[2018] JMCA Crim 32

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 58/2015

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE McDONALD-BISHOP JA

JOEL HENRY v R

Gladstone Wilson for the appellant

Mrs Christine Johnson-Spence and Miss Sasha-Ann Boot for the Crown

20, 22 March and 31 July 2018

MORRISON P

[1] On 14 July 2015, after a trial before F Williams J (as he then was) ('the judge') and a jury in the Saint Mary Circuit Court, the appellant was found guilty on an indictment charging him with a single count of rape. The complainant was six years old at the material time. On 24 July 2015, the judge sentenced the appellant to 23 years' imprisonment at hard labour.

[2] The appellant was granted leave to appeal against his conviction by a single judge of this court on 21 August 2017. We heard submissions from Mr Gladstone Wilson

for the appellant and Mrs Christine Johnson-Spence for the Crown on 20 March 2018 and, on 22 March 2018, we allowed the appeal. However, we ordered that, in the interests of justice, the appellant should stand trial again at the next sitting of the Saint Mary Circuit Court. These are the reasons which were then promised for this decision.

[3] Because the appellant is to be tried again, we will do no more than state the facts in bare outline. The case for the prosecution was that, on a day unknown between 1 September and 31 December 2013, as the complainant was walking along the road on her way home from school, the appellant came up to her, lifted her up and took her into a house. The complainant tried to scream, but the appellant placed a handkerchief over her mouth. He then proceeded to have sexual intercourse with her without her consent.

[4] A report was subsequently made to the police and the appellant, who was well known to the complainant, was in due course arrested and charged with the offence of rape. The appellant pleaded not guilty and his trial took place in the Saint Mary Circuit Court on 13 and 14 July 2015. Apart from the complainant, the doctor who had examined her on 22 December 2013, as well as the complainant's mother, gave evidence for the prosecution.

[5] There was no dispute that the complainant and the appellant had been known to each other for some time before the incident. But, by way of suggestions put to the complainant by his counsel in cross-examination, and in his unsworn statement from the dock, the appellant maintained that he was not the person who had raped her.

[6] The appellant's counsel also suggested to the complainant (at page 21) that the appellant was "a good man". Her answer was –

> "... no, he is no good man. He is the one who troubled [me] and nobody else."

[7] At an early stage of his summing-up, the judge told the jury (at page 9) that "... the essential issue in this case is whether [the appellant] was the one who raped [the complainant] ...". But, after further directions of a general nature, the judge then went on to say (at page 20) that, since the complainant had said that she had known the appellant for a long time, "in this case really identification is not in issue". He also added this:

> "They are known to each other, there is no dispute about that but the defence really is that it was not he the accused man who did [sic]. If it happened at all it would have been someone else."

[8] The judge next told the jury (at page 22) that they should consider the evidence of the complainant very carefully,

> "... because she is the one who is identifying the defendant, or the accused man, Mr. Henry, as the person who raped her on the day in question. So look at it very carefully. Is it that you can accept her evidence, are you satisfied that she has told you the truth, that she is not mistaken? Is it for example, that she would have been influenced by an adult to come here and say what she had to say? There is no evidence as to that. Is it that she is allowing her imagination to run away with her? These are questions for you to

> consider in forming the view whether or not you can accept and rely on her evidence in this case."

[9] Then, finally, in reminding the jury of the evidence which the doctor had given, the judge pointed out (at pages 26-27) that –

> "... [the doctor's] inability to say from her physical examination [of the complainant], who inflicted the injuries means that there is no corroboration in the true sense and corroboration, ... would be evidence, independent evidence coming from someone other than the complainant that goes towards showing that sexual intercourse took place and that the sexual assault would have been done by [the appellant] ... ."

[10] The judge said nothing further to the jury on the subject of identification. And, apart from reminding the jury of the suggestion put to the complainant by the appellant's counsel that the appellant was "a good man", the judge said nothing as regards the appellant's character.

[11] When the appeal came on for hearing before us, Mr Wilson sought and was granted permission to abandon the original grounds of appeal filed by the appellant and to argue the following four supplemental grounds of appeal in their stead:

> "1. The learned trial judge failed to issue the requisite warnings to the Jury to be careful in its deliberation to accept the evidence of a complainant of tender years in the absence of corroborative evidence.
>
> 2. Specific instructions by the LTJ of the requirement to prove a fact in issue were inconsistent having regard to the evidence.

3. Despite the assertion that the Appellant 'is a good man,' the learned trial judge did not give a good character direction in respect to the Appellant's propensity to commit the offence. If given, this direction or warning could have inured to the benefit of [the appellant] when the jury came to its deliberation of the case.

4. That the sentence of 23 years imposed by the Learned Trial Judge is excessive and should be reduced having regard to other sentences imposed for Rape of a minor."

[12] While Mr Wilson provided us with admirably detailed skeleton arguments on all four grounds, we think it is fair to say that he placed his main focus on grounds 1 and 3. On ground 1, Mr Wilson submitted that the judge erred in failing to issue warnings to the jury as regards the need for caution in approaching the evidence of identification and the dangers of acting on the uncorroborated evidence of a child.

[13] On the identification issue, Mr Wilson referred us, unsurprisingly, to **R v Turnbull and Others** [1977] 1 QB 224 ('**Turnbull**'), in which, giving the judgment of the Court of Appeal of England and Wales, Lord Widgery CJ said this (at page 228):

> "...whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition, he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words."

[14] On the corroboration issue, Mr Wilson referred us to, among other cases, **R v Earl Britton** (1996) 33 JLR 307, 307-8, in which Walker JA (Ag) (as he then was) stated that "[i]t is an inflexible rule of practice that a jury should be warned of the danger of acting on the evidence of a child of tender years, and should at the same time be told why it is dangerous so to act". Mr Wilson also referred us to **Erron Hall v R** [2014] JMCA Crim 42, in which this court described the practice (at paragraph [31]) as a "longstanding rule of practice which has been consistently applied in our courts". (See also **Delroy Bent v R** [2015] JMCA Crim 28.)

[15] Quite properly, in our view, Mrs Johnson-Spence readily conceded the identification point. She observed that, although there was no dispute that the complainant had known the appellant for number of years, the appellant's defence was that he did not rape the complainant. In these circumstances, she submitted, the further point made by the court in **Turnbull** (also at page 228) relating to the evidence of recognition was also relevant:

> "Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

[16] In this case, the judge obviously took the view that, because the appellant did not dispute the complainant's evidence that she had known him for a long time, identification was not in issue. But, in our respectful view, he was clearly wrong on this

point. The appellant's stance was that he was not the person who committed the offence, so the correctness of the complainant's identification of him as her assailant was plainly in issue. Accordingly, the judge was required to warn the jury, along the lines indicated in the two passages from **Turnbull** which we have set out above, of the special need for caution in approaching the complainant's evidence identifying the appellant as her assailant; and that mistakes in recognition of even persons well known to a witness, such as close relatives and friends, can sometimes be made. Instead, the judge left the matter to the jury purely on the footing of credibility, thus depriving the appellant of the filter which the requirement that a jury should approach evidence of identification with special caution is intended to provide.

[17] In **Turnbull** (at page 231), Lord Widgery CJ went on to state that a failure to follow the guidelines set out in that case, "is likely to result in a conviction being quashed and will do so if in the judgment of this court on all the evidence the verdict is either unsatisfactory or unsafe". In this case, the assertion by the appellant in his unsworn statement that he was not the person who committed the offence was his entire defence. In these circumstances, as it seemed to us, it was therefore inevitable that the judge's failure to treat with his defence in the manner required by the authorities should result in his appeal being allowed.

[18] On the corroboration point, Mrs Johnson-Spence also accepted that it has long been the practice in this jurisdiction for trial judges to give a warning as to the dangers of acting on the uncorroborated evidence of a child. However, she submitted that the

judge's directions to the jury to look at the complainant's evidence carefully, and that there was "no corroboration in the true sense", when taken together with his other directions to the jury, were sufficient to meet the mischief that the corroboration warning seeks to cure.

[19] In considering these submissions, we should note at the outset that the trial in this case took place in July 2015, in respect of an event which allegedly occurred in 2013. There is therefore no doubt that it was governed by the common law, and not by the provisions of the Evidence (Amendment) Act, 2015, which came into force on 11 August 2015 (as to which, see paragraphs [23]-[24] below).

[20] Traditionally, the reasons for the compulsory requirement for a warning on the dangers of acting on the uncorroborated evidence of a child were, as appears from this court's decision in **Erron Hall v R** (at paragraph [22]), distinct from the former requirement to give the same warning in relation to the evidence of complainants in sexual cases. So, despite the abolition in 2011 of the requirement for the warning in relation to such complainants (see section 26(1) of the Sexual Offences Act, giving statutory effect to the decision of the Privy Council in **R v Gilbert** [2002] UKPC 17), it remained a strong rule of practice in this jurisdiction that a judge should give a warning as to the dangers of acting on the uncorroborated evidence of a child (see **Erron Hall v R**, paragraphs [29]-[31]).

[21] In our view, what little the judge told the jury about corroboration in this case was clearly deficient in this regard. In order to be effective, such a warning was

required to alert the jury to the dangers involved, which, as Walker JA (Ag) stated in **R v Earl Britton** (at page 308), "include the risk of unreliability and inaccuracy, over-imaginativeness and susceptibility to being influenced by third persons". (See also **Erron Hall v R**, paragraph [31].)

[22] We therefore considered that there was also merit in Mr Wilson's complaint that the judge failed to issue the requisite warning to the jury as to the dangers of convicting the appellant on the uncorroborated evidence of the complainant, and the reasons for the warning.

[23] But, for completeness, we should say something briefly about the impact of the Evidence (Amendment) Act 2015. Section 4 of that Act amends the Evidence Act by inserting a new Part 1C, under the rubric 'Evidence of Child Witnesses, Competence and Corroboration'. Section 31P(1) of the Evidence Act, as amended, now provides that the evidence of a child (defined in section 31M as a person under the age of 14 years) "shall be given without administering an oath" (thus abolishing the distinction between the sworn and unsworn evidence of children). Section 31Q(1) provides that "it shall not be necessary for the evidence given by a child in civil or criminal proceedings to be corroborated for a determination of liability, a conviction or any other issue, as the case may be, in such proceedings". However, section 31Q(2)(a) goes on to provide that a trial judge may, "where [he or she] considers that the circumstances of the case so require, give a warning to the jury to exercise caution in determining whether to accept [the] uncorroborated evidence of the child and the weight to be given to such

evidence". In the case of a trial by judge alone, the trial judge is also required to warn him or herself in the same terms (section 31Q(2)(b)).

[24] The upshot of all of this is that the requirement of a compulsory corroboration warning in respect of the evidence of a child has now been abolished. There remains, however, a discretion in the trial judge to warn the jury (or him or herself in the case of a trial by judge alone), where the circumstances appear to so require, to exercise caution in respect of such evidence. This therefore brings the law with regard to the requirement of corroboration of the evidence of children in line with that relating to the evidence of complainants in sexual cases.

[25] We can deal more shortly with the good character issue. Mr Wilson submitted that, it having been asserted on the appellant's behalf that he was "a good man", the judge ought to have given the jury a direction as to his propensity to commit the offence for which he was charged. This is, of course, an unexceptionable submission, given previous decisions of this court, to some of which Mr Wilson helpfully referred us (see, for instance, **Michael Reid v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 113/2007, judgment delivered 3 April 2009; and **Gian Hall v R** [2011] JMCA Crim 51).

[26] Mrs Johnson-Spence accepted this, but pointed out, obviously correctly, that the question for the court was, as Brooks JA put it in **Tino Jackson v R** [2016] JMCA Crim 13, paragraph [45], "whether the jury, given the case as a whole, would inevitably have convicted the accused, even if the proper direction had been given".

[27] But in the end it was not necessary for us to pursue this line of enquiry, as Mrs Johnson-Spence, again very properly, conceded that, the judge having failed to give the jury two "very important warnings" in this case, she could not take the matter any further.

[28] In fact, as it turned out, the judge omitted to give three very important directions: a **Turnbull** warning, a warning on the dangers of acting on the uncorroborated evidence of a child and a direction as to the relevance of the appellant's good character to his propensity to commit the offence for which he was charged. Naturally, the actual terms in which the essence of these directions, and the reasons for them, are conveyed to the jury will always be a matter for the trial judge in each case. However, in our view, the omission to give them altogether in this case rendered the appellant's conviction unsafe. It is therefore for these reasons that we came to the conclusion that the appeal should be allowed, the appellant's conviction quashed, and the sentence set aside.

[29] On the question of how the appeal should ultimately be disposed of, we were guided by the provisions of section 14(2) of the Judicature (Appellate Jurisdiction) Act, which empowers the court, if it decides that an appeal should be allowed and a conviction quashed, to order a new trial "if the interests of justice so require". In this case, the appeal succeeded because of errors on the part of the judge, and not as a result of any deficiency in the evidence relied on by the prosecution. In these circumstances, we took the view that, in keeping with the principles laid down by the

Privy Council in **Dennis Reid v R** (1978) 16 JLR 246, the interests of justice clearly required that the matter be remitted to the Saint Mary Circuit Court for a new trial to be held at the earliest convenient date.