JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 66/92

COR: THE HON MR JUSTICE CAREY J A
THE HON MR JUSTICE FORTE J A
THE HON MR JUSTICE WOLFE J A

R V SILBERT DALEY
also known as
SYLBOURNE BAILEY

Dr Diana Harrison for appellant

Hervin Smart for Crown

January 30 & February 13 1995

CAREY J A

On the completion of the hearing of this application for leave to appeal a conviction for murder in the Circuit Court Division of the Gun Court before Karl Harrison J (Ag) and a jury, which we treated as the hearing of the appeal itself, we allowed the appeal, quashed the conviction, set aside the sentence and in the interests of justice, ordered a new trial. We intimated that we would put our reasons in writing and these now follow.

Having regard to our disposition of the appeal, the facts need only be stated in a summary form. The victim Neville Burnett a security guard was shot to death as he attempted to place a bag containing cancelled cheques and computer data into the night deposit vault at the Canadian Imperial Bank of Commerce in Twin Gates Plaza, Half Way Tree in St Andrew. The crime was observed by a witness who was then by a telephone booth in Lane Plaza which is across the road from Twin Gates Plaza. The appellant having shot the security guard, made off in a car with the bag and although the witness chased him, he eluded capture until nearly three years later. The witness, then thirty-five years of age testified that he knew the appellant from school days, a fact admitted by the appellant when he gave evidence in his defence.

The solitary ground of appeal argued by Dr Harrison was framed thus:

> "1. The attempt by the learned trial judge to define corroboration and identify the elements which, in his view, amounted to corroboration (p.115 line 6 of transcript) was pregnant with the possibilities of misleading and confusing the jury. As the concept of corroboration embraces implication of the accused, the direction on corroboration was fatal misdirection (R v Neville Stora SC. Cr. App. No. 95/1974."

She relied on **R v Morrison** (unreported) SCCA 71/91 delivered 9th March 1992 and **R v Stora** [1975] 24 WIR 300.

The impugned misdirection is to be found at pp. 114 - 115 when Crown Counsel at the request of the trial judge reminded him of his omitting to direct the jury on "corroboration in respect of the sworn evidence given by the different witnesses." He gave the following directions:

> " Miss Crown Counsel has reminded me of my responsibilities. She has mentioned the whole question of corroboration, i.e. whether or not there is evidence supporting what the witness says, namely Mr. Dias, as far as the whole issue of the identification of the accused man is concerned."

In these words the trial judge clearly shows that he is using corroboration in its legal sense as evidence implicating the appellant in the murder. He then continued:

> "And you have heard where he says that he knew the accused man very well. He is now thirty-five years of age and they have been seeing each other from school days, as far back as that. The accused man himself is corroborating that evidence to the extent where he says 'Yes, I know him too. I know him quite well.' So both are there supporting what the contentions are, that each one knows the other. That in law is known as corroboration. They have said things which support what the other is saying in terms of the person whom Mr. Dias said he saw. They knew each other. So it's a fact that you will have to bear in mind when you retire, as to whether or not there is corroboration."
> [Emphasis supplied]

It is in this passage that we detect the misdirection. The trial judge identifies the appellant's admission that he knows the witness as capable of amounting to corroboration for he explains that it implicates the appellant as being the assailant. There is no question that the appellant's admission that he knew the witness for a number of years did not in any way implicate the appellant as

the assailant. The jury would have withdrawn to the jury room with the judge's last words charging them to find that the solitary eye-witness had been corroborated.

This was a case where conviction depended entirely upon visual identification, a genre of evidence which a jury must approach with especial caution, the more so when it is uncorroborated. The learned judge had identifed as corroboration, evidence which was incapable of amounting to corroboration and in so doing, we agree with Dr Harrison, he eroded his correct direction on identification which he had given.

The circumstances of the instant case are in no way different from **R v Morrison** (supra) where the trial judge had erroneously identified as corroboration evidence which was not. We said this then:

> " This was a clear misdirection. In these words he was directing the jury that the applicant's statement that he was a mason and had worked for Mr. Williams, was capable of corroborating the witness' evidence that the applicant was in fact the assailant. The statement made by the applicant we would point out, was in no way an admission of guilt nor did it confirm in any particular that he had attacked Mr. Williams. The learned judge having erroneously pointed out to the jury evidence which was incapable of amounting to corroboration, we were of opinion that the conviction should not stand."

**R v Stora** (supra) deals with a somewhat different point but is helpful. There the danger of using corroboration interchangeably with "support," "strenghten" or "support" was highlighted. This court held:

> "that such terms as 'corroboration', 'support', 'strengthen' and 'confirm' may be used interchangeably in a trial judge's charge to a jury but whatever synonym was chosen it was imperative that the jury be made to understand that such synonym embraced the triple concept of intercourse, absence of consent and implication of the accused; if reference was intended to one factor only of this concept then this should be made absolutely clear as otherwise there was a real danger of the jury regarding evidence as corroboration when it was not; in this case it was left open to the jury to conclude that there was corroboration as defined after all,

> thus rendering the evidence of the complainant more credible and causing it to appear safe to convict.
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> Appeal allowed. New trial ordered."

There can be little doubt that the effect of identifying evidence as corroboration, is to render the witness being corroborated more credible. It therefore presents an unfair picture of the strength of the prosecution case and is likely to induce a jury to have unwarranted confidence in convicting.

Learned counsel for the Crown essayed to support the conviction but on mature reflection conceded that the conviction could not stand. For the reasons we have given, his concession must be right.