JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 120/91

BEFORE: THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.
THE HON. MR. JUSTICE GORDON, J.A.

REGINA vs. JOSEPH McKENZIE

Delroy Chuck for the appellant

Miss Caroline Reid for the Crown

September 28 and December 18, 1992

MORGAN, J.A.:

In the Clarendon Circuit Court held at May Pen on the 20th September, 1991, before Malcolm, J. the appellant was convicted on an indictment containing two counts, each charging him with incest in that he had sexual intercourse with a female who was to his knowledge his daughter. On each count he was sentenced to a term of four years at hard labour. Leave to appeal was granted by a single judge and after the hearing on the 28th September, 1992, we allowed the appeal, quashed the convictions, set aside the sentences and in the interest of justice ordered a new trial in the current session of the Circuit Court.

As there will be a new trial, we propose to deal with the facts as briefly as possible.

The complainant D.M., a school girl fifteen years old, lived with her father, the appellant, and his wife. On a day in the month of March 1990 she requested from him some money to buy lunch. He said she could only have it if she had sexual intercourse with him. She had sexual intercourse with him on his demand. Thereafter on six occasions he had sexual intercourse

with her in his room in return for lunch money to go to school. Sometime on a day in June she made a complaint to one Ingrid Holness, a lady who was very kind to her. After the last act of intercourse on a day in July, he whipped her. She then made a report of his having sexual intercourse with her to Woman/Cpl Pryce. She was sent by the police to a doctor. On arrest the appellant denied having sexual intercourse with her but admitted he had flogged her because she was rude to him.

Counsel successfully argued the single ground of appeal filed, namely:

> "The Learned Trial Judge failed to direct the Jury adequately on the issue of corroboration. Corroboration is of crucial importance in cases involving young children and particularly so in this case."

On this issue the learned trial judge said (pp 5-6 of transcript):

> "You heard Crown Counsel mention the question of corroboration and quite rightly he told you that when people are committing certain offences they do not call the whole world and say, 'Come here, come and watch me, a going to commit sexual intercourse with my daughter,' or if you are going to break a house you say, 'I am going to break this man's house and rape somebody in there.' That is not how people behave. They act furtively. So it is not often that you can find an eye witness who will come here and say 'I saw when he did X-Y-Z.' So very often there is no corroborative evidence. Corroborative evidence is of this nature: It must confirm in some material particular that intercourse has taken place."

In this passage the trial judge merely warned the jurors that corroborative evidence to confirm that an act of sexual intercourse took place is difficult to find, because matters of sex are not done in the presence of others.

At page 8 he says:

> "I told you what corroborative evidence is, but I must also go on to tell you that, that even if you find that there is no corroboration, it is open to you to convict..."

He then proceeded to warn them that it was dangerous to convict without corroboration.

It is the responsibility of a judge to tell jurors whether or not there is evidence capable of amounting to corroboration and also to assist a jury in finding it. If there is corroboration, he must indicate to them that area of the evidence - if there is no corroboration he must say so. This is important in two areas, that is, whether the sexual intercourse took place, and, that it was the appellant who committed it. No attempt was made by the learned trial judge to guide the jurors as to whether on the evidence produced in this matter there was anything amounting to corroboration.

In **R. v. Johnson** (1963) 5 W.L.R. 396, where a similar situation existed, it was held that in sexual cases:

> "...where there is no corroboration at all it is the duty of the judge so to point out to the jury otherwise he may well be inviting them to regard as corroboration something which is not corroboration."

In fact, there was no corroboration in this matter and a failure by the judge to point that out to the jurors may well have led them to believe that the previous complaint of the female D.M. to Ingrid Holness amounted to corroboration.

Again, the case involved a complainant who was a child of fifteen years and gave sworn evidence. Notwithstanding, the jury should have been directed that it was dangerous to convict on the uncorroborated evidence of a child. This is so because of the susceptibility of children to influence, their fallibility of memory, the fact that they are prone to fanciful thinking and sometimes inventive, but that they may convict if having seen and heard her they were convinced that the child was speaking the truth.

Lord Goddard in **R. v. Campbell** (1956) 40 Cr. App. R. 95 said:

> "The sworn evidence of a child need not, as a matter of law, be corroborated but a jury should be warned, not that they must find corroboration but that there is a risk in acting on the uncorroborated evidence of young boys or girls though they may do so if convinced the witness is telling the truth..."

At page 8 of the transcript the learned trial judge said:

> "...but I warn you that it is dangerous and unsafe to convict on the evidence of the complainant alone, it is always desirable that there is corroboration of her story by independent testimony. The corroboration of the complainant's evidence is not essential in law, but in practice, you always look for it, but in spite my telling you it is unwise to convict without corroboration, even though my warning, if you believe her, you can convict on her evidence alone."

This general direction, we agree, is correct but inadequate, and particularly so in the context of this case where the report was made by the child after a severe beating administered to her by the appellant.

On these bases, we found the omissions may have given rise to a misdirection of justice and made the order which we did.