[2011] JMCA Crim 51

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 107/2006

BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MR JUSTICE DUKHARAN JA
THE HON MRS JUSTICE MCINTOSH JA

GIAN HALL v R

Delano Harrison QC for the appellant

Miss Melissa Simms for the Crown

25,26 July and 7 October 2011

HARRIS JA

[1] On 16 June 2006 the appellant Gian Hall was convicted in the Home Circuit Court on an indictment which charged him with two counts of rape. On the first count, he was found guilty of rape and sentenced to a term of 10 years imprisonment at hard labour. On the second count, he was found guilty of carnal abuse and sentenced to seven years imprisonment at hard labour. It was ordered that the sentences should run concurrently.

[2] A single judge, having refused an application made by him for leave to appeal, he renewed the application before us. On 26 July 2011, we treated the application as the hearing of the appeal. We allowed the appeal, quashed the conviction, set aside the sentences and in the interests of justice, we ordered a new trial.

The Crown's Case

[3] The prosecution's case was anchored on the evidence of the complainant, who spoke to the appellant having sexual intercourse with her on two separate occasions, once in June 2003 and on 1 September 2004.

[4] At the time of the incident in June 2003, she was 12 years old. Her evidence is that between 2:00 and 3:00 pm sometime in that month, she was on her way home from school when she was approached by the appellant who was previously known to her. He pulled her into an unfurnished building, placed a knife at her throat and had sexual intercourse with her. During the act, she used a piece of broken bottle to hit the appellant in his face. He retaliated by boxing her. She, thereupon, told him that she would be making a report to her father. He responded by saying to her, "A dead you ready fi dead?"

[5] Her evidence as to the second incident was that at about 8:00 pm on 1 September 2004 , she was walking in a lane on her way back home from a shop, when the appellant grabbed her by the hand and walked with her along the lane

until they arrived at a bench. He placed her on the bench and had sexual intercourse with her.

[6] The complainant stated that she would see the appellant almost daily in the area where she lived. She asserted that on the first occasion of the assault she was able to view her assailant's face for five minutes. At the time of the second encounter, she said she had the opportunity of viewing his face for about five minutes, she being aided by a street light and the light from a cook shop.

[7] The investigating officer stated that the appellant, upon being cautioned, said, "Mi no rape in my area."

The Defence's Case

[8] The appellant made an unsworn statement. He stated that he lived at Shooter's Hill. He said that the complainant's father, brother and himself were involved in an altercation which he described as "a little friction, argument develop and cool down back". He went on to say, "The fight never did happen. The complainant's father come to mi one day and seh, 'a chop him fi chop mi up, weh mi and him 'brother' have and dem stuff deh. Him was getting real ignorant, soh I just walk him out. All I know next is that police come hold me and seh mi charge fi two counts of rape."

[9] He denied that he told the police that he did not rape in his area.

[10] He called two witnesses as to character, Miss Alice Chance and Miss Lisa Lee. Miss Chance testified that she had known the appellant for 16 years. He was of quiet disposition and was not a person who was prone to committing offences of the kind for which he had been charged. She expressed disbelief at hearing about the matter, as such incidents were completely out of character for him.

[11] Miss Lee stated that the appellant was known to her and she would see him daily on the road. She related that she had never heard of him being involved in any incident such as that for which he had been charged. She declared that she did not believe that he was capable of committing the offences.

[12] Four supplemental grounds of appeal were filed. The appellant was granted leave to argue three of these supplemental grounds, he having abandoned the original grounds and supplemental ground three. It is convenient for grounds one and two to be dealt with simultaneously. They are as follows:

Ground 1

> "In his charge to the jury the learned trial judge erred insuperably in that he gave the jury no directions so ever as to how they ought to approach the character evidence adduced by the Applicant on his defence (see pages 52 – 53)."

Ground 2

> "The learned trial judge erred in leaving for the jury's consideration, as bolstering the Complainant's credibility, evidence from her that she had actually made a note of the commission of the offence in an almanac (see pages 44-45)."

[13] Mr Harrison QC submitted that where a defendant makes an unsworn statement, the value of a good character direction as to credibility may be moot but he is "entitled to the propensity limb of the directions". The failure of the learned trial judge to give the propensity direction amounted to a miscarriage of justice, he argued. In support of this submission he cited ***Michael Reid v R*** SCCA No 113/2007 delivered on 3 April 2009 and ***Muirhead* v R** Privy Council Appeal No 103/2006 delivered on 28 July 2008.

[14] He further contended that the complainant's evidence that she recorded the date of the second incident on a calendar amounted to self corroboration and notably, the calendar was never tendered as an exhibit. He also argued that the complainant's evidence was a late invention and the learned judge failed to guide the jury carefully on the issue. The learned judge, he further argued, having not done so, effectively bolstered the complainant's credibility. In aid of these submissions, he directed our attention to ***R v Roberts*** [1942] 1 All ER 187 and ***R v Oyesiku*** (1972) 56 Crim App Rep 240.

[15] Miss Simms, while conceding that the learned judge did not give an express propensity direction, argued that his review of the appellant's witnesses' evidence satisfactorily met the propensity limb of the rule. She further submitted that based on the demeanour of the complainant, the jury was satisfied that her evidence was credible and compelling and the absence of the direction would not necessarily amount to a miscarriage of justice.

[16] It cannot be denied that the learned judge's omission to give a specific propensity direction amounted to a non direction. A trial judge is under a duty to direct a jury on the relevance of good character evidence which is adduced on the part of the defence – see ***R v Vye*** [1993] 3 All ER 241; ***R v Aziz*** [1995] 3 All ER 149;***Michael Reid v R.*** A direction on both limbs is required where a defendant gives sworn evidence. However, where the defendant makes an unsworn statement, only a direction on propensity is necessary - see ***Muirhead*** and ***Michael Reid v R***.

[17] In the case under review, although the learned judge recounted the evidence of the defence witnesses he failed to give a propensity direction. The real question is whether in the circumstances of the case, the non direction would render the conviction unsafe. How should the court be guided in resolving this issue? In ***Michael Reid v R,*** Morrison JA pronounced the requisite test to be as follows:-

> "The focus by this court in every case must be on the impact which the errors of counsel and/or the judge

> have had on the trial and verdict. Regard must be had to the issues and the other evidence in the case and the test ultimately must always be whether the jury, properly directed, would inevitably or without doubt have convicted."

[18] As shown in the foregoing, the court, in directing its attention to the issue, is obliged to examine all the evidence and the issues arising in the case and decide whether on the material before it, a jury would have undoubtedly convicted notwithstanding the omission.

[19] The two main issues in this case are credibility and visual identification. So far as the identification is concerned, there was sufficient evidence in support thereof. However, the brunt of Mr Harrison's attack was with reference to the complainant's credibility. His first complaint related to her evidence with regard to the date of the second offence and the manner in which the learned judge treated with this evidence. The learned judge, in dealing with this aspect of the evidence, at pages 44 lines 2 – 25 and 45 lines 1-13 of his summation, said:-

> "However, in respect to 2004, what she said in 2004, she was asked what make you sure it was September, 2004 and her answer, 'Because I wrote it down in my almanac.' She said she really can't remember the first, if she gave the police any date in the first one. 'I gave the police a time in 2003 when this happened, I did not give the police a date,' that's what she said happened. However, in 2004, she said she wrote it down, 'Don't remember if I told the police, if I recorded it on my almanac, I did not remember if I told the Court at Half Way Tree, I recorded it on my almanac.' Those questions were meant to say you just made up that because I'm suggesting to you that you did not tell the Court at Half Way Tree anything

> about it. She said, 'I don't remember.' And you didn't tell the police about it, so what defence counsel is trying to say, this is something you made up about write down in almanac, she said that's what she did. Well, you know this girl would have been a bit older, well, not a bit, she is an older child. You know the rate of development at that point, is it that although not regarding no note was made on the first occasion but for whatever reason she now sees the necessity to make a note of this thing? This has happened, is that the kind of event that a child would have been exposed to and would not have tried to commit it to memory? She did not have the facility of telling her mother, she did not tell her mother, she did not tell her father. It was something that she was keeping, would she not have committed it by even inserting it on an almanac or wrote it down on an almanac? A matter for you."

[20] In her evidence in chief, the complainant spoke to the date of the second incident being 1 September 2004, although admittedly, she was led to that date by counsel for the Crown and it was only in response to a question from counsel for the appellant that she said she "marked it down on the almanac". The fact that she had not so stated in examination in chief or that the calendar was not exhibited would not, in itself, influence the jury that the offence had been committed. It was clear from the learned judge's treatment of this area of the evidence that, in reminding the jury that the complainant had said she had recorded the date on the calendar, he brought to their attention her answers in cross-examination and left for their consideration whether she had in fact recorded the date. This clearly shows that he satisfactorily directed them as to the approach to be adopted in considering the evidence. Nor can it be said that

in his directions he effectively bolstered the complainant's credibility. It was for the jury to decide whether she was worthy of belief.

[21] The cases cited by Mr Harrison are distinguishable. *In* ***R v Roberts*** the defence of accident was raised at the trial of the appellant for murder. It was held that the trial judge properly refused to admit the evidence of the appellant's father that he, the appellant, had told him, while in custody, that the killing was accidental. In ***Oyesiku***, the appellant was charged with assault occasioning actual bodily harm and assault of a police officer. Approximately two days later, while the appellant was in custody his wife gave a statement to his solicitors to the effect that the police officer was the aggressor. The statement was ruled inadmissible by the trial judge. It was held that he erred in so doing.

[22] In the instant case the complainant gave a specific date in relation to the second incident. The response given by her as to her ability to recollect the date, she having recorded it, flows naturally from the question posed by counsel for the defence during her cross-examination. Therefore, there would have been no necessity for the Crown to have tendered the calendar as an exhibit. Significantly, the complainant could have stated in examination in chief that the incident occurred sometime in 2004 or in September 2004 without giving a specific date, as it was open to her to do so. It could not be said that the learned judge was wrong in admitting the evidence that the complainant recorded the date of the incident on a calendar.

[23] So far as Mr Harrison's contention that the learned judge failed to bring to the jury's attention that the complainant's evidence was a recent invention is concerned, the questions posed to the jury by the learned judge do in fact demonstrate that he directed them to consider whether her evidence as to the recording of the date was a concoction. The learned judge gave adequate and fair directions to the jury in this regard. Consequently, it cannot be said that the learned judge, by his directions, bolstered the complainant's credibility.

[24] However, it is of significance that the appellant denied that he had told the investigating officer that he did not rape in his area. His witnesses spoke to his good character. Although it is difficult to say what the jury would have made of this evidence, we are of the view that in fairness to him, the learned judge ought to have expressly directed them as to the propensity of the appellant to have committed the offences.

Ground 4

> "In light of the fact that, at his trial, (sic) Complainant testified to two (2) offences against the Applicant, corroboration **vel non** was a live issue in the case and, accordingly, the learned trial judge erred in law in his failure to direct the jury in clear terms that there was, in fact, no corroboration of (sic) Complainant's evidence."

[25] Mr Harrison submitted that the learned judge's directions on corroboration were defective in that he failed to inform the jury that there was no corroboration of the complainant's evidence. The cases of ***R v Anderson***

(1966) 9 JLR 391 and ***Eric James v R*** (1970) 12 JLR 236 were cited by him to bolster this submission.

[26] In **Anderson,** although the trial judge warned the jury of the danger of convicting the appellant on the uncorroborated evidence of the complainant, he failed to instruct them that there was no corroboration. In allowing the appeal, the court held that the omission was a miscarriage of justice. In **James**, the Privy Council, allowing the appeal, held among other things, that the failure of the trial judge to tell the jury that there was no evidence capable of amounting to corroboration, was a serious misdirection.

[27] Although Miss Simms agreed that the learned judge erred in not giving the requisite direction, she argued that the law has developed since ***James*** and ***Anderson***. She brought to our attention a number of cases which, she submitted, the court could find useful. Principal among these cases were: **R v Kory White** Privy Council Appeal No 12/1998, delivered on 10 August 1998; ***R v Prince Duncan & Anor*** SCCA Nos 147 and 148/2003, delivered on 1 February 2008; ***R v Makanjuola*** [1995] 1 WLR 1348. It will only be necessary to refer to **Kory White** and **Prince Duncan & Anor.**

[28] In **Kory White** the appellant was convicted of rape and attempted burglary. The complainant testified that she had been raped by the appellant and had made reports to several persons, shortly after the incident, who were not called as witnesses. The learned trial judge, informed the jury that the

complaints were made and that they did not amount to corroboration. The Board was of the view that the trial judge, having admitted the complainant's evidence that complaints were made by her, ought to have carefully directed the jury on the limited value of this evidence. The Board in allowing the appeal held that:

> "As the jury had been told that even without corroboration they could convict if they believed the complainant's evidence, there must have been a significant risk that they considered themselves entitled to regard the evidence of complaint as confirming her credibility. To leave it open to the jury to take such a view was a misdirection."

[29] In ***Prince Duncan & Anor*** the appellants were charged with rape, among other offences. A corroboration warning with respect to the offence of rape was not issued by the trial judge. The Crown's case was essentially dependent on visual identification. Smith JA, in dealing with the question of a corroboration warning, said at pages 14 and 15:

> "There has been a trend, in the development of the law, towards the abrogation of the corroboration requirement in sexual offence cases. In ***R v Derrick Williams*** (supra) Forte P, carefully examined the development of the common law in this regard.
>
> At common law a judge was required to warn a jury that it would be dangerous to convict on the uncorroborated evidence of a victim of a sexual assault. This common law requirement was fully enunciated by their Lordships' Board in ***James v The Queen*** (1970) 55 Cr. App. R. 299.
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> In ***R v Clifford Donaldson et al*** (supra) this Court held that the rule applied with equal force where the only live issue was identification. However, in ***R v Chance*** (1988) 3 All E.R. 225, the English Court of

Appeal held that in a case where the only issue was identification, the full corroboration warning need not be given.

In ***R v Donovan Wright*** SCCA 30/96 delivered January 12, 1998, this court stated that a distinction must be made between a case where there is a single charge of a sexual offence and a case where non-sexual offences, such as robbery and burglary, are also charged in relation to the same woman.

The Court was of the view that in the former case, even where the only issue was one of identification, the warning ought to be given, whereas in the latter case the ***Turnbull*** direction was sufficient.

In ***R v Anthony Legister*** and ***Lincoln Facey*** SCCA Nos. 87 and 88/98 delivered December 20, 2000, the Court, following ***Wright***, said that where the only charge was one of rape and despite the fact that the only issue was one of identification, the warning on corroboration and (sic) reason for it were obligatory."

[30] At pages 16, 17 and 18 he went on to say:

"In early 2002 the rule requiring the corroboration warning in all sexual cases fell to be considered by their Lordships" Board in the ***Queen v Rennie Gilbert*** (supra). This was an appeal from a decision of the Eastern Caribbean Court of Appeal (Grenada) (the ECCA). The ECCA had, in ***Pivotte v The Queen*** (1995) 50 W.I.R. 114, rejected the approach adopted by the English Court of Appeal in ***R v Chance*** (supra) and held that the corroboration warning must always be given.

Their Lordships examined the jurisdiction for the rule. The Board reviewed the decision in ***James v The Queen*** (supra) in the light of the approach by the English Court of Appeal in ***Chance***. (see paras. 9, 10 and 11). Their Lordships approved the view expressed by that Court of Appeal that the decision in ***James*** must be read subject to the qualification that what, if any, warning a judge should give, would

depend upon what were the live factual issues on the evidence given at the trial. Their Lordships held that the ECCA erred in holding that in all sexual cases the full corroboration warning should be given…

An important question was whether the rule requiring the said corroboration warning could only be abrogated by statute as had occurred in England by the Criminal Justice and Public Order Act 1994. Their Lordships held that the rule was not a rule of law and was 'liable to be reassessed in the light of further experience or research and reformulated in order to better perform its function'.

In their Lordships' opinion 'the rule has become counter-productive and confusing'. And 'the rule of practice which now will best fulfill the needs of fairness and safety' is that set out in the following passage from the judgment of Lord Taylor C.J. in ***Makanjuola*** (1995) 1 WLR 1348 at 1351:

> '… whether, as a matter of discretion, a judge should give any warning and if so, its strength and terms must depend upon the content and manner of the witnesse's (sic) evidence, the circumstances of the case and (sic) issues raised. The judge will often consider that no special warning is required at all. Where, however, the witness has been shown to be unreliable, he or she may consider it necessary to urge caution. In a more extreme case, if the witness is shown to have lied, to have made previous false complaints, or to bear the defendant some grudge, a stronger warning may be thought appropriate and the judge may suggest it would be wise to look for some supporting material before acting on the impugned witness's (sic) evidence. We stress that these observations are merely illustrative of some, not all, of the factors which

> judges may take into account in measuring where a witness stands in the scale of reliability and what response they should make at that level in their directions to the jury. We also stress that judges are not required to conform to any formula and this Court would be slow to interfere with the exercise of discretion by a trial judge who has the advantage of assessing the manner of a witness's (sic) evidence as well as its content.'"

[31] It cannot be said that the authorities establish that a corroboration warning is unnecessary in every case. As shown from the foregoing dicta, the modern approach in dealing with the matter of the corroboration warning is for the judge, in the exercise of his discretion, to decide on such warning as he considers appropriate in the circumstances of the particular case and in so doing, he should take into account factors arising in the case, the question of the reliability of the witness being one such factor.

[32] We will now direct our attention to the case under review. The learned judge correctly directed the jury as to the meaning of corroboration and warned them of the danger of acting on the uncorroborated evidence of the complainant. There were discrepancies and inconsistencies in the complainant's evidence which the jury could have regarded as material. There was no independent evidence to show that the complainant was raped or was carnally abused by the appellant. This could give rise to the danger that the jury could have entertained the belief that the complainant's evidence buttressed her credibility. It was

incumbent on the learned judge to have gone further and expressly brought to the jury's attention that there was no evidence capable of amounting to corroboration. In the circumstances of this case, such a warning would have been appropriate. The learned judge's failure to bring to the jury's attention that there was no corroboration amounts to a non-direction rendering the conviction unsafe.

[33] For the foregoing reasons, we allowed the appeal and ordered a new trial.