IN THE COURT OF APPEAL OF BELIZE, A.D. 2009

CRIMINAL APPEAL NO. 3 of 2009

BETWEEN:

JIMMY JERRY ESPAT	**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 Carey	**-**	**Justice of Appeal**

Mr. Oswald Twist for the appellant.
Ms. Cheryl-Lyn Branker-Taitt, Director of Public Prosecution (Ag.) for the respondent.

—

16 and 30 October 2009.

CAREY JA

[1] After a trial before Lucas J and a jury, the appellant, who was charged with the offence of rape, was convicted and sentenced to ten years' imprisonment. He appealed his conviction and sentence. On 16 October, we heard submissions on his behalf from Mr. Twist, and we called upon Ms. Branker-Taitt on the question of sentence only. We dismissed the appeal and intimated we would give our reasons at a later date.

[2] In fulfillment of that promise, our reasons are set out below.

[3] The grounds of appeal argued before us, were in the following form:

"Ground I

The Appellant was not allowed a fair trial in that:

a. He was not permitted to cross examine the prosecution's witness Shelmadine Pandy.

b. Was not allowed to object to the tendering of caution statement after the voir dire and during the regular trial.

c. The learned trial judge did not indicate to the jury the possible effect of alcohol/drug on the Complainant.

Ground II

The learned trial judge erred in law in that he failed to give the jury a direction in law based on section 92(3)(a) which states as follows:

(a) Where at a trial on indictment "A person is prosecuted for rape, attempted rape, carnal knowledge or any other sexual offence and the only evidence for the prosecution is that of the person upon whom the offence is alleged to have been committed or attempted; or,

The Judge shall, where he considers it appropriate to do so, warn the jury of the special need for caution before acting on the evidence of such person and he shall also explain the reason for the need for such caution.

Ground III

The Sentence of 10 years was excessive."

[4] As the grounds do not raise questions of fact, there is no need to set out the facts *in extenso*. The victim M, a 31 year old Canadian, was a visitor to the country staying in San Ignacio, Cayo in March 2007. On 31 March she was at a bar called Faya Watta listening to music while awaiting the arrival of a friend. She was admittedly picked up by the appellant. In the course of the night, they had a number of drinks, eventually arriving at Santa Elena. The first bar which they visited provided neither good music nor any excitement, a fact which induced her to accept the appellant's invitation to go elsewhere. They set off but instead of following the road, they took a short cut across a field and came upon a graveyard.

[5] Without any warning, she found that he was putting his hand up her skirt. She attempted to return the way they had come, but he grabbed her and tried unsuccessfully to remove her skirt. She managed to get away but he pursued her, threatened that he would kill her and hit her in her face knocking her to the ground. This allowed him to overpower and sexually assault her. Thereafter he repeatedly raped her. He even attempted to penetrate her anally and only desisted when she screamed. He compelled her to perform fellatio on him. Thereafter, they parted company.

[6] A kindly taxi-driver drove her to a friend's house. On the following day, she identified the appellant at an identification parade, as her assailant.

[7] The appellant gave a statement under caution in which he said that the intimacy was entirely consensual. This statement was admitted as part of the prosecution case after the trial judge held a voir dire.

[8] In his defence, he made a statement from the dock which did not differ from his cautioned statement.

[9] By its verdict, the jury did not accept his version of what took place between 31 March and 1st April 2007.

[10] We can now deal with the grounds. Mr. Twist identified three bases on which he urged that the appellant had been denied a fair trial. The first basis was that the appellant was not permitted to cross-examine a prosecution witness, Shelmadine Pandy.

[11] It is true to say that the transcript of the evidence does not state that there was any cross-examination of the witness by the appellant. But that is a far cry from an assertion that the appellant was not permitted to cross-examine the witness. We were however provided with a copy of the judge's notes of evidence which indicates that the appellant did not cross-examine this witness. Mr. Twist when confronted with this material, showed no enthusiasm in maintaining his unfounded suggestion.

[12] The second basis is unfortunately even more unmeritorious than the first. The basis put forward for the unfairness of the trial was that the appellant was not allowed to object to the tendering of the caution statement after the voir dire and during the "regular" trial.

[13] We think that the formulation indicates a complete misunderstanding of the purpose of a voir dire. Upon a voir dire, there is a ruling by the trial judge as to the admissibility or otherwise of an impugned cautioned statement. If the judge rules the statement in, it is tendered in evidence by the officer who took the statement. Rarely, if ever, are there further objections taken to the statement because the question thereafter, which is one for the jury, is the weight which the jury will accord the statement.

[14] The third and last error which Mr. Twist attributed to the trial judge, related to directions on the possible effect of alcohol or drugs on the complainant. We would think that it is the appellant's state of mind with which the jury would have concern. If the complainant's mind was affected by alcohol, the evidence showed that it was the appellant who was plying her with alcohol. That would be powerful evidence, hardly favourable to the appellant. Any link between that fact and the fairness of the trial is, we must confess, far to seek. The point is altogether without vestige of merit.

[15] Ground II was based on section 92(3)(a) of the Criminal Code which enacts as follows:

> "(3) Where at a trial on indictment
>
> (a) A person is prosecuted for rape, attempted rape, carnal knowledge or any other sexual offence and the only evidence for the prosecution is that of the person upon whom the offence is alleged to have been committed or attempted; or,
>
> (b) …
>
> The Judge shall, where he considers it appropriate to do so, warn the jury of the special need for caution before acting on the evidence of such person and he shall also explain the reasons for the need for such caution."

[16] Mr. Twist did not seem prepared to vouchsafe to the court, any reason why he thought the circumstances of the case warranted a warning to the jury of the special need for caution. We have not been astute to discover any. The victim in this case was a 31 year old woman, a visitor to this country. She was not a child who could be influenced by some family member. There was no

evidence that she had any reason to concoct a story against the appellant whom she was meeting for the very first time on the night of the incident. The short issue for the jury in this case was consent vel non.

[17] A helpful case in this regard is **Makanjuola** and **E v R [1995] 2 Cr. App. 469** where Taylor LCJ said this:

> "Whether, in his discretion a judge should give any warning and, if so, its strength and terms had to depend on the content and manner of the witness's evidence, the circumstances of the case and the issues raised. The judge would often consider that no special warning was required at all.
>
> Where, however, the witness has been shown to be unreliable, the judge might consider it necessary to urge caution. In a more extreme case, if the witness was shown to have lied, to have made previous false complaints, or to bear the defendant some grudge, a stronger warning might be thought appropriate and the judge might suggest it would be wise to look for some supporting material before acting on the impugned witness's evidence.
>
> Their Lordships stressed that those observations were merely illustrative of some, not all, of the factors which judges might take into account in measuring where a witness stood in the scale of reliability and what response should be made at that level in the directions to the jury."

In **Mark Thompson v The Queen**, 28 June 2002, this court observed (paragraph 12) –

> "There must be an evidential basis for suggesting that the evidence of the victim was unreliable thus giving reason for such a warning."

We have said enough to indicate our disinclination to interfere with the trial judge's exercise of his discretion. This ground must accordingly be rejected.

[18] Counsel also argued against the sentence of ten years' imprisonment on the basis that it was excessive.

[19] We would note, as the trial judge himself pointed out, that the sentence prescribed in section 46 of the Criminal Code, Cap 101 for this offence shall not be less than eight years but may extend to life imprisonment. The Director submitted that the rape was accompanied by violence, an attempt was made to penetrate her per anus, and there were repeated acts of sexual abuse. Moreover, the appellant had, as the judge trenchantly commented, "used the tool of deception to gain the victim's confidence." These were all factors which the trial judge was entitled to take into consideration in assessing the sentence which was appropriate. We are inclined to say that, if anything, the trial judge was unduly lenient to the appellant. Far from being mitigating, these constituted aggravating factors rendering the appellant liable to a condign sentence. We were not minded to reduce the sentence in these circumstances.

MOTTLEY P

SOSA JA

CAREY JA