JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 85 OF 1998

BEFORE: THE HON. MR. JUSTICE FORTE, P.
THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE HARRISON, J.A.

REGINA vs. HUBERT PATRICK FLETCHER

Delano Harrison, Q.C., for the appellant

Miss Paula Llewellyn, Senior Deputy Director of Public Prosecutions, and Miss Tanya Lobban for the Crown

December 1 and 20, 2000

HARRISON, J.A.:

The appellant was convicted by McIntosh, J., in the High Court Division of the Gun Court on July 10, 1998, for the offences of illegal possession of firearm and rape, and sentenced to ten years imprisonment on each count to run concurrently.

We heard the application for leave to appeal, treated it as an appeal, allowed the appeal, set aside the conviction and sentence and ordered a new trial. These are our reasons in writing.

The short facts are that on Friday October 19, 1997, at 7:00 a.m. the complainant was at a bus stop on Molynes Road on her way to church when the appellant stopped his car and offered to drive her to church for a stated fare. On nearing her church on Waltham Park Road he sped off to Spanish Town Road where the offence of rape was allegedly committed by him on her while he was in possession of a firearm.

Mr. Harrison, Q.C., for the appellant, with leave, argued the supplementary ground, namely:

> "That the learned trial judge omitted absolutely to warn himself in his summation (a) of the danger of acting on the uncorroborated evidence of the Complainant and (b) of the danger inherent in unsupported visual identification evidence."

In support of that single ground of appeal, counsel argued that the learned trial judge should have demonstrated in his reasons that he warned himself of the danger of acting on the uncorroborated evidence of a witness in a case based on visual identification alone. In addition, in a case involving a sexual offence, the learned trial judge is also required to demonstrate in his language that he is equally aware of the danger of convicting on the uncorroborated evidence of a complainant.

Miss Llewellyn for the Crown argued that, whereas the learned trial judge should have given the warning, identification was not in issue, the evidence was strong and therefore this court should apply the proviso or, in the alternative, order a new trial.

This court has consistently followed the directions in ***R. v. Baskerville*** [1916] 2 K.B. 658, so that in cases of sexual offence the learned trial judge must warn the jury (or in cases such as this when he sits alone, demonstrate by his language that he is aware) that it is dangerous to convict on the uncorroborated evidence of the complainant.

We agree with counsel for the Crown that from the nature of the defence, identification was not in issue, and therefore there was no necessity to give a warning in respect of the identification of the appellant.

This court has held that although a trial judge is presumed to know the law, there is no presumption that he applied it in a particular instance: ***R. v. Cameron*** (1989) 26 J.L.R. 453. It is the language which the said judge uses that will reveal his thought processes that he in fact applied the relevant law. Failure to give the said warning on corroboration in sexual cases will be fatal to the conviction: ***R. v. Trigg*** [1963] 1 W.L.R. 305 which was followed by this court in ***R. v. Donaldson et al*** (1988) 25 J.L.R. 274. In the instant case, the issue of consent was raised, and although the learned trial judge found that the appellant was untruthful, his language did not reveal his state of mind, that he was aware of the warning

necessary in cases such as this. The only reference to corroboration was the finding of the learned trial judge that:

> "Her mother of course corroborates her evidence in the sense that she tells of her daughter leaving for church at about seven o'clock that Sunday morning, the 19th of October, 1997."

This statement was less than accurate in law and misleading in the circumstances.

This court has not failed to note that there are several cases in which this particular judge has fallen into the same error.

We are mindful of the considerations governing the principles for the application of the proviso by the court. However, in all the circumstances of this case, in the interests of justice we ordered a new trial.