JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 130/96

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

REGINA vs.
DONOVAN WRIGHT

Applicant unrepresented

Kent Pantry. Q.C. and Miss Marlene Mahaloo
for the Crown

November 24 1997 and January 12. 1998

BINGHAM. J.A.:

The applicant was convicted at a sitting of the High Court Division of the Gun Court before McIntosh, J. (acting) on 22nd October, 1996, on an indictment for:

1. Illegal possession of a firearm (count 1)
2. Robbery with aggravation (count 2)
3. Rape (count 3)

He was sentenced to concurrent terms of imprisonment at hard labour for ten years (count 1), fifteen years (count 2) and fifteen years (count 3).

His application for leave to appeal having been refused by a single judge, he renewed his application to the Full Court. Having examined the record, we

found no valid basis for any complaint as to the manner in which the learned trial judge dealt with the matter. We accordingly refused the application. We ordered that the sentence commence as from 22nd January, 1997. What follows hereafter are the reasons for our refusal.

The facts

On October 1, 1994, sometime in the night, the complainant was on her way home from work. After alighting from a bus and while walking to her home she came upon a female acquaintance of hers talking to the applicant and another man. She was later accosted by the same two men, one armed with a gun and the other with a knife. They robbed her of her groceries and money. She was then dragged and beaten until she went across a lane to a Church where she was forced at gunpoint to undress. She pleaded with her assailants not to interfere with her because of her physical condition, having recently given birth, but her entreaties fell on deaf ears. She was sexually assaulted by the applicant whom she later identified as the gunman. The men then went away.

The complainant managed to raise an alarm and persons from the neighbourhood came to her assistance. She then went to her home and from there to the Half-Way-Tree Police Station where she made a report. She subsequently got information as to the name of the applicant which she gave to the police. He was later taken into custody by the police. The applicant was identified at an identification parade held one month later. He was then arrested and charged for these offences.

At his trial the applicant gave sworn evidence in which he denied the charges. He was not, however, able to recall where he was on the night in question when the complainant said the incident took place.

On the basis of the evidence in the case, the sole issue which arose for the determination of the learned trial judge was that of visual identification, viz. the identity of the complainant's assailant.

Learned counsel for the Crown, Mr. Pantry, Q.C. informed the court that he was unable to find any fault with the directions of the learned trial judge with regards to this issue. Having ourselves carefully perused the printed record, we are also unable to detect any omission in this regard. A few examples of the manner in which the learned judge approached his task, will suffice.

Having dealt with the burden and standard of proof, the learned judge then said:

> "The defence contends that this is a case in which there is no corroboration and this court so find that this is a case in which there is no corroboration. This court feels that corroboration is always good but that speaks to the quantity and not necessarily the quality of the evidence and there is not (sic) legal requirement for there to be corroboration. The real issue in this case is one of identification. Was it the accused man who was with the gunman held up the complainant and robbed and raped her?" [Emphasis supplied]

By this passage the learned judge indicated that he had the dangers of acting on the uncorroboratead evidence of the complainant in the forefront of his mind.

Later in his directions the learned judge proceeded by adhering to the guidelines as laid down in the authorities by assessing the quality of the identification evidence adduced by the prosecution. He said:

> "After careful consideration and having warned itself of the dangers inherent in the visual identification of the accused person this court unhesitantly finds the

> evidence of the identification overwhelming. This court examined the opportunities which the complainant had to see the accused man and these opportunities were firstly at the stoplight, at Lyndhurst and Maxfield Avenues, in the vicinity of Champion House, secondly at the intersection of St. James Avenue and Maxfield Avenue and thirdly in the Church yard in the vicinity of Norman Manley Secondary School. This court took into consideration the times or the length of time during which the complainant had an opportunity of seeing the accused. It is significant that when she saw the accused man the second time - she said that she had seen him before and under what circumstances. It is the first circumstances that this court regard as a fleeting glance. On the second occasion in the vicinity of St. James Avenue she tells us that there was street light there, there were lights coming from shops and that she argued with him for about some fifteen minutes trying to dissuade him from trying to rape her. She said that in the church yard because these men wanted to search her bag they took her under a light which was on the outside of the building and that while they were searching her bag and during the entire ordeal she was able to see these men. She said that she saw him from his head to his toe. She said that she remembered him because they were face to face and arguing. She said that she remembered him because of the scar that he has on his face. A scar that he does have on his face and she pointed it out. She told us that her ordeal, between the time that she was accosted by them took some two hours and during that time she had ample opportunity to see him better."

From the passages referred to we are satisfied that there can be no doubt that the learned trial judge, in dealing with this crucial issue, approached his task with utmost care and caution in keeping with the established guidelines. Our task, however, does not end there, as apart from the directions on identification the matter also involved a complaint of a sexual assault (count 3) for which there exists the requirement for a warning as to corroboration. An examination of the summation discloses that the learned trial judge alerted his mind to the need for

corroboration of the complainant's testimony and to the fact that there was an absence of any support for her testimony.

The question which, therefore, needs to be considered is this: where a complainant is not only the victim of an offence, e.g. 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?

At the outset, a warning given in relation to the identification of the accused, where the only issue in relation to the offence of rape is one of identification, would be enough to demonstrate that the learned trial judge was aware of the dangers of convicting the accused of the offence of rape as well as for the offence of robbery. In this case, the learned trial judge, in dealing with the identification evidence, which was the only issue joined by the applicant, expressly warned himself when he said:

> **"After careful consideration and having warned itself of the dangers inherent in the visual identification of the accused person, this Court unhesitatingly finds the evidence of identification overwhelming."**

In arriving at this conclusion, we are aware of the judgment of the Court in *R. v. Clifford Donaldson, Leroy Newman and Robert Irving* S.C.C.A Nos: 70-73/86 (unreported), the circumstances of which, can be distinguished from the instant case.

We therefore now examine that case.

A summary of the case

The applicants were charged in the High Court Division of the Gun Court on an indictment for:

All the accused--

1. Illegal possession of a firearm (count 1)

2. Robbery with aggravation (counts 2 & 3)

Clifford Donaldson only--

3. (a) Attempted rape (count 4)

   (b) Rape (count 6)

Robert Irving--

4. Rape (count 5).

At the end of the trial all the accused were found guilty on counts 1-5. Donaldson was found not guilty on count 6.

The defence of both Donaldson and Irving, they being the accused persons involved in the charges of sexual assault, was that of an alibi.

In challenging the convictions in relation to courts 4 and 5, learned counsel for the applicants argued that there was a serious defect in the judgment, viz. the absence of corroboration of the victim's evidence in circumstances where the trial judge did not at any time in his summation say that he warned himself of the danger of acting upon the uncorroborated evidence of the victim of a sexual assault.

In upholding the submissions advanced and quashing the convictions in relation to these counts, the court, having reviewed a number of authorities, said (per Carey, J.A.):

"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 Lordships' 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.'

We think that we should follow this rule and state in positive terms that 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 this 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.
>
> The incantation of the correct formula may well be irrefragable proof that the judge is conscious of his responsibility to give a reasoned judgment."

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.

In the English case of ***Terrence Easton Chance*** [1988] 87 Cr. App. R. 398 a similar approach to the issue as we now adumbrate, was adopted.

Significantly, in that case, the cases of ***Sawyer and Trigg*** (supra) which were cited by this Court in ***Donaldson*** (supra) were also considered by the English Court of Appeal.

On facts which were not too dissimilar to the matter under review and in which the defence was an alibi, in his summing-up the trial judge accurately set out the potentially corroborative evidence and went on to deal with the identification issue directing the jury not only about the special need for caution before convicting on the complainant's identification but also that there should be corroboration of that identification. On conviction on appeal a similar complaint was made as in ***Donaldson et al*** (supra) and rejected by the Court.

In dismissing the appeal, the Court held that:

> "The only objection that could be made to the judge's summing up was that the direction to the jury about corroboration was unnecessary but it was an error which if anything benefitted the applicant."

In delivering the judgment of the Court, the learned Chief Justice said:

> "The aim of any direction to a jury must be to provide realistic, comprehensible and common sense guidance to enable them to avoid pitfalls and to come to a fair and just conclusion as to the guilt or innocence of the defendant. This involves the necessity of the judge tailoring his direction to the facts of the particular case. If he is required to apply rigid rules, there will inevitably be occasions when the direction will be inappropriate to the facts. Juries are quick to spot such anomalies, and will understandably view the anomaly, and often (as a result) the rest of the directions, with suspicion, thus undermining the judge's purpose. Directions on corroboration are particularly subject to this danger."

A clear distinction must be drawn between ***Donaldson's*** case, ***Chance's*** case and that under review. In ***Donaldson et al*** the judge did not advert to corroboration in any wise neither in relation to the sexual offence nor in relation to identification. In ***Chance,*** the learned trial judge dealt with corroboration with particular reference to identification and emphasized the need for caution before convicting on the evidence of the complainant.

In this case the learned trial judge found that there was no corroboration, warned himself of the dangers inherent in visual identification and expressed acceptance of the overwhelming weight of the identification evidence. It must be remembered that in ***R. v. Turnbull*** [1976] 63 Cr. App. R. 132 [1977] Q.B. 224 Lord Widgery, C.J. in his judgment gave guidance with respect to the caution that should occasion the acceptance of uncorroborated evidence of identification. The term "corroboration" whether in relation to a sexual offence or to identification has the

essential common element viz. it must connect the accused to the commission of the offence - the actus reus.

The learned trial judge in referring to the absence of corroboration used language which does not have to be construed, language which clearly indicates that his mind was adverted to the correct legal principles. Indeed the live issue in the case was identification. This called for an approach as adumbrated by this Court in ***R. v. Alex Simpson*** *and* ***McKenzie Powell*** SCCA Nos. 151/88 and 71/89 delivered 5th February, 1992; [1993] 3 L.R.C. 631.

It is for these reasons that at the end of the hearing of the matter we refused the application for leave to appeal conviction and sentence.