JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 122/95

COR: THE HON MR JUSTICE FORTE JA
THE HON MR JUSTICE PATTERSON JA
THE HON MR JUSTICE WALKER (AG.)

REGINA VS ALWYN McBEAN

Delano Harrison for appellant

Miss Audrey Clarke for Crown

2nd, 16th December,1996

WALKER JA (AG.)

At a trial in the Home Circuit Court before Cooke J and a jury the appellant was convicted of the crime of carnal abuse and sentenced to seven years at hard labour.

The case for the prosecution revealed that on the night in question the complainant, a child of the age of 7 years, slept at her home in a bed which she shared with her younger siblings. Sometime after she fell asleep she was aroused by someone who was kissing her. She opened her eyes and found herself looking into the face of the appellant. At the time the appellant was no stranger to her as they had all been living in the same house for a period of one year previously. Having been awakened in this way, the complainant testified that she was assaulted by the appellant who had sexual intercourse with her. The next morning, after

being questioned by her mother who had observed tell-tale signs of sexual intercourse, the complainant identified the appellant to her mother. The complainant's mother gave evidence which confirmed that the children slept with a light burning in their room and that the complainant did make a report to her as aforesaid. In due course the appellant was arrested and charged for carnal abuse.

The appellant's defence was simple. It took the form of an alibi. He swore that he had been working throughout the night in question at a location away from the complainant's house where he was also resident at the time. He returned home at 2:45 a.m. on the following day and, being tired, retired immediately to bed. He slept until 8:00 a.m. and after this left the house to return to his work place. He denied that he interfered with the complainant at any time.

Of the three supplemental grounds of appeal which Mr. Harrison for the appellant was given leave to argue, only one was pursued with any vigour. This was ground 1 which reads as follows:

> "1. That the learned trial judge failed to direct the jury fairly or adequately in respect of the Applicant's alibi, which was his cardinal answer to the charge."

On this ground it was argued, firstly, that in his summation to the jury the learned trial judge misquoted the evidence when in reviewing the case for the appellant he said:

> "... He doesn't give any reason why he came home at quarter to three but he reached home at quarter to three."

Mr. Harrison pointed us to an extract of the notes of evidence which showed that the appellant had, in fact, testified that he had worked all night on the roof of a house at a place known as Ebony Vale. By that testimony, said counsel, the appellant had, indeed, offered a reason for the late hour at which he returned home. Mr. Harrison contended that this misquotation had the effect of depriving the appellant of a proper consideration by the jury of his defence of alibi.

Mr. Harrison was also critical of the learned trial judge's directions to the jury on alibi. His criticism lay in the learned judge's failure to direct the jury as to how they should proceed in the event that they rejected the alibi defence. In particular, Mr. Harrison argued that the jury were not told that a rejection of this defence did not lead inevitably to a finding of guilt. In support of his argument counsel referred us to the judgment of this Court in **R v Earl Watson** (unreported) SCCA 92/88 delivered November 8, 1988.

In answer to these submissions counsel for the Crown, Miss Clarke, urged that the learned trial judge's directions on alibi were adequate and fair, and she pointed us to various portions of the summing-up which she contended supported her stance.

We have scrutinized this summing-up with anxious care. In it the jury were correctly directed in general terms as to the burden of proof, but nowhere were they told specifically that by raising a defence of alibi the appellant did not thereby assume any burden of proving that alibi. In this regard the present case bears a striking resemblance to **Watson's** case (supra). In **Watson's** case in addressing a similar situation, Carey JA had this to say:

> " We have examined with counsel the summing-up of the learned trial judge and we note that he gave usual general direction as to the burden of proof cast upon the prosecution, and it is true, he also said that the jury could only convict if they rejected the story which the appellant had put forward. The burden of the complaint is that at no point in the summing-up did he make it clear to the jury that where an accused person raises alibi as an answer to the charge, he does not thereby assume the burden of proving that answer. We think that that is a non-direction sufficient, in our view to cause us to interfere with the verdict which was recorded in this case.
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> The impression which could be conveyed to the jury, in our view, by such directions as given by the learned judge was that there was some burden on the appellant. Moreover, the absence of directions in this regard would prevent the jury from a proper consideration of the answer which this appellant put forward."

We adopt these observations of Carey JA which we think apply equally to the circumstances of the present case. Furthermore, as Mr. Harrison complained, although the learned trial judge directed the jury as to three ways in which they could treat the appellant's evidence, he failed to direct them how to proceed in the event they rejected that evidence. He should have gone on further to tell them that if they concluded that the alibi defence was false, and for that reason rejected it, that did not, of itself, entitle them to convict the appellant: it was for the prosecution still to establish guilt.

Below is the sum total of the actual directions given by the learned trial judge on this aspect of the matter:

> " Mr. Alwyn McBean gave evidence on oath and his evidence is to be treated in the same way as the evidence of every other witness. Now, if what he said you accept, of course, you acquit him immediately. If what he said leaves you in a state of doubt, of course, you acquit him. But, of course if what he says, in your interpretation, a matter for you, could go to strengthen the prosecution's case. A matter entirely for you."

In our opinion this non-direction and the misdirection resulting from the misquotation of the evidence earlier referred to, when taken together, produced the cumulative effect of denying the appellant a fair chance of acquittal.

For these reasons we treat the hearing of this application for leave to appeal as the hearing of the appeal, allow the appeal, quash the conviction and set aside the sentence imposed on the appellant. In the interests of justice we order a new trial herein.