IN THE COURT OF APPEAL OF BELIZE AD 2013
CRIMINAL APPEAL NO. 12 of 2012

ISAAC CHAN

Appellant

v

THE QUEEN Respondent

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BEFORE

The Hon Mr Justice Dennis Morrison	Justice of Appeal
The Hon Mr Justice Douglas Mendes	Justice of Appeal
The Hon Mr Justice Samuel Awich	Justice of Appeal

A G Sylvestre for the appellant.
C Vidal, Director of Public Prosecutions, for the respondent.

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15, 28 March 2013.

MENDES JA

[1] On 8 May 2012, after a trial before Hanomansingh J and a jury, the appellant was convicted of rape. On 31 May 2012, he was sentenced to eight years' imprisonment to commence from 16 April 2012. On 15 March 2013, we allowed his appeal, quashed his conviction and ordered that he be retried before another judge at the next sitting of the Supreme Court in the Northern District on 8 April 2013. We ordered further that he be remanded into custody until then. These are our promised reasons.

[2] The Crown's case was that on Friday 17 September 2010, after a party at a friend's house, during which she had a couple alcoholic beverages, the virtual complainant accepted a ride home with four young men. The appellant was the driver. One of the young men was the complainant's friend, Omar. Instead of going directly to her home, however, the appellant veered off into Central Orange Walk, stopped awhile at the Banquitas House of Culture and headed across the bridge to San Estevan. At this point, the complainant attempted to open the van door while it was still in motion, but one of the young men pulled the door in. The journey continued along a road heading to Honey Camp and into a street after San Victor's Inn. The van now stationary, one of the young men began rubbing her leg. She told him to stop and exited the vehicle. Omar then pushed her back inside and told her that they had brought her there to have sex with all four of them. She refused and punched Omar on his arm. Omar exited the van and spoke with the appellant who, taking his turn, entered the van and repeated Omar's exhortation that she was to have sex with them all. She again refused and started to cry, pleading with the appellant to take her home. Undaunted, the appellant told her that she either had sex with all of them or just with him. Thinking that he might be discouraged, the complainant told the appellant that she was having her period, but to no avail. The appellant persisted. He told the complainant that he was her only ride home and insisted that she should at least have oral sex with him. To this suggestion, she initially refused, saying that she had never done that in her life. The appellant then took out his penis and told the complainant that she should start now. Afraid, and in tears, the complainant complied but stopped after ten seconds. The appellant then insisted that she could not stop now and that she should have sex with him. He started to take off her clothes. He pulled her over to sit on him. The complainant repeated that she did not want to have sex with him and asked him to stop, but he said he did not care. He then pulled the complainant's undergarments to one side and had sex with her.

[3] When the complainant eventually got home her mother was very angry and beat her because she had come home late. She did not tell her mother about the incident with the appellant but just went to have a bath. The next day, a Saturday, she visited a friend of hers, Adriana Novelo, and told her what had happened. Her friend wanted to

tell the complainant's mother but the complainant felt too ashamed to do so. On Monday 20 September 2010, she met her friend Itzel Chan at Fort Chan Market while catching a bus to go to school. On her way home with the appellant that Friday, she had stopped off at Itzel's home to retrieve her shades and her school ID. Itzel asked her why she was crying, and she told her she would tell her later. So on Monday, when they met, Itzel asked her again what was wrong, and the complainant told her what had happened.

[4] Later that afternoon her friend Adriana met her at home and encouraged her to tell her mother, which she did. She then told her father the next day, she said initially, and he took her to the police station where she made a report and gave a statement to WPC Melanie Anderson. That night she was taken to the hospital to be examined. Although, the complainant said all this took place on the Tuesday, the medical report is dated Monday 20 September.

[5] As the medical report shows, the doctor did not find any evidence of bruising, redness or swelling, wounds or scratches but in his report he did confirm that the complainant was menstruating.

[6] Under cross-examination, the complainant admitted that her statement to the police contained the following paragraph:

> "I told Issac I had my menstruation, he then close the van and put on the air conditioner, he told me to give him a heads and he will take me home. I did gave him the heads by sucking his penis, he then took off my pants, blouse and bra. He started to suck my breast then took his pants half way and sitting down he lifted me up and put me on top of him to ride his penis. I have on my panty and he pulled it to the side by the crotch and inserted his hard erected penis inside my vagina. He lifted me up and down for a while in a riding position. It lasted for a while he then took me off and hold his penis inside the palm of his hand where I saw some liquid substance with blood which he wiped away with a cloth and threw it outside the window."

[7] When it was pointed out to her that nowhere in that extract was she recorded as saying "no" or telling the appellant to stop, as she had said in her examination in chief, she said that she told WPC Anderson about her protests, but they were not recorded.

At that point, the trial was adjourned for the day. The following morning, she said that she had given two statements, that WPC Anderson had re-written her first statement to make it more presentable, and that the statement which she had be shown the day before was the second, re-written statement. She said she did not know what WPC Anderson had done with the first statement. She had signed both statements, but did not read the second. There was also a third statement made on 28 September 2010. She said she gave the first statement on Monday 20 September, which she read and signed, then she signed the second statement on 22 September, which she did not read before she signed, but which she later admitted WPC Anderson read to her. And then there was a third statement which she signed on 28 September 2010. When shown that what she referred to as the second statement was dated 20 September, she said that that date was wrong. She said that when WPC Anderson read the second statement to her, she did not stop her to point out that her protests were not recorded.

[8] WPC Anderson testified next. She said she took two statements from the complainant. The first was taken on 20 September 2010, and the second on the 28th. She said she read over the first statement to the complainant and also gave it to her to read. There was no third statement. She said that what she recorded in the first statement was exactly what the complainant had told her.

[9] In his unsworn statement from the dock, the appellant admitted that he had sex with the complainant but claimed that it was at her invitation and was entirely consensual. He denied that she ever told him 'no' or to stop.

[10] Mr. Sylvestre argued four grounds of appeal, only two of which we thought had any merit. His first ground was that the trial judge had failed to give adequate directions on the need for the jury to take special care before acting on the complainant's evidence, but his argument gained greatest traction as a complaint about the failure of the trial judge to direct the jury properly on the inconsistencies in the complainant's evidence. He referred to a number of such instances, only one of which we thought was of any substance. This was in relation to the inconsistency between her oral evidence and her written statement and between her claim that WPC Anderson had re-

written her statement to exclude her protests, and WPC Anderson's denial that she did any such thing.

[11] The trial judge's direction in this regard was as follows:

> "In her evidence Victoria said that she gave a statement to the Police on the 20th of September and when she returned on the 22nd of September WPC Anderson who took the first statement canceled it and rewrote her statement and told her to sign it.
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> WPC Anderson denies this, but asks yourself; what reason would Victoria who knows nothing about the courts have to lie about something like this. I will tell you I accept Victoria's story about the statement and I ask myself; why would Anderson do this. Is it that Anderson crafted this young lady's statement the way she wanted her to give evidence which could be different to what Victoria had original said. I will ask you though not to speculate as to what was in the original statement but just bear in mind that the version of the incident which we have in court is not the same as originally report to the police by Victoria.
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> WPC Anderson's version of what transpired on the 17th is what crown counsel had in her position when she was leading Victoria in her evidence. This is one of the reasons why I must warn you of the special need for caution before acting on the evidence of Victoria and before convicting the accused of rape based only her evidence.
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> The reason you must be careful apart from what I just said members of the jury is because there is a danger that Victoria may be lying or be deluded or confused so be careful in looking at the evidence but if after you look at the evidence you feel sure that Victoria is telling you the truth you can find Issac Chan 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 Issac Chan and find him not guilty."

[12] The contradiction between the complainant's oral testimony and her written statement went to the heart of the prosecution's case against the appellant. In her evidence before the jury, the complainant related how she withheld her consent from the appellant's sexual advances and told him to stop. Her statement to the police, on the other hand, shorn, as it was, of any expression of protest, was consistent with the consensual sexual intercourse which the appellant said he had with her. Which version the jury believed would determine the verdict which they would return. Yet, the trial judge did not highlight for the jury the sharp contrast between the two versions, nor did

he tell them how crucial their acceptance of the one version or the other was to the outcome of the case. Instead, he simply directed them to bear in mind that the complainant's oral testimony was "not the same" as her statement to the police.

[13] There was also the stark disparity between the complainant's version of the number and circumstances in which her statements were taken and that given by WPC Anderson. The complainant said there were three statements, that she told WPC Anderson that she repeatedly told the appellant 'no' and to stop, that her protestations were recorded in her first statement, and that WPC Anderson re-wrote the first statement and produced the second, the suggestion being that WPC Anderson edited out her expressions of protest. The allegation that WPC Anderson in effect 'doctored' her statement was therefore intimately tied up with her explanation as to why her oral evidence differed from her written statement. If the jury believed the implicit charge she made against WPC Anderson, it was but a small step for them to accept her oral testimony as truthful. WPC Anderson, for her part, testified that everything the complainant told her was recorded in the first statement and that there were only two, the implication being that the complainant never told her that she withheld her consent and that the second statement was not a 're-write' of the first.

[14] Despite the importance to the eventual verdict of the resolution of this conflict in the prosecution's case, the trial judge all but withdrew the dispute from the jury's consideration, telling them that he preferred the complainant's version and asked, almost rhetorically, whether WPC Anderson 'crafted' the complainant's statement in a way she preferred it to be presented. The trial judge's earlier admonition to the jury that they should not put too much stock on any expression of opinion on his part was insufficient to cure the damage which was done. The trial judge ought to have impressed upon the jury the significance of their acceptance of WPC Anderson's evidence and directed them to decide whether they accepted or rejected it. His failure to do so was a misdirection and along with his failure to properly direct the jury on the conflict in the complainant's evidence as it related to the issue of consent, was a serious miscarriage of justice and on this basis alone we were minded to allow the appeal and quash the conviction.

[15] The other ground of appeal which we thought had merit was that the learned trial judge had failed to give proper directions on the evidentiary value of the recent complaints which the complainant said she made to her two friends. Section 96 of the Evidence Act is relevant in this regard. It provides that:

> 96.-(1) The particulars and details of a complaint made soon after the commission of an alleged offence in the absence of an accused person by the person in respect of whom the crime is alleged to have been committed may be admitted in evidence in prosecutions for rape, indecent assault, other offences against women and boys and offences of indecency between male persons.
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> (2) Such particulars and details are not to be taken in proof of the facts in issue, but merely as showing the consistency of the conduct of the person complaining and supporting his credibility.

[16] In accordance with subsection 2, the trial judge was required to direct the jury that the complainant's recounting to her friends of her encounter with the appellant was relevant merely as showing the consistency of her conduct and as supporting her credibility, but not as proof of the facts in issue, namely, whether the complainant had consented to having sexual intercourse with the appellant. What the trial judge said instead was the following:

> "Victoria called the names of two (2) of her friends that she spoke to concerning the incident namely Adriana Novelo and Itzel Chan yet neither of them were called as witnesses.
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> Now do not misunderstand me, there's no need for anyone to corroborate Victoria's evidence, if after you have analyze her evidence you are satisfied that what she told you is truth so that you feel sure that she is truthful you are free to convict Issac Chan of the offence, if all the ingredients of the offence are present.
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> What I am saying is that their evidence might have assisted you in ascertaining who is speaking the truth as the evidence stands it is now a case of who do you believe of what transpired and what was said during that period when Victoria and Issac were alone in the van on Honey Camp Road."

[17] While this may have been understood by the jury as a direction that the complainant's 'complaints' to her friends would go towards supporting her credibility, the trial judge did not direct the jury that they could not be taken as proof of the facts in issue, even though in this case it may have been difficult for the jury to understand the difference between the two.

[18] Ms. Vidal argued, somewhat faintly, that we should apply the proviso, but we found it impossible to say that, if the jury had been properly directed, particularly in relation to the inconsistencies in the complainant's evidence and between her evidence and that of WPC Anderson, they would inevitably have come to the same conclusion.

[19] On the other hand, we considered this an appropriate case for a re-trial. Despite the blemishes already referred to, we did not consider the prosecution's case to be weak and indeed, despite what can fairly be described as an overall direction which, notwithstanding the above, favoured an acquittal, the jury nevertheless returned a guilty verdict. The offence is obviously a serious one and the trial is unlikely to last more than the two days it took in the first instance. Although a retrial will result in the appellant undergoing a second ordeal for reasons for which he is not responsible, it is possible to have that trial fixed for a date in April 2013, we were told, and a relatively short period of just over two years will have elapsed since the offence was alleged to have been committed. We have not been told of any evidence which was available at the first trial which will not be available at the second. For all these reasons, we decided that it was in the interests of justice that the appellant be re-tried.

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MORRISON JA

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MENDES JA

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AWICH JA