JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 158/95

COR: THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE PATTERSON, J.A.
THE HON. MR. JUSTICE LANGRIN , J.A. (Ag.)

REGINA
vs
WALFORD FERGUSON

Miss Fara Brown for the Appellant
Mr. Hopeton Clarke and Miss Georgiana Fraser for the Crown

2nd February, 1999 and 26th March, 1999

LANGRIN, J.A. (Ag.)

On December 20, 1995 at the High Court Division of the Gun Court before Pitter J, the appellant was convicted on count 1 of an indictment of illegal possession of firearm, on counts 2, 3,4, 5 of rape, and on counts 6,7,8,9 of robbery with aggravation. He was sentenced to:

- 15 years imprisonment at hard labour on count 1;

- 15 years imprisonment at hard labour and in addition to receive 6 strokes of the tamarind switch on count 2;

- 15 years imprisonment at hard labour on count 3;

- 15 years imprisonment at hard labour and in addition to receive 6 strokes of the tamarind switch on count 4;

- 15 imprisonment at hard labour on count 5;

- 10 years imprisonment at hard labour on count 6;

- 10 years imprisonment at hard labour on count 7;

- 10 years at hard labour on count 8; and

- 10 years imprisonment at hard labour on count 9.

The sentence on counts 1,2,6,7, 8 and 9 were ordered to run concurrently while those on counts 3, 4 and 5 to run concurrently and consecutively to counts 1,2,6,7,8 and 9. The effect of the sentencing is that the accused will serve 30 years imprisonment and receive 6 strokes of the tamarind switch.

He appeals against conviction and sentence by leave of the single judge. On the 2nd February, 1999, having heard the arguments of counsel we reserved our decision which we now set out. Several grounds of appeal were filed and argued and because of their nature it becomes necessary to give a summary of the facts.

The facts of the case are that on Sunday, April 10, 1994 at about 11:00 p.m. three men invaded the home of S. W and her family at Lyssons, St. Thomas and committed several acts of rape upon her and other females in that house and also committed several acts of robbery. At the end of the robbery they took two of their victims to Warieka Hills, St. Andrew, and then released them.

The defence on the charges is an alibi. The defendant gave evidence on oath that during the period that the offences took place he was at his mother's house watching video.

We can now consider the several grounds of appeal in respect of which Miss Fara Brown sought and obtained leave to argue.

Ground 1

The first area of complaint is that the judge erred by failing to analyze adequately the evidence of identification with respect to the counts in the indictment. She submitted that the requisite caution requires the scrutiny of the evidence concerning identification as in each instance the victim is the sole witness concerning the commission of each offence.

The learned trial judge gave a *Turnbull* warning and then analyzed the evidence as under:

> "Now, first, what do I make of the evidence of identification because that is crucial. First was S known to the accused as the accused is saying? Was she a person who used to talk to the accused, I hold not. I find that she was not a person who had special conversation with the accused. I also find as a fact that she has been to school with this accused man. She had been to school with this accused man but they were in different classes.
>
> Now, the incident at the house on the 10th of April that night, I find that the lighting was sufficient and she had every opportunity to see who was her attacker and it was a question of recognition. She was now recognising the accused as being a person whom she had known before.

> So far as the witness N W is concerned, I find that the lighting in the premises were sufficient and she was with the accused sufficiently long for her to recognise him and she had no difficulty in pointing him out on the Identification Parade.
>
> The other witness, L S, she seems to have experienced the longest time with the accused and I accept her evidence. I find that she is speaking the truth when she said it was the accused. The condition was there. Again the lighting was there. She was in close proximity with the accused and it gave her every opportunity to have known him as her assailant.
>
> Robert Wilson, knew the accused before and again it was a question of recognition. Again, the lighting had not changed. The lighting was there and again I find that he had this ample opportunity to have recognised the persons, the men who came in the house particularly the accused.
>
> I also find that Shelton Marshall had sufficient opportunity to recognize the accused as the person whom he had known six or seven years.
>
> The Identification Parade, I find that it was properly held. The accused man had every opportunity and in fact did use some of these opportunities to change his position in the line and again all these witnesses came and identified him positively as the person who was among three men who invaded the ... home".

We find that the judge adequately dealt with the issues raised in this ground and we see no reason to interfere with his judgment in that regard. That ground therefore fails.

Grounds 2 and 3

The complaint here is that the consideration by the judge as to common design is not specific enough to demonstrate an appreciation of the appellant's role, if any, in the common enterprise to rape and rob.

The evidence is that all four witnesses identified the appellant on the parade as the man with the gun. The witnesses said that the appellant and other men were searching the house and they not only raped three females but took jewellery before leaving.

There was adequate evidence before the Judge to find and he did find that all three men were acting in concert and had gone to the premises with intention to rob. The law is clear that where an offence is committed jointly by two or more persons each of them may play a different part, but each is guilty of the offence.

These grounds fail.

Ground 4

The complaint is that the verdict of the learned trial judge was in all the circumstances unreasonable having regard to the lack of credibility and reliability of the identifying witnesses.

Miss Brown submitted that the credibility and reliability of the witnesses were seriously undermined by discrepancies. Reliance was placed on ***Regina v Keith Rennick*** S.C.C.A. No. 130/90 delivered on 16th July, 1992 where it was held that having regard to the specific weaknesses in the evidence ignored by

the learned trial judge, his finding of guilt was not reasonable and this could never be supported having regard to the evidence.

In the instant case the learned trial judge found that "the statements of the witnesses given to the police were challenged against the evidence but I do not find that there are any discrepancies or the few discrepancies that arose would not affect this matter". We do not see any reason to interfere with this finding. This ground also fails.

Ground 5

It was strongly argued before us that since the nature of the case called for corroboration, there was a duty on the part of the trial judge to make it clear that he had directed his mind to the dangers of acting on the uncorroborated evidence of the victim of a sexual assault. It was pressed on us that this not having been done in relation to counts 2 to 5 the appeal ought to be allowed on those counts.

Counsel relied on the case of ***R v Clifford Donaldson Newman & Irving*** [1988] 25 JLR 274 where this Court had to decide what was required of a judge sitting in the High Court Division of the Gun Court trying a rape case in which there was no corroboration. Carey J.A. in delivering the judgment of the Court dealt thus with the question at page 280 :

> "There can be little doubt that the cases establish that a jury must be warned against the danger of acting upon the uncorroborated evidence of the victim of sexual assault, and that this rule applies with equal force in cases where there is no dispute that the sexual offence has been committed and where the

> only live issue is identification. See a trilogy of cases ***R v Sawyers*** [1959] 43 Cr. App R 187; ***R v Clynes*** [1960] 44 Cr. App R 158 and ***R v Trigg*** [1963] 1 WLR 305. We would add that the sanction imposed to ensure compliance with the rule is the quashing of the conviction".

In ***R v Trigg*** (supra) Ashworth J said:

> "In principle, this Court feels that cases in which no warning as to corroboration is given, where such a warning should be given, should, broadly speaking, not be made the subject of the proviso in Section 4 (1) of the Criminal Appeal Act 1907".

Reference was further made by the learned judge in ***R v Donaldson*** (supra) to the Privy Council decision in ***Chiu Nang Hong v Public Prosecutor*** [1964] 1 WLR 1279 where the Board interfered with a conviction for rape in which contrary to the conclusion of a trial judge that there was corroboration of the victim's allegation of lack of consent really there was none.

Lord Donovan in this case said:

> "Their Lordships would add that even had this been a case where the judge had in mind the risk of convicting without corroboration, but nevertheless decided to do so because he was convinced of the truth of the complainant's evidence, nevertheless they do not think that the conviction could have been left to stand. For in such a case a judge sitting alone, should in their Lordship's view make it clear that he has the risk in question in his mind, but nevertheless is convinced by the evidence, even though uncorroborated that the case against the accused is established beyond any reasonable doubt. No particular form of words is necessary for this purpose. What is necessary is that the judge's mind upon the matter should be clearly revealed". (p. 280)

It is a settled practice of this court to examine the reasons for judgment to ascertain whether the judge has heeded his own warnings as to corroboration in sexual cases.

In the instant case the judge has failed to reveal that he warned himself which amounts to error of law by non-direction.

This ground therefore succeeds.

Ground 8

The complaint is that the sentence of fifteen years imprisonment consecutive to a term of fifteen years imprisonment at hard labour and six strokes with the tamarind switch is in the circumstances manifestly excessive and disproportionate to the sentences usually imposed for the same offences in corresponding or similar circumstances.

When imposing consecutive terms the sentencer must bear in mind the total effect of the sentence on the offender. Where two or more offences arise out of the same facts but the offender has genuinely committed two or three distinct crimes it is often the general practice to make the sentences concurrent.

If offences are committed on separate occasions there is no objection in principle to consecutive sentences. However, if one bears the totality principle in mind it is more convenient when sentencing for a series of similar offences to pass a substantial sentence for the most serious offence with shorter concurrent sentences for the less serious ones.

We are of the view that all the sentences should run concurrently. Therefore this ground succeeds.

Ground 9

This ground is set out as under:

> "That part of the sentence on Counts 3 and 4 namely; 'you are to receive six strokes of the tamarind switch' is unlawful and/or unconstitutional in that there was no valid law authorising the infliction of such a punishment at the time of its imposition and/or such a punishment is severer in degree than the punishment authorised by law at the time of the commission of the offence in question".

This Court is bound by the decision of ***R v Noel Samuda*** (unreported) Supreme Court Criminal Appeal No. 134/96 delivered December 18, 1998 comprising Rattray P, Forte, Gordon, Bingham and Harrison JJA. The Court decided with Harrison, JA dissenting that the trial judge had no power to impose a sentence of whipping in sexual offences. Accordingly this ground succeeds.

Appeal against convictions in Counts 2, 3, 4,& 5 is allowed. Judgment and verdict of acquittal entered. The sentences are set aside. Appeal against convictions on Counts 1, 6,7,8,& 9 is dismissed. And the convictions and sentences affirmed. The sentences on Counts 6-9 to run concurrently with the sentences on Count 1 to commence on the date of convictions.