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

CRIMINAL APPEAL NO. 11 OF 2007

BETWEEN:

RAUL BARAHONA **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.
Mr. Cecil Ramirez for the respondent.

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25 February, 20 June 2008.

MOTTLEY, P.

[1] The appellant was convicted on 11 June 2007 of kidnapping Eloisa Vellos and robbing her of three gold rings. He was sentenced to 12 years' and 10 years' imprisonment on each count to run currently. The evidence disclosed that on 4 November 2004, Miss Vellos went with her friend to the beach in the area known as Tony's by the Ferry. After about 30 minutes, two masked men, one armed with a machete and the other with a sawed off shot gun, attacked them. The men robbed Miss Vellos of three rings and then blindfolded her and tied her hands behind her back. She was placed in the rear seat of the car beside her

friend and was driven around for about two hours. Threats were made that if they did not co-operate with their attackers, both she and her friend would be killed. Subsequently, they were taken to Xaibe Village where they were released and left in a cane field. In support of its case, the prosecution relied on the evidence of Laugerud Viana. Mr. Viana stated that, sometime in November 2004, he and the appellant had agreed to go to an area behind Tony's Inn where "couples usually used to go and romance." Once there, he and the appellant would rob any couple found. Armed with a gun and machete, he and the appellant attacked Miss Vellos and her companion. He supported the evidence of Miss Vellos regarding the robbery and kidnapping. Mr. Viana said that he knew Miss Vellos because she used to rent a bar known as Corozones Rotos in Ranchito Village. The appellant, in his evidence, denied any knowledge of the crime. He also denied knowing Mr. Viana before meeting him in prison while on remand for this offence. He went on to say that he was at home sleeping.

[2] The appellant originally filed four grounds of appeal. However, at the hearing of the appeal these were abandoned and a single ground was argued. This ground alleged that the trial judge erred in law in not informing the appellant who was unrepresented at the trial of his right to call witnesses in support of his defence.

[3] At the close of the case for the prosecution, the transcript showed that the judge addressed the appellant in the following manner:

> "The Court: Mr. Barahona, the prosecution has closed its case and now it's now your turn to open your case to reply to the prosecution's case. You have a right to give evidence and to call witnesses."

It is abundantly clear that the trial judge did in fact inform the appellant that he had the right to call witnesses. However the judge did not again tell the appellant, after he had completed his evidence, that he had the right to call

witnesses. The judge had performed her duty when she had earlier informed the appellant of his right to call witnesses. It may have been prudent for the judge to have inquired of the appellant whether he wished to call any witnesses after he had completed his evidence.

[4] The Court was referred to the transcript of proceedings where, at the end of the cross examination of the appellant by Crown counsel, the following took place:

> "The Court: Mr. Barahona, you can step down. This is the closing of our case. The prosecution will not address because you don't have a lawyer, so you can address the jury. Ask them to find you not guilty for whatever reason. You can ask them to find you not guilty."

The interpreter confirmed that he relayed to the appellant what the judge had said. Counsel for the appellant submitted that there was nothing in the transcript to indicate that, at this stage the trial judge informed the appellant that he had the right to call witnesses. Counsel contended that it was the duty of the judge, after the appellant had concluded his evidence, to tell the appellant that he had the right to call witnesses. He argued that the failure of the judge to inform the appellant that he had a right to call witnesses in support of his defence had deprived the appellant of a fundamental right which was guaranteed to him under the fundamental rights provisions of the Belize Constitution and was denied the statutory protection afforded by section 106 of the Indictable Procedure Act Cap 96.

[5] Section 3(e) of the Belize Constitution states:

> "3 Every person who is charged with a criminal offence-
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> (e) shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before the Court, and to obtain the attendance and carry out the

examination of witnesses to testify on his behalf before the court on the same conditions as these applying to witnesses called by the prosecution."

[6] Section 106 of the Indictable Procedure Act Cap 96 provides:

"106 The accused person or his counsel shall be allowed, if he thinks fit, to open his case and, after the conclusion of the opening, the accused person or his counsel shall be entitled to adduce evidence in support of the defence and when the evidence is concluded, to sum the evidence."

[7] The effect of these two provisions is that an accused person is given the right, in a criminal trial, to call witnesses to give evidence on his behalf. For the right guaranteed under the Constitution to have meaningful effect, the judge is clearly under a duty to inform the defendant that he has the right to call witnesses in support of his defence. Unless the judge performs this duty, the right would exist in a vacuum and would not afford the defendant the protection which was intended.

[8] This right which is guaranteed under the provisions of section 3(e) of the Belize Constitution and protected by section 106 of the Indictable Procedural Act was a right recognized and protected by the common law. In **R v Andrew (1940) 27 Cr. App. Rep 12**. Lord Chief Justice Hewart recognized that "the utmost care should be taken to inform a prisoner of his right to call witnesses." In R v McGregor [1945] 2 ALL ER 180, Tucker J. said at p. 181:

"…….Furthermore, and most important of all perhaps, the appellant was never asked whether he desired to give evidence with regard to the alleged break, nor was he asked whether he had witnesses to call or whether he wished to give any explanation from the dock.

All those matters are elementary matters of procedure going to the root of the administration of justice, which have been referred to on more than one occasion by this Court."

[9] In **Leslie Tiwari v The State Privy Council Appeal No. 76 of 2001 [2002] UKPC 29**, one of the complaints made before their Lordships was that "the judge had failed to inform the appellant of his right to call witnesses in his defence and failed to take appropriate steps to enable any such witnesses to be called". Lord Hutton in giving the judgment of the Board said:

> "18 In relation to the first question their Lordships observed that the duty of the judges to inform an accused of his right to call witnesses when he is unrepresented is an important one. In R v Carter (1960) 44 Cr. App. R 225, 230 Lord Parker of Waddington CJ stated:
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> > "…..it became imperative to ensure that this appellant, who was unrepresented, had every opportunity of putting forward his defence; calling his witnesses, and for that purpose, the court should give him every assistance."

[10] After indicating that their Lordships found considerable assistance from the judgment of the Court of Appeal in Guyana in the State v Clarke (1976) 22 WIR 249 Lord Hutton cited from the judgment of Crane JA at p. 251 where it is stated:

> "There is however, no record that the trial judge gave him to understand that it was his right to call witnesses on his behalf. At least, the judge did not indicate on the record, as he ought to have done, that any such right was explained or in any way intimated to the accused, and we were given to understand by counsel for the appellant that the latter would have wished to call witnesses had he been aware of his right to do so at the time".

[11] It is of significance that no affidavit was prepared and submitted by the appellant showing that he had witnesses whom he wanted to call. Nor did his counsel, at the outset of his submission state that the appellant had witnesses whom he wished to call. It was accepted by the Court of Appeal in Guyana in

State v. Clarke (1976) 22 WIR 249 and Court of Appeal in Trinidad in **Tiwari's** case that, if the appellant could show that he had witnesses that he wished to call, and would have done so if he had been informed of his right to do so, this would have been a good ground for allowing the appeal.

[12] In **R v Andrew (1940) 27 Cr. App. Rep. at p. 13**, Hewart LCJ said:

> "The appellant gave evidence on his own behalf, but, unfortunately, by mere inadvertence, the Commissioner omitted to ask the appellant if he desired to call any witnesses. We are told that he did desire to call one witness at any rate. Whether the calling of that witness would have had the effect of preventing the jury from arriving at the conclusion at which they did arrive is difficult to say."

[13] In **Bert Elijio v The Queen Criminal Appeal No. 5 of 2001** this Court, sua sponte considered the situation where the judge had failed to inform Elijio, who was unrepresented at trial, of his right to call witnesses to give evidence in support of his defence. This Court accepted that there was no doubt that Elijio had not been informed of his right to call witnesses. Having regard to the issue raised by Elijio in his defence in that case, this Court considered that the appellant had not seriously challenged the evidence which was overwhelming and took the view that, even though there were deficiencies nonetheless no prejudice was suffered by the appellant and applied the proviso and dismissed the appeal on the ground that no substantial miscarriage of justice had occurred.

[14] It is useful to recall the observations of Crane JA in **Clarke's** case. The Justice of Appeal observed at p. 252:

> "It is the habit of careful and prudent judges to make enquiries of every unrepresented accused person with respect to the names and addresses of his witnesses immediately after arraignment and before the evidence is recorded, so that subpoena could be issued by the registrar to these witnesses in good time. There is no rule laid down for determining at what

> stage of the trial such enquiries should be made. Experience has shown, however, that to make them just after arraignment, i.e., before the first state witness testifies, saves time and expense at the trial, because if delayed until the time comes for the accused to make his defence, there is the danger (which is not known) that an un co-operative and troublesome prisoner may give a fictitious list of witnesses, send the police on a wild goose chase and so cause his trial to be unduly protracted."

We recommend this as a salutory practice that should be followed in this jurisdiction.

[15] Although the judge did not remind the defendant after his cross-examination had been completed that he had the right to call witnesses in support of his defence, the question which this Court must ask itself, is whether this failure operated in such a way as to deprive the appellant of a fair trial. As stated earlier, it was significant that counsel for the appellant did not inform the Court that the appellant had witnesses which he wished to call and was in fact prevented from so doing. Had the appellant so inform the Court, the Court would have been bound to adopt the approach of the Court of Appeal of Guyana which is found in the judgment Haynes C in **The State v Dennis Pryce 22 WIR 298 ad p. 302** where he said:

> "I am of the view that once this court is apprised of the fact, whether by affidavit, or in the grounds of appeal, or by the appellant or his counsel at the hearing, that the appellant would have wished to call witnesses had he been aware of his right to do so, in support of his defence, as for example in this appeal to account for his presence at a particular place at a particular time, or, as in Cleveland Clarke's appeal (1), in support of his defence of alibi, the appellant should not be required to do more."

In the absence of such information, the Court does not consider that the failure of the judge to inform the appellant of his right to call witnesses, in the circumstances of this case, rendered the trial unfair. The evidence of Miss Vellos

was supported by Mr. Viana. No complaint is made about the summing up by the judge.

[16] It was for these reasons that we dismissed the appeal and affirmed the conviction.

MOTTLEY, P

SOSA, JA

CAREY, JA