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

CRIMINAL APPEAL NO. 30 OF 2005

BETWEEN

DENNIS GABOUREL	**Appellant**
AND	
THE QUEEN	**Respondent**

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BEFORE:

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

Mr. Hubert Elrington for the appellant.
Ms. Cheryl-Lynn Branker-Taitt, Deputy Director of Public Prosecutions for the respondent.

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5 June, 26 October 2007.

MOTTLEY, P.

1. The appellant was charged on an indictment containing four counts. In count 1, he was charged with having carnal knowledge of YM without her consent on 19 September 2003 in the Hanger area in the City of Belize. In count 2, he was charged with having carnal knowledge with YM without her consent also on 19 September 2003. On this occasion, the offence was alleged to have taken place at her home at 4522 Morning Glory Street also in the City of Belize. Count 3 charged the appellant with intentionally

and unlawfully causing grievous harm to YM also on the 19 September 2003. In count 4, the appellant was charged with aggravated assault on SS, a female. The aggravated assault alleged that he indecently assaulted her on 9 September 2003. She is the daughter of YM. Count 4 was tried together with counts 1 to 3. The appellant was acquitted on count 2, but was convicted on counts 1, 3 and 4. On count 1 and 3 he was sentenced to 8 years' and 3 years' imprisonment respectively. On count 4 he was sentenced to 2 years to run consecutively to the sentence on count 1.

2. The appellant has appealed against his conviction and sentence. He filed a number of grounds of appeal. The Court allowed the appeal and ordered a new trial and, consequently, we will restrict our comments on the facts.

3. The appellant and YM had an intimate relationship. At one stage, he resided with her at her residence at 4522 Morning Glory Street, along with her son and daughters. As a result of an incident which occurred at the house, the appellant, on 10 September 2003, was asked by YM to leave her residence. On the night of 18 September, YM, on leaving work at the Karl Heusner Memorial Hospital, saw the appellant who offered to take her to her home. Upon arrival, YM asked the appellant to take her to the casino at the Princess Hotel. Later, she called the appellant and asked him to come to the casino in order to take her home. While driving with him, she refused his invitation to go to his home. He instead took her to an area near the Municipal Airport, where, at an area referred to as the Hanger Area, that the offence alleged in count 1 took place. Later the same day, at about 7:30 am, the appellant went to YM's residence. It was there that the offences of rape and intentionally causing grievous harm were alleged to have occurred. The appellant denied committing any of the offences.

4. At the hearing, Mr. Elrington had submitted that count 4 which alleged indecent assault on Shamira Smith on 9 September 2003, did not have any relationship to the other counts in the indictment. He argued that count 4 arose out of completely different facts and was in no way connected with the facts which related to counts 1 to 3. He submitted that if this count were allowed to stand, it would mean that the prosecution would be leading evidence which would tend to show that the appellant was involved in prior criminal conduct. Such evidence, he contended, would be highly prejudicial and would prevent the appellant from having a fair trial.

5. The judge recognized that, in exercising his discretion under Rule 4 of under the Indictable Procedure Act Cap. 96, he was required to consider the interest of the prosecution and the accused. He identified the question that he had to ask himself was whether the jury would be able to act fairly when directed by the judge that each count is indeed separate and that the evidence in relation to count 4 was independent of the other three counts. The judge went on to point out that he had to consider whether the indecent assault was a crime of a similar character to that of rape for the purpose of joinder. Clearly the trial judge had in mind the approach adopted by Roskill LJ (as he then was) in **R v Blackstock (1979) 70 Cr. App. R 34** where he pointed out at p. 38:

> "We see no reason at all, within the principles applicable to rule 9 of the Indictment Rules why these two robbery counts with the associated firearms counts should not have been tried together. There was no injustice as a result, so long as the jury were told that the evidence of one pair of counts was not evidence on the other pair."

6. The trial judge stated as follows:

> "Count 4 as I have said is a substantive and independent count. The evidence in respect of this count will be relevant only to the point that it will show, if believed by the jury that it was an act which caused or triggered the severance of the relationship between the accused and YM. This piece of evidence is relevant and is also admissible to rebut in anticipation, that the relationship at the time of the incidents, in connection to counts 1 and 2, did not exist between the accused and YM."

7. In other words, the judge was of the view that the evidence in respect of count 4 was only relevant to show that it was the indecent assault which caused or triggered the break up of the relationship between the appellant and YM. The judge was aware nonetheless that the question which he had to ask himself was whether the evidence on count 4 would prejudice the fair trial of the appellant. He answered this question by saying that most authorities he had read stated that "it is on rare occasions that judges have exercised their discretion to sever in the indictment." In his ruling, the judge expressed the view that, in the event of the case reaching the jury for its decision, with adequate directions in the summation, the jury would be able to render a proper verdict. The judge would have to direct the jury that the evidence in support of the allegations contained in count 4 cannot be used by them to convict the accused on counts 1 to 3.

8. Joinder of offences in the same indictment is governed by Rule 4 of the Indictment Rule which is set out in the Schedule to the Indictable Procedures Act Cap 96 of the Laws of Belize (revised Edition 2003). Rule 4 states:

> "Charges for any crimes, whether felonies or misdemeanors, may be joined in the same indictment if those charges are found on the

same facts, or form part of a series of crimes of the same or similar character."

Rule 4 is similar to Rule 9 of the Indictment Rules 1976 (made under the Indictment Act 1915) of England except that Rule 9 uses the word "offences" instead of "crimes" and does not contain the distinction between felonies and misdemeanors.

9. Section 73(3) of the Indictable Procedure Act Cap 96 provides:

> (3) If the court thinks it conducive to the ends of justice to do so, it may direct that the accused person be tried upon any one or more of the counts separately.

This is to be compared to section 5(3) of the Indictment Act 1915 of England which provides:

> "Where, before trial, or at any stage of a trial, the court is of the opinion that a person accused may be prejudiced or embarrassed in his defence by reason of being charged with more than one offence in the same indictment, or that for any reason it is desirable to direct that the person should be tried separately for anyone or more offences charges in an indictment, the court may order a separate trial of any count or counts of such indictment."

The effect of section 73(3) is to give to the trial judge a wide discretion when considering an application to sever counts in an indictment. In exercising this discretion however, the judge must have regard "to the ends of justice". This means that the judge must have regard to the interest of the defendant as well as the interest of the prosecution.

10. The appellant alleged that the trial judge erred in the purported exercise of his discretion when he rejected the appellant's application to sever count 4 from the other count in the indictment and have a separate trial. In reviewing the exercise of the discretion of the trial judge to refuse to sever the count we are mindful of the approach of the Court of Appeal in England when faced with reviewing the exercise of a discretion by a trial judge. In **Rex v Sims [1946] KB 531**. In Sims, the Court was reviewing the exercise of the discretion by a judge under section 5(3) of the Indictment Act of 1915 which permitted the judge to sever a count in an indictment. Lord Goddard CJ, said at p 536:

> "That section confers a discretion on the judge with which this court will not interfere unless it sees that justice has not been done. See **Rex v Grondkowski, Rex v Malinowski [1946] KB 369**.

11. In **Reg. v. Flack (1969) 1 WLR 937**, Salmon L.J. at p. 943 also speaking of the approach of the Court of Appeal when reviewing the discretion of the trial judge in criminal cases put it succinctly:

> "This court will not, however, interfere with the decision of the judge in such a matter unless satisfied that there were no reasonable grounds upon which his decision could be supported, or that it may have caused a miscarriage of justice."

This statement was adopted by Lord Lane CJ in **Reg. v. Cannan (1990) 92 Cr. App. R. 16** where at p.23 he said:

> "But the fact remains that the Indictment Act 1915 gives the judge a discretion and it is a well-known fact, and a well-known principle, as Salmon L.J. in his usual clear language sets out in the case of **Flack [1969] 1 W.L.R. 937**, that it is not a matter with which the

court will interfere, unless it is shown that the judge has failed to exercise his discretion upon the usual and proper principles, namely, taking into account all things, he should, and not taking into account anything which he should not."

12. Under the provisions of section 73(3) the judge is required to exercise the undoubted discretion given to him. In so doing, the judge must have regard to the 'ends of justice.' The authorities cited above with which we agree, make it abundantly clear that a Court of Appeal will not interfere with the exercise of the judge's discretion unless it is shown that the judge failed to take into account all the circumstances of the case or did take account any matter which he ought not.

13. It is indeed unfortunate that the judge, in giving his ruling, expressed the view that, in most of the authorities he had read, it appeared to him that, it was only in rare occasions, judges had exercised their discretion to sever counts when confronted with indictments containing counts similar to those with which the appellant had been charged. It appears that, in exercising his discretion, the judge had regard to the fact, as he observed, that most judges in the past had exercised their discretion not to sever. The observation could have left the impression that this was a factor which might have influenced his decision. It is impossible to say whether it did influence his decision and if so to what extent. The judge was required to exercise his discretion on the facts of this case. The statistic mentioned by the judge, even if true, cannot be a factor to which the judge ought to have regard.

14. It cannot be over emphasized that in exercising his discretion the trial judge must take into consideration all the circumstances of each particular case. Nonetheless, it is useful to be mindful of what was said by Lord Taylor of Gosforth CJ in **Regina v. Christon [1997] AC 117**, where after

pointing out that Lord Lane C.J. in delivering this judgment in **Regina v Cannan** (supra) "refrained from specifying the factors a judge should consider when taking into account all things he should" indicated nonetheless at p.129:

> "They will vary from case to case, but the essential criterion is the achievement of fair resolution of the issues. That requires fairness to the accused but also the prosecution and those involved in it. Some, but no means an exhaustive list, of the factors which may need to be considered are: -how discrete or inter-related are the facts giving rise to the counts; the impact of ordering two or more trials on the defendant and his family, on the victims and their families, on press publicity; and importantly whether directions the judge can give to the jury will suffice to secure a fair trial if the counts are tried together."

15. We are satisfied that the exercise by the trial judge of his discretion resulted in unfairness to the appellant. It was for these reasons that we allowed the appeal.

MOTTLEY P

SOSA JA

MORRISON JA