JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 12/98

BEFORE: THE HON. MR. JUSTICE FORTE, P.
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE COOKE, J. A. (Ag.)

REGINA VS. DERRICK WILLIAMS

Delano Harrison, Q.C., for Appellant

Bryan Sykes, Senior Deputy Director of Public Prosecutions for Crown

22nd November, 2000 & April 6, 2001

FORTE, P.

The appellant was convicted on the 21st January, 1998 in the High Court Division of the Gun Court for the offences of illegal possession of firearm and rape and sentenced to ten years and twenty years respectively. It was ordered that the sentences should run concurrently. On the 22nd November 2000, the matter came before us, leave to appeal having been granted by a single judge. Because of the particular nature of the legal arguments advanced, we took time out to arrive at a decision, promising to deliver judgment at a later date. This we now do.

The major point taken before us centred on the fact that the learned trial judge in coming to his decision did not express in his reasons that there was no evidence of corroboration and that being so that he had warned himself of the dangers of acting on the uncorroborated evidence of the complainant before accepting her as a witness of truth. Counsel for the Crown faced with the reality of the learned trial judge's omission to

do so invited us to say that there is no necessity for the judge to warn himself where, as in this case the only issue in the case concerns the identification of the appellant as the assailant. In the instant case, he maintained, the learned trial judge, expressly demonstrated in the words he used, that he was aware of the cautious approach he ought to take in accepting the correctness of the identification in circumstances where there is no independent support for that testimony. In those circumstances, Mr. Sykes contends, the cautious approach would have been taken in respect of the only issue, which arose in the defence.

The facts upon which the appellant was convicted are straightforward. On the 12th July, 1997 at about 11.30 p.m. the complainant, having come from a gospel concert arrived at 26 Merridale Avenue, the home of her brother Sheldon and where she intended to spend the night. She called out at the front of the house, and receiving no response went to the back to see if she could attract the attention of the occupants (her cousins) of the house, in order to gain entrance. While there, the appellant she said, approached her armed with a gun. Her reaction was to scream and cry, but the appellant silenced her by hitting her with the gun and demanding that she "shut up." He thereafter raped her, and hit her in her face causing a wound. With the wound bleeding he took her to the washroom on the premises so that she could wash away the blood. While she did this, he watched over her, with the gun pointed at her. The wound having been cleaned, he took her back to where he had earlier raped her. He put the gun in his pocket and proceeded to rape her once more. She managed to get the gun from his pocket, but in a struggle which ensued the assailant bit her on her hand and managed thereby to retrieve the gun from her. She nevertheless succeeded in escaping from him, fleeing to the sanctuary of the next-door neighbours from where the police were called.

In an unsworn statement, which formed his defence the appellant, said this:

> "You Honour, me and Sheldon was have a dispute at road and he said he was going to set me up. Your Honour and he take me to Half-way-tree Court, Your Honour, three time, 21,22nd and 24th, he tek me Thursday night. And he tek me Thursday night and carry me to Central and he put me on a parade on the 30th, whey him done show me up to the public, Your Honour.
> Your Honour, a don't know nothing that they talking about Your Honour.
> I am not the one that try to rape no one, Your Honour I am not the one to do that, Your Honour. Your Honour, they take me away from my family and try to blame me Your Honour, a don't know anything they are talking about. I am not the one to idle to do those things, Your Honour; I don't hold a gun to do nothing, Your Honour. A don't know nothing about gun, Your Honour, or rape, Your Honour. They try to mix me up; I am innocent, Your Honour. A never seen that girl before yet, Your Honour, first time I been seen her when she come to court today, never been seen her yet."

The above statement is the basis for the Crown's contention that the only issue raised by the appellant was one of identification, and the consequent submission summarized heretofore.

Before dealing with its applicability to the facts in the present case an examination of the legal principles governing the warning in the absence of corroboration in rape cases is appropriate. There is no necessity to re-state the principles as pronounced in the earlier cases except to look at the reasons for and the backgound to those principles. It is sufficient to commence with the case of ***Eric James v. R*** [1970] 12 J.L.R. 236 where it was held inter alia, that it was a serious misdirection not to tell the jury that there was no evidence capable of amounting to corroboration of the complainant's evidence that she was raped, and raped by the appellant. Viscount Dilhorne who in delivering the opinion of the Board of Her Majesty's Privy Council, made the above statement, went on to say that such a misdirection is so serious that the conviction should be quashed. In that case, the defence was an alibi, consequently

putting the identification of the accused in issue, but nevertheless the Board concluded that the jury ought to have been told that there was no evidence capable of amounting to corroboration. Unfortunately, as that omission by the learned trial judge was not the only error that occurred in the case, their Lordships therefore had no option but to advise that the appeal be allowed.

It is easy to understand the gravity of the error in not telling the jury that there was no evidence that could amount to corroboration, as a possible result would be that the jury may be looking for corroboration where there is none and perhaps assign that quality to evidence which did not amount to corroboration. In the instant case the learned trial judge did not speak to corroboration at all, neither stating that there was none, nor that he had warned himself.

It is his omission to warn himself that led Mr. Delano Harrison, Q.C. for the appellant to rely on the case of ***R. v. Clifford Donaldson, Leroy Newman and Robert Irving,*** a judgment of this Court reported at [1988] 25 JLR 274 at 275 in which the following was held:

> "(ii) the cases establish that a jury must be warned against the danger of acting upon the uncorroborated evidence of the victim of a sexual assault and this rule applies with equal force in cases where the only live issue is identification.
>
> (iii) a judge sitting alone in the trial of any sexual offence should state or make it clear in his summation, which is for the benefit not only of the parties before him but also for the assistance of the appellate court, in the event of an appeal, that (a) he has in mind the dangers of convicting on the victim's uncorroborated testimony, and (b) nevertheless, he is satisfied, so that he feels sure, that she is speaking the truth.
>
> (iv) the trial judge did not at any time advert to the rule or indicate that he was conscious of those dangers but nevertheless felt sure that Miss X was speaking the truth and accordingly his verdicts on counts for rape and attempted rape cannot stand."

In coming to this conclusion, the Court followed dicta in 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 W.L.R. 305.

Here is how Carey, J.A. who delivered the judgment of the Court dealt with the issue 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 a 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 W.L.R. 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.'
>
> In a case tried without a jury, the Privy Council decision in ***Chiu Nang Hong v. Public Prosecutor*** [1964] 1 W.L.R. 1279 is apt. There the Board interfered with a conviction for rape where contrary to the conclusion of a trial judge sitting with a jury, that there was corroboration of the victim's allegation of lack of consent, when there was not. Their Lordships then said this at page 1285:
>
> > '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'."

Following the ***Donaldson*** case (supra) this Court per Bingham, J.A. in the case of ***R. v. Donovan Wright*** SCCA 30/96 delivered on 12th January 1998 (unreported) analysed the dicta of Carey, J.A. and sought to make a distinction between the cases where the single complaint is one of a sexual offence and those in which there are other charges being tried on the same indictment as that of the sexual offence. In ***Donaldson,*** however, the charge of the sexual offence was numbered among charges for robbery with aggravation and illegal possession of firearm. Nevertheless, this Court as is clearly set out in the cited dicta, spoke to the necessity in such cases for the warning to be given, and the fatal effect of such an omission. In making the distinction Bingham, J.A. pointed out that the cases relied on in the ***Donaldson*** case, all related to charges of single sexual offences and opined that in these circumstances "it is trite that the standard direction as to the warning on corroboration and the reason for it is obligatory. A failure by the trial judge to give a warning is fatal to the conviction."

This Court therefore per Bingham, J.A. was again reiterating, at any rate, that where there is a single charge of a sexual offence then the warning ought to be given, and that an omission to do so would result in the quashing of a conviction. It should be noted therefore, that by implication at least Bingham J.A. opened the possibility of reversing the decision in ***Donaldson*** in so far as that case was a case in which there were several charges against the appellants including the offences of rape and robbery, the defences in respect of each being an alibi. Bingham J.A. without making any definitive statement in respect of the principles expressed in ***Donaldson,*** contented himself with making a clear distinction between the ***Donaldson*** case in which there was no mention of corroboration in the judgment of the learned trial judge and the case of ***Wright*** (supra) which was under consideration, and in which the learned trial judge had expressly found that there was no corroboration. In the latter case, having omitted to

warn himself of the danger of convicting on the uncorroborated evidence in respect of the charge of rape, the learned trial judge nevertheless warned himself of the dangers inherent in visual identification.

The instant case on the face of it, should be governed by the principles adumbrated by Carey, J.A. in the ***Donaldson*** case, and as the learned trial judge made no mention of corroboration in his judgment, it would appear that it cannot be gleaned from what he said (as could be done in the ***Wright*** case) that he gave any consideration to that issue.

Mr. Sykes however, has asked this Court to revisit this issue and to look at the direction being taken in other jurisdictions in determining whether there is necessity for such a warning where in a sexual case, the only defence offered is one of identification, and the learned trial judge has dealt adequately with that issue.

To make a determination, it would be convenient to start firstly with the case of ***R. v. Chance*** [1988] 3 All E. R 225 a case from, the English Court of Appeal which was decided just about the same time as ***Donaldson.*** In that case it was held:

> "Where, in a trial for rape, the commission of the offence is not in issue and the only issue is the identity of the assailant, it will not normally be necessary for the trial judge to give the usual warning to the jury in sexual cases about the dangers of convicting on the uncorroborated evidence of the complainant. Instead, the usual direction to the jury regarding identification by the complainant, namely a warning of the special need for caution before convicting on an identification made by the complainant, will usually suffice, especially where the rape has been committed in conjunction with another offence such as robbery, burglary, or breaking and entering. However, if the sexual nature of the case may have affected the complainant's identification evidence or if the judge considers it advisable, then the formal corroboration direction should be given."

The English Court, in that case in which similar circumstances existed as in the ***Donaldson*** case, found contrary to the finding in ***Donaldson,*** that such a warning

would no longer be necessary where there is no issue as to whether the offence was committed and the only issue was one of identification and the proper warning was observed in relation to the identification evidence. Interestingly, the English Court in coming to that conclusion considered the cases of ***Sawyer*** (supra) and ***Trigg*** (supra), which were followed in the ***Donaldson*** case.

The question of the obligation placed on judges to warn juries of the dangers of acting upon the uncorroborated evidence of a complainant in a sexual case has come under criticism in recent times. The reason for the warning, it is said is based on the presumption that because of the ease of making such a complaint, women are prone to create falsehoods in that regard and it is difficult for the man to refute the allegation. As said in ***Chance*** (per Roch J) the locus classicus for the reason is to be found in ***R. v. Henry, R. v. Manning*** [1969] 53 Cr. App. R 150 at 153 per Salmon LJ. He said:

> "because human experience has shown that in these courts girls and women do sometimes tell an entirely false story which is very easy to fabricate, but extremely difficult to refute. Such stories are fabricated for all sorts of reasons ... and sometimes for no reason at all."

Speaking to circumstances where the sexual offence is just one of several offences charged e.g. burglary or robbery, Roch J demonstrates in my view the absurdity of calling for a special warning on corroboration for the sexual offence when the only issue is identity and where adequate directions in keeping with the ***Turnbull*** principles have been given by the learned trial judge. He said:

> "In those circumstances, if one applies the corroboration rules strictly, the woman's evidence about the identity of the intruder requires no corroboration if he confines himself to robbing or stealing, but must be the subject of the usual warning if, having stolen or robbed, he then goes on to rape the woman, despite the fact that the rape would almost certainly give her more opportunity and more incentive to observe and memorise his appearance than the robbery or theft.

> If the law demands that in those or similar circumstances the usual warning should be given by the judge, it puts an unexpected and unwelcome premium on rape. Presumably also in such circumstances, the judge would have the task of explaining to the jury that it would be dangerous to convict on the uncorroborated evidence of the victim in respect of the rape but not dangerous so far as the robbery was concerned. Moreover, any judge might be forgiven for hesitating long before adding insult to injury by explaining to a jury the reasons for the usual warning, namely that the unfortunate householder, allegedly burgled and raped in her own home, might have made a false accusation owing to sexual neurosis, fantasy, spite or refusal to admit consent of which she is now ashamed or any of the other reasons in ***R. v. Henry, R. v. Manning.***"

Roch J, thereafter examines different situations and purports to give guidelines as to how a trial judge should deal with the question of the warning in particular circumstances. He suggests that where there is no challenge to the fact that the offence was committed, it would be unnecessary to ask the jury to look for corroboration in that regard or to be warned of the dangers of convicting if there was no corroboration in that respect. Here is what he stated:

> "If, as in the instant case for example, it could not sensibly be suggested that no rape had occurred, it is absurd and gratuitously offensive to the complainant to insist that the usual warning should nevertheless be given. It is a fine distinction between 'I admit' and 'I do not dispute'. On the other hand, where it is suggested by the defendant that the complainant's evidence as to the offence may be unreliable, or, despite the lack of any such suggestion, the judge in his discretion perhaps decides in the interests of justice that it is advisable to do so, the usual warning about the complainant's evidence as to the offence should be given."

He thereafter deals with a situation in which the identity of the offender is in issue. Having expressed the view that that situation has been altered by the decision in ***R. v. Turnbull,*** he then stated:

> "There may no doubt be occasions when the sexual nature of the offence casts some doubt upon the complainant's identification evidence or adds to it a further peril, but in our judgment that possibility does not require judges on every occasion to give the usual warning. In the ordinary

> way a full ***Turnbull*** direction is sufficient, despite the sexual nature of the case."

If the requirement for corroboration rests on the historical reasons as stated in ***R. v. Henry, R. v. Manning*** (supra) then the question arises whether the ***Turnbull*** warning is sufficient to ensure that jurors and judges sitting alone in sexual cases where the only issue is one of identification, exercise the careful approach in acting upon the complainant's evidence. In our view, the warning that it is dangerous to convict on the uncorroborated evidence of the complainant is in no wise expressing any greater caution than the admonition to approach identification with special care, given all the reasons for so doing. Identification of an assailant in a case of rape, is in our opinion, no more essential and no more important than the identification of an assailant in any other offence. If it is that a woman is prone to fabrication when it comes to sexual offences, then that question is more attributable to the credit of the lady, and not to her ability, given the opportunity, to subsequently identify her assailant.

It would follow therefore that where the defence of the accused is that there was some ulterior motive for his being identified as the assailant, as opposed to a straight question of the ability of the witness to correctly identify the assailant, then in those circumstances the warning ought to be given. In the latter case however we would conclude that the ***Turnbull*** warning would be sufficient.

Mr. Sykes for the Crown also relied on the following dicta of Barwick C.J. sitting in the High Court of Australia in the case of ***Kelleher v. The Queen*** [1974] 131 CLR 534, at 543:

> "We were referred to the decision of the Privy Council in ***James v. The Queen*** [1970] 55 Cr. App. R. 299 [1970] 12 JLR 236. There are, of course, earlier decisions to the effect that to be relevantly corroborative the evidence must implicate the accused, e.g. ***R. v. Baskerville; R. v. Trigg***

> This is not the place to discuss all the implications of the decision of their Lordships in ***James***. Suffice it to say that, in my opinion, it is not decisive of this case. Here, the only issue fought at the trial so far as the prosecutrix was concerned was simply whether she was honestly mistaken in identifying the accused as her assailant. That did not depend in this case on her sex or on the nature of the offence. It was conceded that she was truthful and thus her evidence was not to be disturbed either because of her sex or of the nature of the charge. However widely the reasons of their Lordships in ***James*** were expressed, they do not, in my opinion, embrace a case of this kind. None of the reasons, which have prompted the rule, well expressed in its origins by Hale C.J. in ***Pleas of the Crown,*** vol. 1, p. 634, are present. The Chief Justice's words ought to be remembered: 'It' (rape) 'is an accusation easily to be made and hard to be proved, and harder to be defended by the party concerned, though never so innocent'. Lord Salmon's statement of the reason for the rule should also be borne in mind. His Lordship said that convicting on the evidence of the woman or girl alone' ... is dangerous because human experience has shown that in these Courts girls and women do sometimes tell an entirely false, story which is very easy to fabricate, but extremely difficult to refute." (***Reg. V. Henry; Reg. V. Manning***) The rule of practice as to the warning to be given to the jury is related to the reasons, which have prompted it. In my opinion, it does not require a warning where those reasons have no play."

The above dicta is in keeping with the views expressed earlier in this judgment and consequently has our acceptance as a correct approach to be taken in dealing with whether a warning is necessary in a particular case. For the purpose of emphasis we reiterate that where there is no challenge to the fact that the offence has been committed, and the only defence offered is one of mistaken identity, rather than a purposeful identification made because of some ulterior motive, then it will be sufficient if the traditional warning given in cases of sexual offences is omitted, but the warning on the ***Turnbull*** principle is given.

It is hoped that in due course, the legislature will examine the validity of this warning which has developed through the common law and which casts a "slur " on the character of our women. The so called necessity for the warning is based on the presumption that our women for "various reasons" may fabricate allegations of sexual

offences against our men. There can really be no rational reason in our time, for coming to such a conclusion but even so, a tribunal of fact should be capable of determining her credibility, as it does of witnesses in almost all other cases, without having the support of corroborative evidence. The abolition of the requirement has been accomplished in other jurisdictions and it is our view that the time has come for this to be addressed in our own.

I turn now to determine how these principles ought to be applied to the instant case. It has been conceded that the learned trial judge expressly stated that he was aware of the approach to be taken when dealing with evidence of visual identification.

This is what he said:

> "However, this is a trial where the case against the accused depends wholly on the correctness of identification of him, which the Defence alleges to be mistaken.
> The court must warn itself of the special need for caution before convicting the accused in reliance on the evidence of identification. That is because it is possible for an honest witness to make a mistaken identification. And of course, this court is aware that there have been wrongful convictions in the past as a result of such mistakes an apparently convincing witness can be mistaken, so the court needs to examine very carefully the circumstances in which identification is made by the witness N.H."

He thereafter proceeded to examine the circumstances under which the complainant had the opportunity to view her assailant, accepting that she had at least fifteen (15) minutes to do so in proper lighting, and with the assailant in close proximity (touching). He took also into consideration her testimony that she had never seen her assailant before the incident and went on to find that "the case against the accused man was proved beyond all reasonable doubt."

However, an examination of the appellant's unsworn statement reveals that he attempted to raise the question of credibility. For convenience I will set out again a

part of the unsworn statement made by the appellant, as taken from the summary of the learned trial judge.

> "In this case he gave an unsworn statement to the fact that he knew the brother of the complainant and this court infers from that, that he knew 26 Merridale Avenue quite well because the accused man is saying that it is the brother of the complainant one Sheldon Henry who set him up causing him to be here. That he himself does not know the complainant, never saw her before the day when she came here to give evidence."

In fact the appellant in his unsworn statement alleged that he and the complainant's brother had a dispute and as a result the brother said he was going "to set" him up. That he took him to Half-way-tree Court three times, and that it was the brother who took him to Central and put him on a parade on the "30th. He thereafter denied that it was he who raped the complainant and alleged that "they" took him away from his family and try to blame him. And again, "They try to mix me up; I am innocent."

The unsworn statement of the appellant suggests that he was making an allegation that Sheldon, the brother of the complainant, because of a dispute they had before, "set him up" i.e. caused him to be accused of the offence. An examination of the notes of the evidence of the cross-examination of the complainant by counsel for the accused suggests that there was some attempt to challenge her in that regard but alas, counsel was stopped by the learned trial judge.

I set out hereunder, the relevant portion of that cross-examination, which appears on pages 12-13 of the transcript:

> "Q. Your brother's name is Sheldon?
>
> A. Sheldon Henry.
>
> Q. You discussed this matter with your brother?
>
> A. No.

Q. After the incident, when next do you recall seeing and speaking with Sheldon?

A. The day of the line-up, the day I was supposed to go and identify the person.

Q. Where was it that you saw and spoke to Sheldon?

A. We were at the Hunt's Bay waiting to be transported to Central.

Q. When you spoke to ...

HIS LORDSHIP: I presume this is relevant?

MS. GRAY: Yes, M'Lord.

HIS LORDSHIP: Why is it relevant?

MS. GREY: Certain instructions that I have that I wish to ask the witness.

HIS LORDSHIP: I can't see the relevance.

Ms. GREY: Let me ask you, did your brother also go to Central for the purpose ...

HIS LORDSHIP: No, no, don't answer anything about what your brother did. She said she had no discussion With her brother about this case.

Ms. GREY: Very well.

Q. I am going to suggest to you, you see, that you are Mistaken when you say that this is the man who pointed a gun at you that night?

A. I am positively sure that is the man.

Q. I am suggesting to you that this accused man did not rape you.

A. He did rape me.

Q. That you are mistaken when you say he is the person who rape you that night.

A. I am not mistaken."

When this cross-examination is viewed against the background of the unsworn statement of the appellant, it discloses that the frailties of counsel did not permit her to insist in continuing her cross-examination which was apparently in keeping with her instructions, and which in the light of the unsworn statement may have been relevant to the defence. However, the witness having denied that she had spoken to her brother about the case, it is obvious that that aspect of the cross-examination would have led nowhere. The appellant was left with his unsworn statement which though not evidence must nevertheless be given such weight as the adjudicating tribunal thinks it deserves. It must therefore be considered in respect of any defence arising therein. The unsworn statement by the appellant sought to raise the question of the credibility of the complainant by attempting to make a connection with her brother's threat to "set" him up, and the allegation of rape made by her. There was however no evidence upon which a finding in relation to that connection could have been made. It is evident from his reasons, that the learned trial judge did give consideration to the unsworn statement but gave it no weight at all and in fact rejected it in the following words:

> "This court does not accept the accused as a witness of truth when he says he knows nothing at all about the incident."

In the end, there was really no evidence upon which the credibility of the complainant could be said to have been challenged. Consequently, the learned trial judge quite correctly treated the case as one in which the only issue was one of mistaken identity. In the event we conclude in keeping with the reasons heretofore given, that the ***Turnbull*** warning was sufficient in the context of this case. We should add, that had we found it necessary we would have applied the proviso as there is no doubt that had the learned trial judge warned himself he would nevertheless inevitably

have arrived at the same conclusion. The appeal is dismissed, and the conviction and sentences are affirmed. It is ordered that the sentences commence on 21st April, 1998.