IN THE COURT OF APPEAL OF BELIZE A.D. 2008

CRIMINAL APPEAL NO. 1 OF 2007

BETWEEN:

JOSE OCHOA	**Appellant**
AND	
THE QUEEN	**Respondent**

BEFORE:

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

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

—

18 October 2007 & 13 March 2008.

CAREY, JA:

1. On 9 February 2007, before Lucas J sitting with a jury, the appellant was convicted on an indictment which charged three counts of incest. He was sentenced to concurrent terms of twelve (12) years' imprisonment. We heard his appeal against conviction and sentence on 18 October which we dismissed promising to give our reasons at a later date. We now do so.

2. The tale which unfolded before the jury at the trial must be considered a family tragedy: a daughter perhaps irreparably psychologically damaged for life, a father imprisoned for a long period and a family rent apart and wrecked. Fortunately, it will not be necessary to rehearse the circumstances in any detail in light of the solitary ground on which the appeal was based, viz., that "the learned trial judge erred and was wrong in law when he failed to assist the defendant, an unrepresentative (sic) person in the presentation of his defenses. This failure resulted in a miscarriage of justice".

3. The incidents which formed the contents of the three counts occurred over a three year period between 1999 and 2001. As to the first which took place between Christmas day 1999 and the end of the month, the victim awoke to find her father having sexual intercourse with her. Then on New Year's night, after she had returned home from a party with her father, her brother and sister, she was again sexually assaulted by her father in an unused storeroom. Her mother came to the storeroom and asked after her when she observed that her daughter was not in bed. When later the mother spoke with her, she admitted to her mother that she had been with her father. The third incident occurred in May 2001 when she had occasion to use the bathroom, apparently a pit latrine. Her father having gained entry once more sexually abused her. When the mother surprised them, her father, the appellant hid in the "toilet hole". There the mother found him. That essentially was the prosecution case and the evidence the jury must have accepted.

4. The appellant testified in his own behalf, and also addressed the jury. He was, he said, innocent of the charges laid against him by his daughter and her mother, whom he accused of having cheated on him. Since those events which prompted the charges, he had married another lady. The

child's mother had fabricated this story in order to frame him, because she thought he had reported her to the immigration authorities.

5. Mr. Hubert Elrington rested his criticism of the trial judge's failure to assist the unrepresented appellant on *R v. Brown (Milton) [1998] Cr. App. R. 364*. In his written submissions, he noted that "the Court of Appeal said inter alia:

> "that it would often be desirable, before cross examination for judges to discuss the course of proceedings with the defendant in the jury's absence, the general nature of the defence could then be elicited, and specific aspects of the witness' evidence with which the defendant took issue identified, the substance of any evidence by the defence witnesses could be elicited with a view of obtaining the witness' observation; The defendant should be allowed to begin the questioning, but it should be made clear in advance that repetition would not be permitted".

Counsel maintained that the trial judge had not assisted the jury in the manner laid down by Lord Bingham CJ (as he then was) in this case. Counsel noted in his skeleton arguments that "a cursory glance at the cross examination and evidence in chief done by defendant, shows that he had no idea of what he was doing and got no help from the trial judge". He complained that the trial was one-sided, it was all in the prosecution's favour from start to finish. Finally, he observed in his written argument, that the defence was never put to the jury.

6. We begin by pointing out that the English Court of Appeal was not presuming to lay down inflexible rules of general application but did no more than provide useful guidance in certain cases, for example, rape as is stated in the judgment. It sought to address a particular problem which

experience had shown, provided unrepresented defendants with the opportunity to abuse the rules "in relation to relevance and repetition which apply when witnesses are questioned". It is not to be presumed that every defendant intends to conduct his case in the manner indicated in the judgment. There is no question that the judge's clear duty is to give such assistance to an unrepresented defendant as is appropriate in the circumstances. That, we apprehend, does not mean that the judge must bend over backwards or to use the words of Lord Bingham CJ, "give the defendant his head, to ask whatever questions, at whatever length, he wishes".

7. We observe *en passant* that counsel's conclusion that the judge had proffered no help to the appellant, was based on a "cursory glance" of the transcript. For our part, we propose to examine the transcript with meticulous care to determine whether the criticisms are at all justified.

8. The duty of a trial judge where an accused person is unrepresented is to assist him to ensure that the jury understand the defence being put forward. He is not to act as defence counsel. Clearly he will assist the accused to put questions in cross examination, having ascertained the point or the issue the accused wishes to address within the bounds of relevance. This duty to assist an unrepresented accused includes assistance in putting forward his defence in intelligible terms. If the judge carries out these responsibilities which we have outlined, to the best of his or her ability, this court would be loath to interfere. We desire to state as well, that nothing that we have stated, runs counter to the guidelines laid down by the English Court of Appeal in *R v. Milton Brown (supra)*.

9. Our examination of the transcript of the proceedings shows that the trial judge was very much alive to the duty he owed to the appellant. During the cross-examination of the victim, there were numerous occasions when

the trial judge intervened to assist the appellant. His method was to formulate the question and put it to the witness. The following extract (p. 65) is illustrative:

“THE COURT:	Yes. So the question is?
THE ACCUSED:	The question is that when find fuh she self naked, no clothes. I mean, how all ah that wan happen without she wake? I mean, eh look like dah she mi did drink.
THE COURT:	The question is: can you explain how you did not know that your clothes were taken off?
THE WITNESS:	

At p.68

THE ACCUSED:	In ah the statement you state that you mi just turn ten years old when this incident occurred and in ah the statement
THE COURT:	Hold on she has to answer all that. Did you state that you had just turned ten years old in the statement?
THE WITNESS:	Yes sir …”

In this example, it is to be noted that the trial judge was not permitting harassment of the young witness by double-barreled questions. He was following what was suggested in *R v. Brown*, that is, he was not “giving an unrepresented defendant his head to ask whatever question...”

10. We do not propose to itemize all the examples of the trial judge's endeavours to assist the accused in formulating questions which the appellant wished to put to the prosecution witness nor do we think it is necessary to do so. It suffices to say that there were numerous occasions on which the trial judge discharged his responsibilities in this regard.

11. Mr. Elrington in his skeleton arguments, further submitted that the trial was one sided; it was all in the prosecution's favour throughout.

12. We do not accept that contention. The trial judge, in our opinion, used his best endeavours to ensure that points the appellant sought to raise were made and ensured that the question was answered. As an example of his concerns in this regard, we refer to p. 129 of the transcript

"THE COURT: Go ahead, Mr. Ochoa

THE ACCUSED: I no really have no more questions but then at the same time I know that I supposed to have some points weh I could try straighten too question and ask she like bout weh she did talk about concerning fuh she same paper weh she did talk bout then and thing.

THE COURT: We are not holding an immigration case. Let me hear the question you are going to ask? What question you want to ask?"

There followed an exchange between the judge and the appellant, at the end of which, the judge formulated the question on behalf of the appellant thus:-

"THE COURT: Did he help you to get your immigration papers?"

We are satisfied that the judge appreciated the appellant's answer to the charges against him. He stated as follows (p.131)

"THE COURT: Stop right here now. Do you know why? You're just showing that indeed she did not have papers. You see, we are not dealing with any immigration papers. That just come up because she said, according to her, its for the jury, if she reported what you did to your daughter, you told her I will report you to the police and they will send you to where you come from, words to that effect, you are going back Guatemala. That's how the papers thing come in. But the important thing here is whether you had sexual intercourse with a girl who is supposed to be your daughter."

As can be seen, the judge tried to get the appellant to focus on the main issue in the case, which was the allegation of sexual abuse of his daughter. We can find no instances where the appellant was stifled in defending himself as he had a right to do within the rules. It is expected that the average unrepresented accused will not display skills in cross examination and it can scarcely be doubted that an accused, albeit unrepresented, is well aware of the reason he claims to be innocent of the charges against himself. An appellate court is accordingly required to satisfy itself that the defence is foreshadowed by the appellant's cross-examination of the prosecution witnesses and that he provides the material on which it is based by giving evidence in that regard as occurred in the instant case.

13. It was contended on behalf of the appellant that the defence was never put to the jury. It is clear that the appellant knew what his defence was. In testifying before the jury, he began by stating as follows (p.146)

“THE ACCUSED: I just want clear the point that I think that my daughter and ma they bring up this allegation against me for the reason ah the same papers we did talk about…”

In his directions to the jury, the trial judge at p. 249, reminded the jury of the appellant’s defence. He stated as follows:

> “This is what the accused said after he gave his names I think my daughter and mother are bringing up this allegation against me for the reason of the same paper. Look like he is talking about the immigration papers. So he is saying to put it another way then, he is saying I did not do this girl, my daughter, anything the allegation then are making up, she and her mother…”

The jury could be in no doubt that the appellant’s answer to the prosecution case was a denial of the charges and a claim that the charges were manufactured certainly by the mother of the child out of malice. The facts in this case were quite simple and straightforward and we do not think the jury would have had any great difficulty in understanding the issues raised. We are led to the conclusion that the criticisms leveled against the trial judge are not warranted. Indeed, we would point out that this judge who was charged with a failure to assist the appellant, adopted a course with which this court is entirely unfamiliar. At the conclusion of his directions to the jury, the judge addressed the accused thus (p.256)

> “THE COURT: Mr. Ochoa, did I miss out anything that you would wish me to tell the jury?”

We would think that the only interpretation to be put on that procedure, was a desire on the part of the judge to assist the appellant. In the result, we were constrained to reject the submissions of counsel for the appellant.

____
MOTTLEY P

____
SOSA JA

____
CAREY JA