the accused.
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> V. The Judge's directions on section 71(2) of the Criminal Code in the context of the accused's evidence that he believed that the victim was in fact consenting, was depicted in a manner that was biased as if ridiculing the accused's defence."

14. It is necessary to turn to the directions of the learned trial judge. He directed the jury that at the end of the day the issue for them was who was lying and who was telling the truth. He strongly advised the jury not to be overly influenced by tears of the victim or the professional manner of the appellant when they gave their evidence in the witness box, or the professional mannerism of counsel on each side. At pages 134 – 135 of the Record the jury were directed that:

> "The important issue for you to decide is what happened. Did she consent? Was he justified in holding that consent? And on that point as to whether he is justified in holding that consent the law is this: Section 71(2) of the Criminal Code of Belize says that 'At a trial for rape a jury has to consider whether a belief that a woman is consenting to carnal knowledge, the presence or absence of reasonable grounds for such a belief is a matter to which the jury is to have regard in conjunction with any other relevant matters whether you so believe."

This provision on the law of Belize is similar in almost identical terms to the language in the Sexual Offences Act 1976 of the United Kingdom and this section, worded in similar terms was also considered by the Court of Appeal in England as recently as April of last year and the case is one **The Queen v Atkins** ('Adkins'). And the judge in this case says: In summing up a case for rape which involves the issue of consent the judge in dealing with the state of mind of the jury (sic.) must direct the jury that

before they can convict, the Crown must have proved that either the woman indeed did not consent or that he was reckless as to whether she consented.

The case goes on to say and I quote, "If the jury are sure he knew she did not consent you will find him guilty of rape knowing there is no consent. If you are not sure about this then you will have to go on to consider reckless rape. However, if he genuinely believed that she did consent even though he was mistaken on that belief he must be acquitted. You have to give him the benefit of the doubt and I go on to quote the same thing as in the Belize Act. "In considering whether the belief may have been genuine, the jury should take into account all the relevant circumstances including presence or absence of reasonable grounds." In the instant case before us, the evidence of the complainant is, she let him in and next thing you know he is on top of her. There is evidence that the complainant and the accused knew each other, for certainly in her case, for her life that she could remember. He was her godfather and he knew her from the time – he said when she was three or four years but then said yes, I was present when she was baptized. So it comes down to at the end of the day, is it something that this 20 year old girl someone whom she treated as an extended member of her family thinking I am consenting to sex with him? Or is this some shock that I am there and this is happening? Is this really happening to me? My uncle raping me, having sex with me? As was said there is not a lot of issue in this case."

15. The offence of rape is defined in section 71 of the Criminal Code, Chapter 101 of the Laws of Belize, Revised Edition 2000.

> "71(1) Rape is carnal knowledge of a female of any age without her consent.
>
> (2) It is hereby declared that if at a trial for rape the jury has to consider whether a man believed that a woman was consenting to carnal knowledge the presence or absence of reasonable grounds for such a belief is a matter to which the jury is to have regard, in conjunction with any other relevant matters, in considering whether he so believed."

There is a different and somewhat more elaborate definition of rape in England and Wales. It is contained in section 1 of the Sexual Offences

Act 1956 and is conveniently set out in **R v Adkins [2000] All E.R. 185, 189**:

> "A man commits rape if – (a) he has sexual intercourse with a person (whether vaginal or anal) who at the time of the intercourse does not consent to it; and (b) at the time he knows that the person does not consent to the intercourse or is reckless as to whether that person consents to it."

16. In England and Wales rape is not confined to carnal knowledge of a female and is not limited to vaginal penetration. A distinction is drawn in England and Wales between a situation in which an accused (a) knows that the complainant is not consenting and (b) is reckless as to whether she consents or not. On the plain language of section 72(1) of the Criminal Code, "reckless rape" as is statutorily enacted in England and Wales does not apply to Belize. In that regard, therefore, decisions of the Court of Appeal, Criminal Division, of England and Wales, in rape cases, may not always be completely applicable to Belize. The passages from **Adkins** which were read to the jury by the learned trial judge, in so far as they related to "reckless rape" were inapposite. As a matter of practice, a trial judge in directing a jury should refrain from quoting case law to the jury. The judge who is trying the case is the repository of the law for the purposes of the jury and it is commonplace for the trial judge and attorneys to tell the jury that they must apply the law as explained by the judge. The source of that law may be varied and it would be impossible for the judge to explain to the jury the source of each direction of law throughout the case. This does not apply to statutory definitions or statutory rules than can sometimes best be given to the jury without further explanation.

17. Mr. Sampson relied on the decision of **Solomon Beckford v The Queen 36 West Indian Reports 300, 306E**, where Lord Griffiths delivering the opinion of the Board, said:

> "The reasonableness or unreasonableness of the defendant's belief is material to the question of whether the belief was held by the defendant at all. If the belief was in fact held, its unreasonableness, so far as guilt or innocence is concerned, is nether here nor there. It is irrelevant. Were it otherwise, the defendant would be convicted because he was negligent in failing to recognize that the victim was not consenting or that a crime was not being committed and so on. In other words the jury should be directed first of all that the prosecution have the burden or duty of

> proving the unlawfulness of the defendant's actions; secondly, if the defendant may have been labouring under a mistake as to the facts, he must be judged according to his mistaken view of the facts; thirdly, that is so, whether the mistaken was, on an objective view, a reasonable mistake or not."

Basing himself on this exposition of the relevant law when consent or no consent is a relevant factor in the alleged crime, Mr. Sampson submitted that the appellant said explicitly that he believed in his heart that the victim was consenting, that the conduct of the victim as testified to by the appellant was powerful evidence to support this belief and that the trial judge was under a duty to give a direction in line with the dicta in **Solomon Beckford**, (supra). In his further complaint, Mr. Sampson said that, far from giving the appropriate directions, the trial judge disparaged the defence and described as "absolute jerk" certain submissions made by defence counsel.

18. That matter arose in this way. Defence counsel addressed the jury to the effect that the victim did not scream, or shout or scratch the appellant during the time that she alleged that she was being raped and that the absence of such physical response by the victim could be taken into consideration on the issue of consent. The trial judge told the jury that the offence of rape was not limited to cases where sexual intercourse had taken place as a result of force, fear or fraud. He tried to dispel from the minds of the jury any notion that there could be no conviction for rape unless signs of a violent struggle or any outcry had been made. In doing so, he used the following language:

> "But don't let any counsel ever tell you in any future case that there must be screaming or shouting or scratching or biting to negative consent. This is absolute jerk and that is not the law."

Mr. Sampson said that he was unfamiliar with the term "absolute jerk" but in the context the jury must have appreciated that it was a disparaging term.

19. This was a very difficult case in which the victim was the admitted god-daughter of the appellant and in respect of this victim there was no scintilla of suggestion that an amorous relationship had existed between herself and the appellant. There was no suggestion that they had agreed to come to Belize so as to realize any emotional satisfaction from their presence together away from the United States. There was no suggestion that the

appellant's presence in the victim's mother's home was intended to foster an amorous relationship between the two persons. The trial judge referred at one point to "the histrionics of defence counsel" and to "passionate submissions" of prosecuting attorney. It seems clear that it was in this very charged atmosphere that the trial judge made the remarks impugned above. In our view, the trial judge correctly stated the law as to the definition of rape as excluding fear, force and fraud. His characterization of counsel's submission as shown above was most unfortunate, however, in the context of this trial, it could have had no adverse effect upon the jury.

20. Mr. Phillip drew our attention to the case of **R v Nelson [1997] Crim. L.R. 234**. In that case the issue was whether the victim was forced to hand over twenty pounds sterling to the appellant at knife point or whether he had given the appellant the money to purchase a mobile phone. Although the details of the summing up are not given in the report, the decision given by Simon Brown, L.J. is helpful. He said:

> "Although every defendant had the right to have his defence, whatever it might be, faithfully and accurately placed before the jury, he was not entitled to demand that the judge should conceal from the jury such difficulties and deficiencies as were apparent in his case. The judge was not required to top up the case for one side so as to correct any substantial imbalance; he had no duty to cloud the merits either; judges existed to see that justice was done and justice required that they assist the jury to reach a logical and reasoned conclusion on the evidence. If judges were unfair to an accused, juries were generally quick to spot it and compensate for it, so that unfairness generally proved counterproductive."

We entirely approve the dictum of Simon Brown, L.J. quoted above. The prosecution is well able to advance its case through prosecuting counsel and defence counsel who has instructions from the defendant is always well able to present the case on behalf of the accused. There is no duty on the trial judge to ever enter the arena of battle on the one side or the other.

21. Where the trial judge becomes aware of an authority, not cited by either prosecution or defence, that may have a direct bearing on the case before him, it is the preferred practice for him to bring that authority to the attention of both counsel, either in Chambers or in open Court, and to invite their submissions thereon. If this practice is followed, a trial judge

would rarely use a recent authority for purposes of explaining the law to the jury in his summing up and which might take participating counsel by surprise.

22. If the jury had accepted the testimony of the appellant as being true they would have acquitted him. If the jury believed that his testimony, in the areas in which there as a difference between himself and the victim, might have been true, they would have acquitted him. The appellant could only have been convicted on the basis that the jury totally rejected his evidence where it differed from that of the victim and at the same time accepted as true the evidence of the victim in its entirely. The trial judge left the case to the jury in this stark form, in a fair and balanced manner. The prosecution's case had all the hallmarks of a plausible real-life incident, while this defence was riddled with implausibilities and illogicalities. We found no merit in these grounds of appeal that were so fully and ably argued by Mr. Sampson.

23. The trial judge proceeded to sentencing immediately after the return of the verdict. He did not have the benefit of a Social Inquiry Report in respect of the appellant and the Court had no background in respect of this case other than that the appellant had no prior criminal conviction. There are good reasons why a sentencing court should be provided with maximum assistance by the prosecution and the defence as to the appropriate sentence for very serious offences. The total circumstances of the offender should be placed before the Court, where this is possible, as it might have a bearing on the sentence to be imposed. In this case the trial judge was not provided with the range of sentences that had been imposed on accused person convicted of rape in Belize and so he was in no position to impose a sentence that showed some uniformity with like sentences within the jurisdiction. Our attention was drawn to the case of **Linsford Garnett, CA 15 of 2001**, in which the accused used a knife to compel the victim's submission to his sexual desires in the course of a rape and he was given a sentence of ten years imprisonment (ironically on the same day on which the appellant was sentenced).

24. In our view the sentence of 28 years imprisonment was manifestly excessive and could not be sustained. The circumstances in which rape may be committed are infinite and we cannot therefore lay down a tariff of sentences short of the maximum sentence enacted by the legislature, What we do say, however, is that in the absence of grave aggravating circumstances, a sentence in excess of 15 years' imprisonment might not be appropriate. We considered the sentence of 12 years' imprisonment

which was imposed by this court in the appeal of **Edric Cruz, C.A. 16 of 2001**. In that case the appellant was convicted of the rape of a student who had no previous sexual experience. In many respects this case had similar features to that of **Cruz** but in our view the fact that the appellant was in a semi-parental role to the victim warranted a more severe sentence. We therefore substituted a sentence of 13 years' imprisonment.

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ROWE, P.

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MOTTLEY, J.A.

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SOSA, J.A.