JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEALS NOS. 87 & 88/98

COR. THE HON. MR. JUSTICE FORTE,P.
THE HON. MR. JUSTICE WALKER J.A.
THE HON. MR. JUSTICE COOKE, J.A. (Ag)

ANTHONY LEGISTER & LINCOLN FRAY
VS
R

Frank Phipps, Q.C. for the applicant Legister
Sylvester Morris for the applicant Fray,

Brian Sykes, Acting Senior Deputy Director of Public Prosecutions
and **Tricia Hutchinson** for the Crown.

6th, 7th November and 20th December, 2000

COOKE, J.A. (Ag):

Anthony Legister and Lincoln Fray were both convicted of rape in the St. James Circuit Court. They have now applied for leave to challenge their respective convictions and sentences. We heard arguments, granted leave to appeal convictions and treated the applications as the hearing of the appeals. The circumstances of the offence may be stated shortly.

In the afternoon of the 5th August,1997 the complainant, a school girl and Bryan Clarke set off from Mt. Salem to go to Porto Bello. The former was interested in seeing a spring at Porto Bello which she had heard about.

At the spring the couple were surrounded by a group of men one of whom had a machete. Clarke was beaten on his head with a machete and he ran away. She was beaten and subsequently raped by four men, two of whom she swore were the applicants.

A complaint which is common to both applicants is that although the learned trial judge's general directions on corroboration were unassailable, as indeed they were, he did not tell the jury that in the instant case there was no corroboration. Mr. Phipps, Q.C. in the development of his submission directed the court to a particular passage in the summing up which he argued could have misled the jury into erroneously utilizing this aspect of the evidence as corroborative. Reference will be made to this passage in due course.

Before reviewing the relevant parts of the summation to determine if this complaint is meritorious some observations on the relevant law would not be inappropriate. In our jurisdiction it is incumbent on trial judges, in all cases where the issue of corroboration arises either by law or practice, to indicate to the jury the presence or absence of it (see ***R v Deon Noble*** SCCA No. 121/96 (unreported) delivered July 31, 1997). Where there is no corroboration a simple straightforward statement to that effect is all that is required. This does not seem to be an onerous imposition. In ***R. v Goddard and Others*** [1962] 3 All E.R. 582, Lord Parker C. J. in delivering the judgment of the court at p. 586 said:

> "Quite clearly, it is idle to give that direction (i.e. the danger of acting on uncorroborated evidence)simpliciter in a case where in fact there is no evidence capable of amounting to corroboration,

> because the very fact that the direction is given would leave the jury to infer that there was some evidence capable of amounting to corroboration, if they looked for it. Equally, in a case, as in many sexual cases, where there is a danger that the jury will treat as corroboration something which is incapable of being corroboration, there must be a duty on the judge to explain to the jury what is not corroboration as for example, a complaint made by the complainant."

See also ***R. v Anslow*** [1962] Crim. L.R 101; ***R. v Fisher*** [1965] 1 All E.R 677.

In this case the learned trial judge did direct the jury that the recent complaint was not corroboration. ***Eric James v R.*** 12 JLR 237 is a decision of the Privy Council. It is a Jamaican case. In delivering the Opinion of the Board, Viscount Dilhorne at p.239 said:

> "There was in this case no evidence capable of amounting to corroboration of Miss Hall's evidence that she had been raped, and raped by the accused. The judge should have told the jury that. His failure to do so was a serious misdirection, so serious as to make it inevitable that the conviction should be quashed.
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> Not only did the judge fail so to direct the jury. He went on to tell them wrongly that the medical evidence could amount to corroboration and having said that, he said that two questions had to be considered, was it without her consent and was he the man? Despite what he had said earlier about corroboration being particularly necessary where the issue is consent or no consent, he failed to direct the jury as to the need for corroboration on both these questions. Indeed the passage cited above suggests that the jury might well have thought that if they accepted the medical evidence they were entitled to disregard the warning he had given against the danger of acting on uncorroborated evidence.

> One further criticism must be made of the summing up. Although the judge in the course of his summing up reminded the jury very fully of the evidence that had been given, he failed to relate that to the issues in the case which the jury had to determine. In particular he failed to stress the need for care on questions of identity and to put the evidence in relation to that together in one part of his summing up for the consideration of the jury.
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> Miss Hall said that she only had a slight glance at the man's face when the light was turned on. No doubt she got a better view of him as it became light in the morning. She described him to the detective as a man with a black complexion, medium built, 5ft 8 or 9 inches tall, with black croppy hair, a description which the detective said fitted the appellant and "fitted almost everybody". She said she recognised the accused the next day when he was two chains away and she identified the trousers taken from the appellant's room as those her assailant had worn".

So in this case the misdirection of which Viscount Dilhorne speaks was compounded by other fundamental inadequacies in the summing-up. Hence, the inevitability of the conviction being quashed. Where there is evidence capable of amounting to corroboration, "it is for the judge to say whether a particular piece of evidence, if accepted is capable of being corroboration and then for the jury to act on it or not as they think right" per Lord Goddard L.C.J in ***R. v Sims*** [1946] All E.R. 697 at p.703. See also ***Stanley John Reeves*** [1979] 68 Cr. App. R 381.

There will now be a review of the summation. On page 8 of the transcript this is recorded:

> (a) "Unless you are convinced of the truth of her evidence that the offence of rape was committed against her the accused person or persons cannot properly be convicted.

> Similarly, if you believe that she was raped but not convinced of the truth of her evidence that it was the accused or the accused persons who raped her they or he might not be properly convicted."

This was a case in which the critical issue was the correctness of the identification of the complainant. This is what on page 11 the learned trial judge said:

> (b) "As far as identification is concerned that rest (sic) solely, as the case for the prosecution, on your acceptance of Tanisha Spence as a witness of truth. It depends entirely on what you make of her, what you make of her evidence and whether or not you think that in the circumstances, as outlined by her in her evidence, she had sufficient time to see the accused persons. Whether or not anything was interfering with her observation of them, what the lighting was at the time and whether she could have recognized them afterwards".

Again at page 24 the transcript reveals:

> (c)"Now, Detective Sirjue is not responsible for the identification of the witness Legister, the person responsible for the identification of the witness. Legister is the complainant. It is her evidence that is important because she is the only person who the Crown has brought here who can properly identify him, she is the person who must have seen him and you have to look at her evidence carefully to decide whether you are satisfied that in all the circumstances she could have recognised him".

It is true that the learned trial judge did not specifically state that there was no corroboration of the complainant's evidence. However, a review of the passages which have been reproduced above demonstrates that the learned trial judge made it clear to the jury that the only evidence

on which the prosecution relied was that of the complainant. When he said that, "it depends entirely on what you make of her, what you make of her evidence" there could be no clearer direction that there was no other evidence but hers – that there was no corroboration.

The passage at pages 24-25 to which Mr. Phipps, Q.C. directed the court (adverted to earlier) is now reproduced:

> "Defence has urged that there are a lot of people name 'Screw' but I don't know if that is so and I cannot speculate about that. What the accused man has not done is to say that he is not 'Screw' he has accepted the name that he is 'Screw', what he has done is denied that he is one of the persons who raped her, entirely a matter for you. A man name 'Screw' was named in the company and you must bear in mind that at all material times the complainant said that one of the men was 'Screw', from the start to finish, she has always maintained that. She had said so that she recognised him, she has said he is called 'Screw', she had said that she told it to the police when she got there, she had said so to the sister of Bryan, she said so to Bryan, she said so every time everywhere. So this is a person known, a person known for three years to four years. She said a person who she had spoken with, would she have been able to recognise him? Did she recognise him? Is he one of the men who raped her?"

The submission was based on that part of the passage which said: "what the accused man has not done.... entirely a matter for you". It was argued that by reminding the jury that the accused man had accepted that his name was "Screw", the jury could have been misled into considering that admission as corroboration. As already stated, on the totality of the summing up the learned trial judge had made it sufficiently clear that there was no corroboration. Apart from that, it cannot be said that the

submission as to the passage relied on has merit. The passage set out above follows immediately after passage (c) (supra). So when put in context, what the learned trial judge was directing the jury's attention to – was the assessment of the quality of the identification evidence of the complainant. One of the foundations of the jury system is that jurors are blessed with commonsense even if not possessed of the acuity of lawyers.

There is a part of the learned trial judge's directions which initially appeared to be of some concern. It is that part in which the jury was directed as follows at p. 8 of the transcript:

> "So in considering whether her evidence that the accused persons raped her should be accepted as true you must look for confirmation or support of her evidence in three regards. Firstly, that a man had sexual intercourse with her; secondly, that it took place without her consent and thirdly, that the man, that is each of any of them was the three accused persons or any of them. So the warning is that it is dangerous to convict if confirmation or support is lacking in any of the three indicated above".

The concern was that in this passage, the learned trial judge was inviting the jury to look for corroboration when there was none. However, when that passage is read in the context of all the other relevant directions pertaining to corroboration it becomes obvious that what the learned trial judge was doing was telling the jury of the legal requirement as regards the danger of acting on the uncorroborated evidence of the complainant. Accordingly, a review of the summation demonstrates that there is no merit in this complaint.

Another complaint on behalf of Legister was that:

> "The learned trial judge misdirected the jury by conveying the impression that there was a duty on the defendant (to prove) his innocence. The jury were directed that it was only after they reject the defence they need to look at the prosecution's case to decide guilt or innocence, (pp. 12,17,26). There was no direction that the jury must consider the totality of the evidence in arriving at a decision. By presenting of the defence evidence for consideration (p.11 -17) before the prosecution's case (p. 18-23) must have created the impression on the jury that there was an onus on the defence to prove innocence. The general direction that there was no onus on the defence could not erode or destroy the vice created by putting the defence first for consideration then, if rejected, consider the prosecution's case."

It is true that the learned trial judge reviewed the case presented for Legister before that of the prosecution. Well, that is his style. The particular passage which is said to be offensive is at page 12. It reads:

> "And it is a matter for you, what weight you chose (sic) to attach to that, because if he convinces you of his innocence then you need not even think about the prosecution's case, he would not be guilty. If he leaves you in a state of doubt where you don't know whether he is guilty or not, you need not even consider the prosecution's case, because he would be not guilty".

The learned trial judge was at repeated pains in the summing up to emphasize that the burden of proof was on the prosecution. On page 11 he said:

> "As I told you before, and I might even tell you again, the accused persons have nothing to prove. They are entitled in law to say nothing to you. They also have a choice which they exercised and that is to give a statement from the dock and that is their right. But they could have, if they wanted to, gone into the witness box and give sworn evidence, that also is a right which they have in

> law. So, they have many choices and that is because they really have nothing to prove".

He further emphatically directed the jury in like manner in seven other separate passages at pgs. 6,7,8,11,17,25 & 26. This ground is also without merit.

Before considering the question of sentence in respect of Legister mention should be made of the submission of Mr. Sykes that in cases involving sexual offences where the only issue is that of identity there is no requirement to give the usual "corroboration" warning. He relied on a passage from the judgment of the English Court of Appeal in ***R. v Chance*** (Lord Lane C.J., Rioch and Henry JJ) [1988] 3 W.L.R 661. After dealing with other situations the court had this to say where the identity of the offender is an issue. It is at p. 670 A-C:

> "The situation here seems to us to have been altered by the decision in ***Reg. V. Turnbull*** [1977] Q.B.224. As already pointed out, that decision, albeit not involving a sexual offence, deliberately avoided introducing the concept of corroboration in the strict sense into the problems of identification. Does the fact that the charge is of a sexual nature make any difference to that approach? 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. In the rare case where the sexual nature of the case may have affected the complainant's identification evidence or where the judge in his discretion considers it advisable, the ***Turnbull*** direction should be amplified to include a formal direction as to corroboration, tailored to the particular circumstances of the case".

This court in ***R. v Clifford Donaldson, Leroy Newman and Robert Irving*** [1988]25 J.L.R 274 said at p. 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 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] 1W.L.R. 305".

It is to be noted that ***Sawyers*** and ***Trigg*** referred to in ***Donaldson*** (supra) were two of the cases reviewed in ***Chance***. Before the pronouncement by the Court in ***Chance*** as is contained in the passage excerpted above there was some discussion pertaining to what was categorised as the "background" to the problem. This is now reproduced, pp. 666 to 667:

> "It is submitted that ***Reg. v Turnbull*** [1977] Q.B. 224 has had the effect of altering the long-standing rule exemplified by the authorities already cited, namely, that in cases involving sexual offences the usual warning as to corroboration of the complainant's evidence must be given both with regard to the evidence as to the offence itself and to the evidence of the identity of the offender.
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> Whether ***Reg. V. Turnbull*** has had the effect depends upon the reason for the rule. The locus classicus for that reason is to be found in ***Reg. V Henry*** [1968] 53 Cr. App.R. 150. It is:
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> > '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.' ***Per*** Salmon L.J. at p. 153.

Those reasons have nothing to do with the difficulty of physical identification which is the concern of ***Reg. Turnbull.*** We examine this aspect of the matter hereafter.

The other development which has more recently highlighted the problem is this. Serious crime has not only increased greatly in volume over the last 10 years, it has also increased greatly in unpleasantness and gravity. One of the worst aspects of the latter increase has been the intruder/rape, that is to say the man who, having gained entry to a house by subterfuge or force, rapes the occupant, or probably just as prevalent, a man who breaks into a house with intent to steal or rob and then, so to speak as an afterthought, rapes the occupier, often a woman of mature or advanced years, in other words robbery/rape.

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 welcome 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 ***Reg. v Henry*** 53 Cr. App.R. 150".

It cannot be denied that the observations contained in that discussion are worthy of consideration. ***Chance*** received the attention of this court in ***R v Donovan Wright*** SCCA No. 130/96 (unreported) delivered January 12, 1998. In that case Wright was indicted on three counts. (1) Illegal possession of firearm (2) Robbery with aggravation (3) Rape. The court considered this question:

> "Where a complainant is not only the victim of an offence, eg. robbery, but has also been sexually assaulted and the accused is charged on an indictment with both offences, and the only issue in the case is the identity of the assailant, apart from adhering to the warning and the guidelines as to the issue of identification, is a trial judge, sitting alone obliged nevertheless to warn himself in terms applicable in cases where only a sexual assault is charged?"

The court answered this question in the negative and commented that a similar approach was adopted in ***Chance.*** In dealing with ***Donaldson*** the court said:

> "The authorities relied on by the Court in ***Donaldson et al*** (supra) are not of assistance as these were all cases in which the charges all involved a single complaint of sexual assault. In such 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 the warning is fatal to the conviction".

Thus the position as stated in ***Wright*** is that where the only charge is one of rape, and despite the fact that the only issue is one of identification "the warning on corroboration and reason for it is obligatory". Mr. Sykes

wishes the court to revisit this issue. However, while his request cannot be regarded as unreasonable, this is not a proper case as here there was a general direction on corroboration, and therefore, there was the consequential obligation on the learned trial judge to analyze the evidence in accordance with that direction.

Leave was granted to Legister to challenge the severity of the sentence imposed. This was a sentence of twenty years imprisonment which term was to begin at the expiration of a sentence of ten years which was then being served. He had previously been sentenced on the 29th January, 1998 in respect of the offences of rape and robbery with aggravation, also in the St. James Circuit Court. The later conviction of rape was on the 16th July, 1998. Thus in effect, subject to any considerations of parole or remission of time for good behaviour, Legister would be incarcerated for thirty years. The circumstances of the rape in respect of the conviction on the 16th July, 1998 was particularly horrifying. It was a gang rape. The complainant suffered physical abuse. As the learned trial judge said in dealing with sentence at pg. 41 of the transcript:

> "You beat the woman with sticks, fists, machete and then turn around and rape her, one after the other, watching each other, encouraging each other. How low can you sink? How low can you sink?"

The learned trial judge correctly considered the effect of the crime on the victim. He said:

> "I am aware that there are men and perhaps women, too, in this society who regard rape as a minor offence. I regard it as a most serious and damaging offence. It is an invasion of the privacy

> of a person and it is such a perversive [sic] invasion that it has caused some people to lose their minds but, then, men are usually fortunate not to have suffered and so have no perception of how devastating the effect of rape can be. When it is compounded by more than one person, one after the other it really blows my mind".

There is no doubt that Legister is deserving of a long term of imprisonment. He is obviously a menace to society and especially to women. Sentences should always bear a relationship not only to the crime itself, but to the manner in which such crime was committed. However, while severe sentences ought to be handed down in appropriate cases, such as this, a court should be mindful not to deprive the prisoner of all hope. This would be to say that there is no prospect of rehabilitation. See ***R v Errol Brown*** [1988] 25 J.L.R. 400. In this case it would appear that the two instances of rape took place within months of each other. A review of the relevant factors indicate that the sentence of twenty years imprisonment imposed by the learned trial judge should not be disturbed. However, that part of his order whereby such sentence should begin at the expiration of the prior ten year sentence is varied. So the term of twenty years is to run concurrently with the previous sentence of ten years. This sentence is to commence on the 15th October, 1998.

In respect of the applicant Lincoln Fray the decision of the court is that his conviction should be quashed , his sentence set aside, and a new trial ordered in the interests of justice. As already stated the central issue was one of identification. It would appear that Fray was pointed out by the complainant at the court where proceedings were either to take place, or

were taking place, in respect of one or both co-accused pertaining to the instant charge of rape. It is against this background that the learned trial judge in his summing up posed these rhetorical questions at p. 25 of the transcript:

> "Is it a co-incidence that one of them (Fray) was at the courtroom here when she was here? Is it that he knew somebody was in the court?"

These questions would tend to suggest to the jury that the only reason for the presence of Fray at that time in the precincts of the court was that he was involved in the rape of the complainant. This was not necessarily so and, therefore, the questions posed invited speculation on the part of the jury. Further, the asking of those questions may well have distracted the jury from their task of fully concentrating on the quality of the identification evidence as it pertained to Fray.

Before departing from this case, perhaps, it is time that there should be urgent consideration as to whether there should be this imperative obligation on judges to direct juries on the danger of convicting accused persons in the absence of corroboration, where such a warning is now required. In our jurisdiction, English authorities have, since **Baskerville** [1966] 2K.B. 658, influenced our judicial decisions. By the English Criminal Justice and Public Order Act, 1994, section 32 (1), there has been an abolition of corroboration rules. This section states:

> **"32.--** (1) Any requirement whereby at a trial on indictment it is obligatory for the court to give the jury a warning about convicting the accused on the uncorroborated evidence of a person merely because that persons is –
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> (a) an alleged accomplice of the accused, or

(b) where the offence charged is a sexual offence, the person in respect of whom it is alleged to have been committed,

is hereby abrogated.

This abolition of the rules relating to corroboration was as a result of recommendations from the Law Commission. This Commission was of the view that there was "no justification for automatically applying the same rules to the evidence of all witnesses who fall within one of two categories to which the rules apply" i.e sexual offence cases and cases in which there is evidence of an accomplice. It was the view of the Law Commission that in sexual cases the warning was "a slur on women". In our jurisdiction in every rape case juries are directed in these terms:

> "Experience has shown that people who say that sexual offences have been committed against them sometimes and for a variety of reasons tell false stories".

Then there is the inflexibility of the rules, which rules in their application sometimes involve complexity in interpretation viz-a-viz the evidence. The ultimate question must be whether in our society these corroboration rules are necessary for the due administration of justice.