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

CRIMINAL APPEAL NO. 30 OF 2007

BETWEEN:

DAVID MCKOY	**Appellant**
AND	
THE QUEEN	**Respondent**

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BEFORE:

The Hon. Mr. Justice Sosa	**-**	**Justice of Appeal**
The Hon. Mr. Justice Carey	**-**	**Justice of Appeal**
The Hon. Mr. Justice Morrison	**-**	**Justice of Appeal**

Mr. Anthony Sylvestre for appellant.
Ms. Merlene Moody for the respondent.

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11 June, 26 October 2007.

CAREY, JA

1. The appellant stood his trial before Gonzalez J and a jury at the Central Criminal Session between 12 and 14 December 2006 on an indictment charging him with attempted rape, and upon conviction, he was sentenced to eight years' imprisonment. He appealed. We heard submissions in that regard on 11 June when we dismissed his appeal, affirmed the conviction, and promised to give reasons which we set out hereunder.

2. The facts on which the prosecution was based, are as follows: on 18 December 2003 the Ministry of Health staff held their Christmas party at the William Tam Building in Belmopan. A group of four young ladies, all co-workers at the Ministry, which included the victim, attended this party.

We refrain from revealing their names in light of the nature of the case. Their evidence provided the basis of the Crown's case against the appellant. The appellant who is a co-worker also attended the party. When the party ended at about 2:00 a.m., the four girls made their way to a nightclub accompanied by a male colleague, but found it closed. A telephone conversation between this colleague and the appellant induced them to move to the house of a friend of the appellant, one Douglas Grant.

3. There, according to the victim the appellant insisted on her having a drink of rum, and then of tequila, both of which she declined. Thereafter she went to the area of the kitchen where she had a drink of Sprite. She was again approached by the appellant who attempted to pour some tequila in her glass which she moved away, causing some of the contents to spill on his shirt. She was apologetic when he snapped loudly at her – "Look Minerva what you did to me!" That was not her name but that of his girl-friend. While she was seated on a sofa she heard the appellant calling her name. He was beckoning her to look at something to which he was pointing. At first she ignored this invitation, but as he was laughing in an odd way, she decided to go and see what it was. She stood up and went towards him whereupon he grabbed her by the arm, pushed her into a room and locked the door. She tried to open the door. He grabbed her by the arm and at the same time tried to pull her pants down. She pulled it up. He pulled it down to her knees and then threw her on the bed in the room. He succeeded in removing her pants and underwear from one leg and forced both her legs to her shoulders and tried to penetrate her. She felt his penis against the outside of her vagina and his thrusting motion which she found painful. During this activity, he was lying on her and covered her mouth with his "arm". She was also struggling to escape. When she freed her mouth, she shouted for help. There was immediately a banging on the door and she recognized the voices of two of her friends telling the appellant to open the door.

4. The appellant did open the door. When her friends, the three other girls entered, they found their friend partially dressed – one leg was outside her pants and her panty. The appellant was fully dressed with his zipper down and his pubic hair exposed. She said "he forced me". They helped her dress, comforted her because she was hysterical and helped her to the hospital. When asked by the girls what he had done to their friend, his response was "nothing … and that they should asked their friend". The girls for the most part related a similar story and such variations as there were, could not be regarded as significant.

5. As was to be expected, the appellant's version did not tally with the story told by his victim. He agreed that his co-workers had a Christmas party at the Ministry of Health and that after the party ended, they repaired to Douglas Grant's house in Belmopan, where there was music, and drinks and socializing. Eventually, he found himself in the kitchen with the virtual complainant. They decided to go into a bedroom. But she had some reservations, wondering aloud what her friends would think of her. She did go in and he closed the door. They kissed and fondled each other and when she removed her pants, he engaged in oral sex with her. There was a knocking on the door and voices. He told his companion to put on her clothes and after about two minutes, he opened the door. Prior to the knocking sounds on the door, the virtual complaint was making pleasurable noises but after the sounds of knocking on the door, she began a crying sound.

6. The girls on entry asked him what they were doing in there. He replied "Ask (the virtual complainant)?" He denied attempting to have sexual intercourse with her. For completion, it is to be noted that he did admit that she had one leg outside her pants and her underwear.

7. It is plain that the jury by its verdict was not impressed by his version of events.

8. The appeal did not seek to challenge the findings of the jury and Mr. Sylvestre accordingly raised questions of law in seeking to persuade us to interfere. As we did at the hearing, we wish to pay tribute to counsel, who deployed his arguments with commendable tenacity.

9. He put forward five grounds of appeal which we will consider seriatim.

> (a) The learned trial judge erred when he failed to give a good character direction in favour of the appellant in light of the appellant David McKoy's evidence.

Mr. Sylvestre submitted that such a direction was warranted in light of evidence given by the appellant that he had never been arrested. He accepted that the counsel who appeared on behalf of the appellant at trial, did not in any way make good character an issue before the judge and jury: he did not distinctly raise that issue. On that base, he valiantly endeavoured to maintain, that since good character was raised, it obliged the trial judge to give the jury directions regarding good character. We should add, in fairness to counsel, that he sought to expand the evidential foundation of his argument by calling attention to the fact that the appellant had also stated in evidence that he was a civil servant, and at the time of trial, managed the family business.

10. The authorities in this regard make it clear beyond a peradventure that if good character is being relied on by the defence, it must be ***distinctly raised***. Lord Lloyd of Berwick giving the advice of The Board in *Barrow v. The State 52 WIR at p 495*:-

> "(Their Lordships') view is that the practice in Trinidad and Tobago and elsewhere in the Caribbean, should accord with the practice approved by the House in *R. v Aziz [1969] AC 41*. But a failure to comply with the practice will not necessarily result in an appeal

being allowed in every case. Thus an appellant will only be able to rely on the absence of a direction if the point has been distinctly raised by the defence in the course of the trial."

See also L*ockhart v R 50 WIR 182; Arzu v. The Queen (unreported) C.A. 8 March 2007*.

11. There was no question but that the good character of the appellant was not distinctly raised by defence counsel at trial. No mention whatever was made of the appellant's good character in his counsel's closing address to the jury nor when the trial judge at the conclusion of his summing up, invited counsel to state whether there was any important point of law with respect to which he had omitted to mention. The record shows that the very experienced Senior Counsel who appeared on behalf of the appellant did not respond. Counsel for the appellant before us disclaimed any suggestion of ineptitude on the part of Senior Counsel. So would we. The conclusion seems inevitable that counsel below was not relying on good character. Doubtless he was aware of the observation of Lord Woolf in *Edmund Gilbert v The Queen (unreported) P.C.* delivered 27 March 2006:-

> "… it only remains to point out that it is still the general rule that it is up to defending counsel and the defendant to ensure that the judge is aware that the defendant is relying on his good character. If this rule is not adhered to, there is a danger that an unscrupulous defendant will be able to manufacture a ground of appeal based upon the failure of the judge to give the proper character direction. The fact that a defendant has no previous convictions recorded against him does not mean that he inevitably is of good character. That is why it is good practice for the judge, where there is any doubt as to the position, to raise the matter with counsel…"

In our judgment, this dicta confirms our view that the issue of good character was not raised at the trial. We are of the view that the evidence of the appellant that he was in employment, added nothing to the arguments of counsel. It is as plain as can be, that the need for a good character direction did not arise because the issue was not raised, much less distinctly raised. The facts were against him and the learning on this aspect of the law as we have shown, provided no support.

12. (b) The learned trial judge erred when he admitted evidence the prejudicial effect of which outweighed its probative value.

Counsel for the appellant relied for support of this ground on evidence of a scream which the trial judge elicited from one of the Crown witnesses (KC at p. 96 - 97) by pressing the witness to imitate the scream which she said was made by her co-worker in the room where she was locked with the appellant. Counsel agreed with a member of the court that the scream could be considered real evidence and as such was admissible but, he submitted, its prejudicial effect outweighed its probative value. As he was quite unable to formulate the prejudicial effect of the scream, he did not press the ground and we say no more about it, save that we saw no ground of complaint.

13. (c) The learned trial judge erred when he took on the role of the prosecution counsel and took over the examination of witnesses on behalf of the prosecution.

There was no doubt that counsel for the Crown did not lead the virtual complainant on details of the attempted rape as it unfolded that night. For reasons which are not readily apparent, the trial judge elicited that evidence. It may be that he had good reasons for doing so. We are not prepared to speculate. Unless it could be shown that the trial judge's conduct caused some prejudice to the appellant, deprived him of the

substance of a fair trial or amounted to some material irregularity, we would not wish to interfere. This list is not intended to be exhaustive. Mr. Sylvestre did not cite any authority where a trial judge intervened to ask questions of a witness in which it was held to be prejudicial or could be said to have deprived the appellant of a fair trial or amounted to a material irregularity. We do not think that anything changes because the questions asked by the judge relate to "(those) material issues of the trial". It was never suggested by counsel that any improper questions were put nor that the judge led the witness or hectored the witness. We do not think that "taking over the examination of a witness" by the judge is per se, a basis for our interference.

14. We are satisfied that there was no irregularity on the part of the judge. We only wish to say by way of advice, that it is preferable for counsel for the Crown or for the defence for that matter to be allowed to carry out their responsibilities, unaided. Different considerations would apply if the judge took the view that an inexperienced counsel was floundering or performing ineptly. Ms. Moody for the Crown referred to section 65(7) of the Evidence Act, which states:- "…(7) The judge may of his own motion at any stage of the examination of a witness, put any questions to the witness he thinks fit in the interest of justice…" She noted that experienced Senior Counsel below made no objections whatever. Counsel for the appellant directed our attention to a decision of this court, *Albino Garcia Jr. v. The Queen (unreported)* 24 June 2007, where we were highly critical of the conduct of the trial judge in allowing inadmissible and highly prejudicial evidence to be adduced by the prosecution. We said (para 12) – "It is the essence of a fair trial that the rules be followed not only by counsel but as well by the judge who sits to ensure compliance". In the instant case, counsel did not identify any obvious breach of the rules which could be considered a departure from good practice as to be prejudicial to a fair trial. That case is thus clearly distinguishable from the present matter before us.

15. (d) The learned trial judge failed to direct the jury along section 71(2) of the Criminal Code in respect of (sic) the all circumstances from which the presence or absence of reasonable grounds for belief of consent could be inferred".

Section 71(2) of the Criminal Code provides as follows:-

> "(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".

A summing up, it has been said time out of mind, must be tailor-made for the particular circumstances which the jury is called upon to consider. It is not a circumnavigation of the criminal law to demonstrate the trial judge's familiarity with, and knowledge of, the criminal law. In our view, this particular provision can only be called into play "where the jury has to consider whether (the appellant) believed that (the) woman was consenting to the carnal knowledge", that is, to the sexual intercourse which has taken place.

Assuming, without deciding, that "trial for rape" includes "trial for attempted rape", the jury, in the instant trial, were not called upon to consider whether the victim was consenting to sexual intercourse. The appellant said he never intended to engage in such activity nor did he attempt to do so. His riposte to the allegation was that he engaged in oral sex with his co-worker who was a consenting party. We are in no doubt that this ground is without merit and must be rejected as unsound.

16. “(e) The learned trial judge failed to leave the alternate (sic) charge of indecent assault to the jury.”

The facts of the case as adduced by the prosecution amounted in law to attempted rape. The defence was a denial of the facts amounting to rape and an admission of consensual oral sex. We were unable to appreciate how “the alternative charge” of indecent assault arose in the circumstances. Regrettably, Mr. Sylvestre was quite unable to provide any enlightenment. He contented himself by asserting that it was an issue that ought to have been left to the jury. We found no merit in this ground.

17. Before leaving this case, we note that when the judge called upon the appellant to make his defence, two and half pages of typescript were used to advise him of his rights. In our respectful opinion, it is wholly unnecessary in advising an accused of the options open to him to explain the legal effect of an unsworn statement as in a direction to a jury. Words which convey the three options open to an accused, and his right to call witnesses are, we think, more than adequate for the purpose. All the more so in this case where the appellant had the benefit of Senior Counsel. We take the view that the trial judge believed he was assisting the appellant but we doubt if the appellant, under the stress of a trial, would appreciate the niceties of evidence *vis a vis* an unsworn statement. This exegesis served no useful purpose.

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SOSA JA

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CAREY JA

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MORRISON JA