**IN THE COURT OF APPEAL OF BELIZE, A.D. 2007**

**CRIMINAL APPEAL NO. 18 OF 2006**

**BETWEEN:**

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| **SHELDON LEE BAPTIST** | **Appellant** |
| **AND** | |
| **THE QUEEN** | **Respondent** |

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**BEFORE:**

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| **The Hon. Mr. Justice Mottley** | **-** | **President** |
| **The Hon. Mr. Justice Carey** | **-** | **Justice of Appeal** |
| **The Hon. Mr. Justice Morrison** | **-** | **Justice of Appeal** |

**Mr. Lionel Welch for the appellant.**
**Miss Merlene Moody and Miss Tracy Sosa for the Crown.**

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**5 June, 26 October 2007.**

**MORRISON, JA.**

1. At the conclusion of the hearing of this matter on 5 June 2007, this court dismissed the appeal and confirmed the appellant's conviction and sentence. These are the promised reasons for that decision.

2. The appellant was charged for the offences of carnal knowledge, contrary to section 47(2) of the Criminal Code and two counts of threat of death, contrary to section 238 of the code. He was convicted on all three charges after a trial before Gonzalez J. and a jury, and sentenced to six years' imprisonment for carnal knowledge and one and a half years on

each count of threat of death. It was ordered that the sentences should run concurrently.

3. The case for the prosecution was that on the evening of 4 January 2005, Miss DV was at her home in Burrell Boom, where she lived with her mother. She was 14 years of age at the time. At about 10:00 p.m. she went to the bathroom, which is attached to the house, and while there she heard a noise outside. On her way back into the house from the bathroom she felt someone come beside her, start to choke her and then hit her on the left side of her head with something hard. She fell unconscious and when she woke up found herself somewhere close to a tree stump and an unfinished cement house, at which point someone came on top of her and declared that "he wanted some." She then started kicking and screaming and began to run, getting as far as a point close to a lamp post where the still unknown assailant grabbed her again and pulled her by her hair. It was at this point, according to Miss DV, that she managed to see her assailant's face because of the lamp post directly across a narrow dirt road. She saw that it was the accused, a person she had known all her life. She was able to observe that he was wearing black pants and a dark coloured shirt, before he threw her to the ground and covered her mouth with his shirt, which he had taken off. She continued to struggle, but the appellant tore off her panties, took off his pants, went on top of her and had sexual intercourse with her. After about three minutes, he continued holding her down from her shoulders, asking her questions about her age, where she lived, her parents and whether she knew him. To protect herself, she responded that she did not know him, at which point the appellant told her that if she told anyone what had happened he would kill her. He then released her and as he was leaving reminded her that if she said anything to anyone he would kill her.

4. After he had gone, Miss DV tried to find her way home, but "felt tired and lost" and ended up sitting on the ground close to the house for about two

hours until her mother arrived and carried her home, where she told her what had happened, including that the appellant was the person who had attacked her.

5. Miss DV testified that during the incident she was able to observe the appellant for about ten minutes and saw his face without obstruction from the light of "a big round light" that was on the nearby lamp post. He was someone whom she was accustomed to seeing regularly from she was younger, on the road, passing her house, on the bus and also as a customer at her mother's shop. He was also known by the name "Rover" and was a popular person in the area. Cross examined, Miss DV denied the suggestion put to her by counsel for the appellant that he was not the person whom she saw that night.

6. The victim's mother, Miss GM, gave evidence of becoming aware at some point in the evening in question that her daughter was not in the house and ultimately finding her outside some distance away sitting by herself in the grass. Her daughter told her that she had been "violated" by the appellant, who had also been known to Miss GM for some time.

7. A report was in due course made to the police, the matter was investigated (including medical examination of the complainant) and the appellant was arrested and charged.

8. The appellant in his defence made an unsworn statement in which he denied either knowing or raping Miss DV. He called no witnesses. He was convicted by the jury on all three counts and the sentences referred to at paragraph 2 above were accordingly imposed by Gonzalez J.

9. When the appellant's appeal from his conviction came on for hearing on 5 June 2007, his counsel, Mr. Lionel Welch, sought and was granted leave to argue five amended grounds of appeal, which were as follows:

1. The verdict was unreasonable and could not be supported having regard to the evidence and a jury properly instructed would not have returned such a verdict.

2. The trial judge erred in law in that he did not clearly and adequately explain to the jury the standard of proof necessary.

3. The trial judge did not adequately and fully direct the jury on the law of identification.

4. The jury was not property instructed on how to treat the evidence of the complainant.

5. The judge's summing up was flawed in that it failed to put the appellant's case fairly and properly before the jury.

10. However, during the course of Mr. Welch's argument, it became clear that his main focus was on grounds 2, 3 and 5, with ground 1 being but faintly referred to and ground 4 being formally abandoned.

11. With regard to ground 2, Mr. Welch referred us to the learned trial judge's directions on the standard of proof and complained that they may have had the effect of confusing the jury. These passages in the summing up in particular attracted Mr. Welch's critical attention:

(a) "You look at the evidence, if on the evidence you are satisfied to the degree that you are sure of his guilt, then you can say that because if ten years from now you find that that is not the accused person at least you will say, I acted on the evidence. I have a clear conscience. I was not motivated to come to a conclusion by any sympathy or any prejudice."

(b) “And that standard members of the jury, is that the prosecution must prove the case against the accused to a degree that you feel sure of his guilt. At the end of the day the prosecution must make you sure of the guilt of the accused person.”

(c) “But this burden of proof which the prosecution bears throughout this trial, members of the jury, has a standard. And that standard … is that the prosecution must prove the case against the accused to a degree that you feel sure of his guilt. At the end of the day the prosecution must make you feel sure of the guilt of the accused person. And you will recall that defence counsel in his address yesterday used the phrase ‘beyond a reasonable doubt and he was quite right that I will have to tell you that the expression ‘beyond a reasonable doubt’ and ‘proving a case to make you feel sure of the accused of the accused person’ means one and the same thing. It is felt now that the expression ‘making you sure of the guilt of an accused person’ is less ambiguous than the phrase ‘beyond a reasonable doubt’. What is proof beyond a reasonable doubt? What is that? You might not understand what that means but when you hear the prosecution prove this case to a degree or an extent that you feel sure of his guilt, then members of the jury, you really understand that. I don’t think you have any problem with that. Am I right? You can’t have a problem, you must be sure of his guilt otherwise how could you convict him”?

12. These passages led Mr. Welch to submit that the various explanations of the standard of proof amounted to a misdirection in law and were apt to confuse the jury.

13. We disagree. While it is true that the passage at paragraph 11(a) might be seen as an encouragement to the jury to have regard to a consideration wholly irrelevant to their sworn duty ("if ten years from now you find that that is not the accused", etc.), to be fair to the learned trial judge it must be taken in its context, which was in fact a general and otherwise unexceptionable direction to the jury to eschew sympathy or prejudice in their approach to the case. In any event, to the extent that the judge did mention the standard of proof in this passage of the summing up, he did not misstate it. The passages at 11(b) and (c) are in our view perfectly accurate, bearing in mind with regard to (c) in particular that the learned judge's reference to reasonable doubt was plainly prompted by Mr. Welch himself having used the phrase in his address to the jury.

14. Having considered the summing up as a whole, we are satisfied that the learned trial judge left the jury with full and clear directions on the standard of proof. In addition to the passage already referred to, we would refer to the following passage towards the end of the summing up:

> "Now before I ask you to retire and consider your verdicts, Members of the Jury, let me tell you that there are three charges against the accused, or remind you, there are three charges against the accused. One is the carnal knowledge of the complainant who was above the age of 14 years but below the age of 16 years. With respect to this charge, you will consider, Members of the Jury, the prosecution's evidence, you will examine that evidence carefully and if on that evidence, having considered the dock statement of the accused, you come to the conclusion and you are sure that the accused is guilty, then you will return a verdict of guilty. However, if you are not so sure on the prosecution's evidence of the guilt of the accused person, or if you have any reasonable doubt about his guilt, you will return a verdict of not guilty. You will then go on to consider the two charges, namely,

> threat of death independently or individually, one or separately. And again, you will look to the prosecution's evidence after you have considered the dock statement and in respect to the first threat of death charge, if you are sure of the guilt of the accused person, you will return a verdict of guilty. But if you are not so sure, if you have any reasonable doubts about his guilt, you will return a verdict of not guilty. You will then go on and do the very same thing for the second charge of threat of death, and if on the prosecution's evidence, having considered the defence's dock statement, you are sure of the guilt of the accused person, you will return a verdict of guilty. However, if you are not so sure of his guilt, or if you have any reasonable doubt about his guilt, it is your duty to return a verdict of not guilty. With that, Members of the Jury, I will ask you to retire and consider your verdict, unless defence counsel feels that I have left out some important area of the law."

15. Ground 3 related to the learned trial judge's directions to the jury on the question of identification. Despite the manner in which this ground of appeal was framed, Mr. Welch's complaint appeared to be that, in the light of section 92(3)(c) of the Evidence Act, the learned trial judge ought, in addition to a **<u>Turnbull</u>** direction on the special need for caution with regard to identification evidence, (which he gave), to have told the jury of the special need for caution in respect of the evidence of Miss DV in her capacity as a complainant in a sexual case. No authority was cited for this proposition, but it is in any event plainly unsustainable in the light of the learned trial judge's very clear direction to the jury in the following terms:

> "… you are required to examine the complainant's evidence carefully and cautiously before accepting it and relying on it. Having done that, Member of the Jury, if you accept the evidence of the complainant as true, then, … you can act on it and provided the

> other elements of this offence are proved, it is open to you to find the accused guilty, yes? That is the law."

16. Finally, ground 5 complains of a failure by the learned trial judge to put the appellant's case "fairly and properly before the jury." However, as Mr. Welch developed his argument, it became clear that his complaint related to alleged weaknesses in the identification evidence. However, the learned trial judge did in fact make specific reference to what appears to have been the very weakness highlighted by Mr. Welch at the trial in the evidence in the following terms:

> "Members of the jury, in respect of this identification of the accused by the complainant, it is my duty to point out to you any possible weakness in the evidence as I see it. And you may accept it or reject it. Now one of the weaknesses I see in this evidence of identification, Members of the Jury, is the weakness highlighted by learned counsel Mr. Welch, and, that is, Members of the Jury, that if indeed the complainant saw the accused attacking her and if she really knew him, why did she not yell or holler, Sheldon, leave me alone; or Sheldon, behave yourself, or something to that effect? You see, Members of the jury, why not? It is for you to determine as men and women of this world whether or not that would be a likely behaviour of a person being attacked by someone who that person knows. If you know someone, that person is attacking you, would you not say, boy, so and so, weh the gwine with you? Yuh crazy or what? You know, something to that effect. Why not call a name, you see, Members of the Jury? But she says in her evidence that at no time she called Sheldon Baptist's name and she had known him for some time. She did not even say Rover. Nothing. So, Members of the Jury, this in my view is one of the weaknesses in the evidence of identification and it is a matter for you to take into account and make of it what you wish, okay."

17. For all these reasons, this court found no merit in any of the grounds of appeal argued on behalf of the appellant and his appeal was accordingly dismissed.

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**MOTTLEY P**

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**CAREY JA**

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**MORRISON JA**