JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 12/96

BEFORE: **THE HON. MR. JUSTICE RATTRAY, P.**
THE HON. MR. JUSTICE GORDON, J.A.
THE HON. MR. JUSTICE BINGHAM, J.A.

REGINA vs. IAN BAILEY

Dennis Morrison, Q.C. for the appellant

Brian Sykes and David Fraser for the Crown

November 7 and December 20, 1996

BINGHAM, J.A.:

On 9th January, 1996, at the Clarendon Circuit Court held at May Pen, the appellant was convicted for carnal abuse of a girl under the age of twelve years. He was sentenced to imprisonment for five years at hard labour.

He now appeals against his conviction by leave of a single judge.

On 7th November, having heard the arguments of counsel, we reserved our decision. What now follows is our decision and the reasons therefor.

The facts, for reasons which will appear later, may be briefly summarised as follows: On 2nd January, 1995, the complainant, a young girl aged nine years, was in the daylight hours sent by her mother on an errand to purchase groceries at a shop in the district where they lived. On her return journey and while walking by the appellant's home, he being their neighbour,

she was held by him and forcibly dragged into his house to a room where she was sexually assaulted. Medical evidence at the trial confirmed that sexual intercourse had taken place.

Following the incident, the complainant made a report to her mother and later to her step-father. A report was subsequently made to the police and the appellant was arrested. At the trial the appellant, in an unsworn statement, denied committing the offence.

Before us Mr. Morrison, Q.C. sought and obtained leave to argue the following supplementary grounds of appeal. These were as follows:

> "**1.** That the learned trial judge's directions and warning to the jury, on the question of corroboration were inadequate.
>
> **2.** That the learned trial judge erred in law in his directions to the jury on the effect of the Appellant's unsworn statement.
>
> **3.** That the learned trial judge failed to give the jury any or any adequate directions on the effect of the report made by the Complainant to her parents."

Although grounds 1 and 2 were fully argued, for the purposes of this judgment, it is only necessary to deal with ground 2.

Ground 2

> "That the learned trial judge erred in law in his directions to the jury on the effect of the Appellant's unsworn statement.

In advancing his submission on this ground, learned counsel for the appellant submitted that although the authority of ***D.P.P. v. Leary Walker*** [1974] 12 J.L.R. 1369 has given judicial sanction for trial judges to comment

where accused persons, in exercise of their legal right, elect not to give sworn testimony, the comments made by the learned trial judge, as to his characterisation of the appellant's unsworn statement as though he said nothing fit to be considered by the jury, was wrong as they were entitled to consider it and give it such weight as they thought fit in coming to their verdict in the matter.

Mr. Sykes for the Crown submitted that, on an examination of the dictum of the Board of the Privy Council in ***D.P.P. v. Leary Walker*** (supra) and on a careful reading of the summing-up in this case, the directions of the learned trial judge ought not to be faulted. In response to an enquiry from the Court as to what interpretation the jury were to give the appellant's unsworn statement, the question which now falls for determination was whether as the appellant had not given sworn evidence they must ignore what he said. Mr. Sykes submitted this direction was a correct statement of the law.

The directions being considered are to be found at page 19 of the transcript. There the learned trial judge, in referring to the appellant's unsworn statement made in his defence, said:

> "But this is his testimony and although the highest court says you must only give it what weight you think it deserves because it is not tested by cross-examination ..."

Up to this point there could have been no valid complaint made as these directions were in keeping with the guidelines in ***D.P.P. v. Leary Walker*** (supra). The material part, however, then follows:

> "...<u>you must realise that he has not said anything</u> because the only evidence that you have heard in

> "this case comes from K.C. and the other people who gave evidence and the doctor. What he (the accused) tells you is not evidence. He made a statement." [Emphasis supplied]

This direction follows that which correctly told the jury how the appellant's unsworn statement ought to be treated.

On a careful examination of the passage cited in our judgment there can be no question that, as learned counsel for the appellant has contended, these directions may have left the jury with the clear and distinct impression that as they were told "you must realise that he has not said anything" so, therefore, you (meaning the jury) must totally ignore his unsworn statement. This direction, in our view of the matter, went too far, eroded the earlier one, amounted to a material misdirection and breached a fundamental and well-established principle that a defence ought to be fairly and adequately left to the jury. As a result of this the conviction cannot stand.

Until what is without doubt a long overdue revision of the law in this area takes place, our advice to trial judges is, if comment they must, that they ought to faithfully adhere to the guidelines in ***D.P.P. v. Leary Walker*** (supra), tailored to fit the facts of the particular case, and by so doing avoid the pitfalls that arose in this matter. Before concluding, it may be convenient at this stage to set out the guidelines as a reminder to those concerned with presiding over such matters.

In tendering their advice to Her Majesty in Council, the Board said: (page 1373)

> "In such cases ... the judge should in plain and simple language make it clear to the jury that the

> "accused was not obliged to go into the witness box but that he had a completely free choice either to do so or to make an unsworn statement or to say nothing. The judge could quite properly go on to say to the jury that they may perhaps be wondering why the accused had elected to make an unsworn statement; that it could not be because he had any conscientious objection to taking the oath since, if he had, he could affirm. Could it be that the accused was reluctant to put his evidence to the test of cross-examination? If so, why? He had nothing to fear from unfair questions because he would be fully protected from these by his own counsel and by the court. The jury should always be told that it is exclusively for them to make up their minds whether the unsworn statement has any value, and, if so, what weight should be attached to it; that it is for them to decide whether the evidence for the prosecution has satisfied them of the accused's guilt beyond reasonable doubt, and that in considering their verdict, they should give the accused's unsworn statement only such weight as they may think it deserves."

In the result, the appeal is allowed, the conviction quashed and the sentence set aside. In the interest of justice a new trial is ordered to take place at the Hilary sessions of the Clarendon Circuit Court. The appellant is ordered to remain in custody pending the trial of the matter.