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

CRIMINAL APPEAL NO. 6 of 2008

BETWEEN:

MARK CARDINEZ **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**

Accused in Person.
Ms Cheryl-Lynn Branker-Taitt, Director of Public Prosecution (ag) for the respondent.

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8 October 2008, 27 March 2009.

MOTTLEY, P.

[1] After a trial before Arana J, and a jury, the appellant was convicted of the offence of rape and sentenced to a term of imprisonment for 18 years. The Court had earlier dismissed the appeal against conviction and sentence, at which time, we promised to put our reasons for so doing into writing. We now give those reasons.

[2] The prosecution's case was that a young woman JLW, along with others, lived at the same residence of the appellant and his wife. At the time of the incident which occurred on 23 June 2006, she had been residing there for two weeks. On that day, she returned to the residence shortly after 9:30 p.m. Both the appellant and his wife were at home but the wife left shortly after JLW arrived to visit a neighbour. JLW went to her room and was about to close the door when the appellant forced his way into her room. She inquired of him what he wanted. He informed her that he had a crush on her from the first time he saw her. She made it abundantly clear to the appellant that she had no interest in him. The appellant then forced himself upon her and had sexual intercourse with her without her consent. About 11:30 p.m. that night JLW reported the incident to the police. About 12:50 a.m. the appellant was arrested by the police. In his defence, the appellant denied that he had sexual intercourse with JLW.

[3] The appellant who was represented at trial by experienced counsel but who conducted the appeal in person alleged that one of the jurors and the virtual complainant were friendly. In support of this ground of appeal, the appellant stated that the virtual complainant and one of the jurors were communicating with each other and were "talking and socializing outside of the Court building before the start of the case". The appellant said that he brought this matter to the attention of his counsel at the time when the jury was being empanelled. However, his counsel did nothing about it.

[4] The appellant agreed that the judge had asked his counsel whether he wished to challenge any of the jurors. Counsel did in fact challenge three jurors. The appellant indicated that the juror about whom complaint is now being made was one of the jurors who had replaced the three jurors who had earlier been challenged.

[5] Before the panel took their oath counsel for the prosecution pointed out to the judge that he had noticed that "a number of jurors actually worked at the same place" as JLW. Crown counsel invited the judge to find out whether the

jury could render a true verdict. At that stage counsel for the defendant sought to challenge those jurors for cause on the ground of their "the close association in the work place" with the virtual complainant. However, counsel did not pursue this challenge after the prosecution informed the judge that, while the jurors worked at the same call centre, the workers worked on a shift system and no member of the jury actually worked with JLW. Counsel for the defendant accepted that, as there was nothing to indicate that the jurors knew JLW, he would not pursue the challenge. This occurred after a member of the jury had been excused because he had worked with the appellant for 5 years.

[6] It is significant that the information about jurors working at the same call centre was given to the court after the juror about whom complaint is now being made had been called to the panel. In the circumstances, it is clear that counsel for the defendant must have been satisfied with the bone fides of the jury panel and that the panel was capable of giving a true verdict in keeping with their oath. This ground fails.

[7] The appellant complained about the quality of "physical evidence" led by the prosecution to support the allegation by JLW that the sexual intercourse took place with the use of force. He referred to a portion of the evidence from the doctor that there was no evidence of forced entry. He submitted that in the circumstances there was not "much or any critical evidence at all" to show that he had sexual intercourse with JLW.

[8] In the summing up the judge said to the jury:

> "You have the evidence of Dr. Guerra who told you that he examined J… L… W… and he found that her hymen was not present. This means that she was not a virgin at the time he examined her. The doctor also said he found no signs of forced entry to the vagina in response to a question that you the jury asked. As I said before, the law says the least degree of

penetration of the vagina by the penis is enough to prove sexual intercourse or carnal knowledge."

[9] The absence of any evidence to indicate that force was used was a question of fact for the jury to consider. It was properly left to the jury for their determination. The jury must have been satisfied with the credibility of the JLW who had stated how the incident occurred and that at the time she was having her period. No complaint is made of the summation on this matter. We did not consider that there was any merit in this complaint.

[10] The appellant also referred to the evidence in cross-examination of Mr. Gomez a forensic analyst who stated that if sexual intercourse took place and the penis is withdrawn while dripping sperm some evidence of spermatozoa would be found in the female. JLW stated in her evidence that the appellant withdrew his penis and his sperm drained on the ground and then in the toilet. The appellant contends that if it is correct as she stated that at the time she had pushed him off and his penis was draining, then there should be evidence of sperm in her vagina. But this ignores the evidence of Mr. Gomez who said that it would have been difficult to find evidence of sperm because the virtual complainant had been menstruating. This was an issue of fact which was left to the jury for their consideration.

[11] The appellant complained that JLW was lying. In support of this allegation the Court was referred to the evidence of JLW where she said that on returning home from shopping she put down her shopping and went to the kitchen and drank a glass of water. In cross examination JLW agreed that she told the police that on the arrival home the appellant and Prisha Bowen were present. When asked if she remembered that she never mentioned that the appellant's wife was there, JLW replied that she did mention that his wife was present.

[12] Another issue raised by the appellant related to the time when the offence occurred. In her evidence, JLW said that she arrived home at 9:30 p.m. Ten

minutes later, the appellant came to her room. It was at this time the incident occurred. The appellant stated that he had earlier quarreled with his wife and has left home returning at 10:00pm. The appellant submitted that in the circumstances JLW was lying.

[13] In her summation, the judge warned the jury about the special need for caution as the prosecution was asking them to act on the evidence of JLW whose evidence about the sexual intercourse taking place and that it was without her consent was not supported by any other witness. The judge told the jury:

> "I must warn you, however, of the special need for caution before acting on the evidence of J… L… W… and before convicting the accused of rape based only on her evidence. The reason you must be careful, members of the jury, is because there is a danger that the witness or victim may be lying or may be deluded or confused so be careful in looking at the evidence but if after you look at the evidence you feel sure that J… L… W… is telling you the truth, you can find Mark Cardinez guilty of rape. If you do not feel sure, members of the jury, it is your duty to give the benefit of that doubt to Mark Cardinez and find him not guilty."

[14] In leaving the issues to the jury the judge told the jury:

> "Members of the jury, is J… L… W… lying? Is she confused? Did she make up this entire story like a fantasy because she hates Mark Cardinez or is she telling you the truth? These are questions of fact that you have to decide. Mark Cardinez is saying to you that he did not have sex with J… L… W… on that night or any other night. That is his defence. He is saying he has never had sex with J… L… W… If you believe Mark Cardinez is telling you the truth, your verdict must be not guilty."

[15] In her summing up the judge informed the jury that the issue of credibility of the witness was for them to decide. She told them that it was for them to decide if they accepted JLW as a witness of the truth. In so doing, she pointed out that the jury had to use their common sense and everyday experience in deciding whether JLW was lying or not. In approaching this issue, it was pointed out to the jury that if they were satisfied that a witness was lying and not merely confused then they should reject the evidence of that witness.

[16] These issues raised by the appellant were all issues of fact which were properly left along with the appropriate directions of law for the consideration of the jury. No complaint has been made about the judge's summing-up. In our view, there was ample evidence on which the jury could properly reach the conclusion that the appellant was guilty of the offence. We see no merit to the appeal against conviction.

APPEAL AGAINST SENTENCE

[17] The appellant was sentenced to a term of imprisonment for 18 years. He submitted that he did not think that the sentence was fair as the judge based her sentence on the fact that his counsel, during the sentencing phase of the trial, had disclosed to the court that the appellant was HIV positive. Counsel made this disclosure in the expectation that the judge would have taken it into consideration as a mitigating factor. The appellant told the judge that he had been HIV positive for three years before he was sentenced. This means that on the date of the incident he was aware that he was HIV positive.

[18] The fact that a defendant, who has been convicted of an offence, is HIV positive, may, in certain circumstances, be a mitigating factor which a judge ought to consider when imposing sentence. His counsel stated that he was putting forward his HIV status as a mitigating factor. In some cases the defendant's HIV status may be an aggravating factor The Court does not consider the appellant's HIV status to be a mitigating factor. Indeed, the facts of

this case demonstrate that the appellant's HIV status should be considered to be an aggravating circumstance. The appellant had unprotected sexual intercourse with JLW knowing that he was HIV positive.

[19] In **Mark Thompson v The Queen, Criminal Appeal No.18 of 2001**, this Court stated at paragraph 24 in reviewing a sentence of 28 years which had been imposed on the appellant:

> "24 … The circumstance in which rape may be committed are infinite and we cannot therefore lay down a tariff of sentences short of the maximum sentence enacted by the legislature. What we do say, however, is that in the absence of grave aggravating circumstances, a sentence in excess of 15 years' imprisonment might not be appropriate."

[20] This Court considers that appellant's conduct in having sexual intercourse with JLW, knowing that he is HIV positive, is a grave aggravating factor. Women must be protected from men who, knowing that they are HIV positive, nonetheless for their sexual gratification force themselves upon them. It is difficult to conceive that this or any young woman would have consented to having unprotected sex with the appellant if she was aware that he was HIV positive. This young woman must now live and hope that she has not been infected with this disease as a result of this wanton and callous conduct by the appellant to satisfy his sexual urges oblivious to the harm, both physical and mental, that he was inflicting upon her. The sentence of 18 years is appropriate in these circumstances.

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

MOTTLEY P

SOSA JA

MORRISON JA