IN THE COURT OF APPEAL OF BELIZE AD 2016

CRIMINAL APPEAL NO 9 OF 2015

NICHOLAS KEME Appellant

v

THE QUEEN Respondent

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BEFORE

The Hon Mr Justice Sir Manuel Sosa	President
The Hon Madam Justice Minnet Hafiz Bertram	Justice of Appeal
The Hon Mr Justice Murrio Ducille	Justice of Appeal

L Bradley for the appellant.
C Vidal, Director of Public Prosecutions along with J Chan, Crown Counsel, for the respondent.

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16 March and 24 June 2016.

DUCILLE JA

[1] On 16 March 2016, we allowed this appeal, set aside the conviction of the offence of rape and sentence of 11 years. We promised to put in writing the reasons for our decision and now do so.

[2] The facts were that between 1 and 2 March 2015 at Orange Walk Town, in the Orange Walk District, the appellant raped the virtual complainant.

[3] The prosecution relied on the evidence of the virtual complainant and police officers, as well as the medical evidence of Dr Leslie Mendez who gave expert evidence in her field of gynecology.

[4] The Court having observed the grounds of appeal filed on behalf of the appellant invited the Director of Public Prosecutions to comment on certain features of the case; namely, the parts of the summing up.

[5] The Court directed the DPP to address the provisions of section 92(3) of the Evidence Act which reads:

> "(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; …
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> 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 such caution."

[6] Section 92(3) of the Evidence Act applies strictly to all cases of a sexual nature where the only evidence upon which the prosecution relies is from the person upon whom the offence is alleged to have been committed or attempted.

[7] There is nothing in section 92(3) which alludes to any evidence involving visual identification which would warrant a *Turnbull* warning being given to the jury.

[8] In summing-up the case to the jury the learned trial judge, Lord J, said:

> "Now, members of the jury, I must warn you again of the special need for caution before convicting the accused on reliance of the evidence of M.T. alone. The reason you must be careful is because there is a danger that a witness could be lying or may be deluded and it is also possible for an honest witness to make a mistaken identification. There have been wrongful convictions in the past as a result of such mistakes, sometimes

> an apparently convincing witness can be a mistaken and so can a number of apparently convincing witnesses. And also I remind you that mistakes in recognition and identification of even close friends and relatives are also sometimes made."

[9] The section of the Evidence Act no doubt gives the trial judge a discretion to determine whether it is appropriate to administer a warning in circumstances where the only evidence is that of the virtual complainant concerning a case of a sexual nature. An appellate court would be slow to interfere with the exercise of such a discretion except in the circumstances where the exercise of such a discretion was unreasonable.

[10] In the exercise of such a discretion, the learned trial judge would be expected to give reasons in a meaningful way so as to create a link with the evidence. For the benefit of the jury the reasons given should be of great assistance for them to arrive at a proper conclusion. From the evidence given by the virtual complainant, we are unable to see where the learned trial judge was of any assistance to the jury in giving the discretionary warning as he was most general.

[11] A consideration of the wording of the statute clearly indicates that the learned trial judge, in giving the warning to the jury, shall explain the reasons for the need for such caution. The learned trial judge told the jury that there is a danger that witness "could be lying or deluded". There has been absolutely no explanation given by him as to how he arrived at such a conclusion. We are unable to conclude that there is any link to the evidence in the learned trial judge making such an assertion.

[12] Further, in exercising his discretion in giving the jury the warning pursuant to section 92(3) of the Evidence Act, the learned trial judge purported to give a *Turnbull* warning. This was totally irrelevant and had no bearing in the present case. The sole witness who implicated the appellant was the virtual complainant in circumstances where identification was not an issue. Inasmuch as a full *Turnbull* warning was not given, no *Turnbull* warning was required in this case.

[13] The effect was a conflation of a section 92(3) warning and a *Turnbull* warning which had no useful purpose. The resultant effect was to cause total confusion to the

jury. The Court is of the view that the effect of the conflation of the warnings left the jury in a state of confusion and perplexity culminating in a miscarriage of justice.

[14] It cannot be overlooked that when quizzed by the Court about the import of the warning the learned Director of Public Prosecutions conceded that she did note that the warning given at three points in the summation to the jury to exercise case when considering the evidence of the complainant which was followed immediately by a *Turnbull* warning demonstrated that there may have been some confusion.

[15] In the earlier decision of this Court in *Raul Rivero v R*, Criminal Appeal No 4 of 2008, Sosa JA, as he then was, gave guidance to judges that in applying provisions of section 92(3) of the Evidence Act, nowhere is there mention of evidence of visual identification, the clear focus of Turnbull. For posterity, it is expected that this guidance is followed so as to avoid any further occurrence of this nature.

[16] We are satisfied that the appellant was effectively denied a fair trial as a result of the confused direction given to the jury by the learned trial judge. Accordingly we quash the conviction and the sentence.

[17] In ordering a retrial we refer to the statement of Lord Diplock in *Reid v The Queen* (1979) All ER 900 a decision of the Privy Council from the Court of Appeal of Jamaica. In deciding whether a retrial should be ordered the learned Law Lord said:

> "The interest of justice that is served by the power to order a new trial is the interest of the public in Jamaica that those persons who are guilty of serious crimes should be brought to justice should not escape it merely because of some technical plunder by the Judge in the conduct of the trial over his summing-up to the Jury. There are, of course, countervailing interests of justice which must also be taken into consideration. The nature and strength of these will vary from case to case. One of these is the observance of a basic principle that underlies the adversary system under which criminal cases are conducted in jurisdictions which follow the procedure of the common law: It is for the Prosecution to prove the case against the defendant. It is the Prosecution's function, and not the part of

the functions of the court, to decide what evidence to adduce and what facts to elicit from the witnesses it decides to call. In contrast, the Judge's function is to control the trial, to see that the proper procedure is followed, and to hold the balance evenly between prosecution and defence during the course of the hearing and in his summing-up to the Jury. He is entitled, if he considers it appropriate, himself to put questions to the witnesses to clarify answers that they have given to Counsel for the parties; but he is not under any duty to do so, and where, as in the instant case, the parties are represented by competent and experienced counsel it is generally prudent to leave them to conduct their respective cases in their own way.

It would conflict with the basic principle that in every criminal trial it is for the Prosecution to prove its case against the defendant if a new trial were ordered in cases where at the original trial the evidence which the Prosecution had chosen to adduce was insufficient to justify a conviction by any reasonable Jury which had been properly directed. In such a case whether or not the Jury's verdict of guilty was induced by some misdirection of the Judge at the trial is immaterial: The governing reason why the verdict must be set aside is that the Prosecution having chosen to bring the defendant to trial has failed to adduce sufficient evidence to justify convicting him of the offence with which he has been charged. To order a new trial would be to give the prosecution a second chance to make good the evidential deficiencies in its case, and, if a second chance, why not a third? To do so would, in their Lordship's view, amount to an error of principle in the exercise of the power under s 14(2) of the Judicature (Appellate Jurisdiction) Act 1962."

[18] Having regard to the principle stated in *Reid*, we consider that this is a case in which a retrial is appropriate and we so order..

[19] The Court therefore allowed the appeal, quashed the conviction, set aside the sentence and ordered that there be a retrial, before another judge, at the earliest opportunity.

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SIR MANUEL SOSA P

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HAFIZ-BERTRAM JA

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DUCILLE JA