C.A CRIMINAL LAW — Gun Court — Illegal Possession of firearm, (Count 1) Robbery with aggravation, attempted rape, rape (Counts 2-3) Identification — Corroboration; duty of judge to state in summation on what he has warned self of convicting on the uncorroborated evidence of victim of rape. Rule. (Charge 11)

Rule p 11

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CRIM. PROC.

EVIDENCE -

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS. 70, 72 & 73/86

BEFORE: The Hon. Mr. Justice Rowe, P.
The Hon. Mr. Justice Carey, J.A.
The Hon. Mr. Justice Downer, J.A.

R. vs. CLIFFORD DONALDSON
LEROY NEWMAN
ROBERT IRVING

F.M.G. Phipps, Q.C., & Wentworth Charles for applicants

Miss Yvette Sibble for the Crown

3rd May & 14th July, 1988

CAREY, J.A.:

These applicants who stood their trial in the High Court Division of the Gun Court between 22nd July and 1st August, 1986 on an indictment which charged all three together with illegal possession of a firearm (Count 1), robbery with aggravation (Counts 2-3) Donaldson only, attempted rape (Count 4), and Irving for rape (Count 5), were convicted upon these counts before Walker, J., sitting without a jury and sentenced to varying terms of imprisonment. There was another Count (No. 6) in respect of Donaldson, which charged rape, but a verdict of not guilty was returned in that regard.

They now apply for leave to appeal their convictions and on their behalf Mr. Phipps has argued questions of law and of fact, and mixed questions of law and fact, with commendable economy and lucidity. These we will detail later in this judgment.

The facts upon which these convictions were founded are as follows: On Saturday 27th July, 1985 at about 1:30 in the morning two young women (whom we will hereafter refer to as Miss X and Miss Y) were on their way home from work. They had taken a taxi from their workplace and having been deposited at the foot of a hill, began climbing the path to their respective houses. At the half-way mark up the hill, they paused to have a conversation, and while so engaged, two men approached. They demanded that the women hand over their money and one of these men who was identified as the applicant Donaldson, was armed with a gun. Miss X was relieved of her hand-bag and a chain which she wore around her neck.

In the meantime, the other young woman, a cousin, was also being robbed of her hand-bag by another man. Donaldson, it was alleged, then dragged away the woman he had robbed, intimating to her that he intended to have sexual intercourse with her. But his victim did not share a similar desire. She held onto a tree as he endeavoured to pull her along another track on the hill. At this point, another man came up and Donaldson handed the gun to him. With both hands free, he pulled her panties down, and tried to penetrate her from behind but despite his frenetic endeavours, without any success. He then desisted.

Another man identified as the applicant Irving, came on the scene. He was known to Miss X before, as "Ballerina". His opening sally was a threat accompanied by the usual expletives, to kill her. He then forced her into a bending position facilitating his sexual assault upon her. At the same time, Donaldson put the gun to her neck as a means of inducing her cooperation. She was still holding fast to the tree and resisting as best she was able. Just before Irving succeeded in ravishing Miss X, she noticed the third of the trio, charged, viz., "Newman" approach. He walked up and down the road - "like he was keeping duty." He passed very close to her while she was being raped. Apart from keeping guard duty, he never spoke.

Donaldson who had apparently moved away, returned, advised Irving that the other girl had run off, and ordered Newman to come on. These events were then interrupted by shouts for help by Miss Y and her mother from their house which was close by. The men all departed precipitately and at that time Miss X said she counted 7 men altogether. Miss X made for her cousin's house where she reported her ordeal to her cousin's mother. She estimated that her experience lasted some twenty five minutes.

So far as the lighting conditions at the time of the rape went, she testified that she was able to make out features by a light attached to the back of a house, the beam or glow from which illuminated the track. At an identification parade held on 30th July, she identified Donaldson as being one of her assailants.

Miss Y also gave evidence before the learned judge with respect to lighting for the purposes of identification; she said that there was a street light at the foot of the hill which casts its glow to the point where they had stopped to converse. Of the two men who first approached them at that point, Donaldson was previously known to her as "Strength". He it was who held onto her cousin. Her assailant demanded that she hand over her [expletive deleted] money. Eventually, another man named Horace, who was never charged, arrived. He was told to search her hand-bag from which he removed a gold chain and cash Two Hundred & Thirty-four Dollars ($234.00). She related certain events with respect to herself which took place subsequently, but their relevance to these applicants is questionable.

In the event, she got away from these men and ran home. While she was recounting her experience to her mother, there was a knock on the door. It was her cousin. She was in a distressed condition.

At an identification parade, she also pointed out Donaldson as the man who held her cousin. Miss Y said she never saw a gun in the possession of any of the men that night.

An application, which was granted, was made by learned counsel for the Crown to treat Miss Y as a hostile witness because it appeared that the witness in her statement to the police, had been recorded as saying that Donaldson was armed with a gun and had stated to the contrary in the course of her examination-in-chief. We are unable to appreciate why such an application was thought necessary in the first place. It merely resulted in an unnecessary and undue prolongation of the trial. There was also some evidence from the witness as to the reasons for her giving evidence contrary to her statement. She alleged that she had been threatened with death by a girlfriend of one of the applicants.

In his defence, Irving, who contented himself by making a statement from the dock, tersely said that he was at Lyssons at the time of the incident and knew nothing of any robbery or rape. He called a witness who said that the applicant Irving assisted in her bar at Lyssons between the hours of 3:15 p.m., 26th July and 4:00 a.m., of the next day. She vouchsafed that the three applicants often frequented her establishment and she confirmed that both Donaldson and Newman attended there in the early hours of the Saturday morning following the incident. When pressed she gave the hour of Donaldson's arrival as 12:30 a.m., and his departure at just after 4:00 a.m. She also swore that although she was aware of the allegation against Irving, and indeed Newman, she only spoke out in favour of Irving to the police.

Leroy Newman also choose to claim the sanctuary of the dock in order to state that he knew nothing about any rape and to deny that he was known as "Rail-up". He suggested that he was being framed deliberately by Miss Y, the motive for which was that her brother had kicked in his door and wounded him.

Donaldson was equally brief. He had gone to a bar owned by Miss Clarke, the witness called on behalf of Irving, where he had a

stout and remained until 4:00 a.m. "Strength" was not his name.

The learned trial judge expended a deal of time in delivering his judgment; it occupied some two hours. It was lengthy but considered. A disproportionate period of that time, however, was spent in berating Miss Y whom the learned trial judge had earlier allowed to be treated as hostile. He thought it necessary to demonstrate that her evidence was unreliable. In the result, he accepted that she had been robbed, a finding based, he said, on his reliance on the corroborative evidence of Miss X. He examined with some care the discrepancies in the evidence of Miss X, which were identified by counsel who appeared before him, and concluded his analysis of her evidence with these words at page 248:

> "As a matter of fact, I found her to be an absolutely truthful witness; a witness upon whom this Court could rely. I believe every bit of the evidence that she has given in this Court."

He also found that the firearm which Donaldson had in his possession was a real firearm.

We can now consider the several grounds of appeal in respect of which Mr. Phipps sought and obtained leave to argue. This first area of complaint was that the evidence as to identification of her assailants by Miss X was so unsatisfactory, the learned trial judge ought not have called upon any of the applicants. If contrary to his submissions, there was a case to answer, then the verdict was unreasonable and could not be supported having regard to the evidence. He maintained that a serious defect in the judgment was 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.

The evidence as to the circumstances in which Miss X said she was enabled to identify the applicants may be considered under the

following heads:

(i) Lighting

The episode of the robbery occurred in the early morning along a roadway half way up a hillside. Now counsel for the Crown asked the following question on this question at page 7:

> "MISS LLEWELLYN: Now, "Miss 'X'", before we go any further, you said it was 1:30 in the morning. How were you able to make out that these were the men, how were you able to see that they were the men; it was 1:30 in the morning?
>
> A. There was light on the bottom of the hill and we could recognize the persons coming over the hill, that it was men. There is a main road and there was a light at the bottom of the hill.
>
> HIS LORDSHIP: Just a light at the bottom?
>
> A. Yes.
>
> MISS LLEWELLYN: What kind of light?
>
> A. A street-light."

She also elicited the following answer in response as to the existence of any other light source -

> "Q. Now, apart from the light at the bottom of the hill, were there any other lights along that road?
>
> A. Not at the time.
>
> HIS LORDSHIP: What?
>
> A. The light focus on the hill, the bottom of the hill and if you leaving the hill, you can see somebody going across the street or coming up.
>
> MISS LLEWELLYN: From the light?
>
> A. From the light.
>
> HIS LORDSHIP: So, there was no light immediately...?
>
> A. There was no light on top of the hill.
>
> HIS LORDSHIP: So, where you were stopped?
>
> A. In the middle of the hill.
>
> HIS LORDSHIP: That is where you stood up when these men reached up to you?
>
> A. Yes, sir.

As to the distance of the light source from their position -

"A. It is about 3 chains."

As to the light source at the scene of the rape, at page 17 the examination-in-chief proceeded thus:

"Q. Now, how were you able to make out that it was 'Ballerina' right there by the tree?

A. I saw his face - I saw him.

Q. Well, it was 1:30 in the morning.

A. Where he comes there is Leonie's house and two more houses near-by; one of the house has a light at the back, it was focusing in the road.

Q. This is where the tree was?

A. It is near-by to the tree, it is over there and the tree is here (indicating)."

(ii) Proximity of assailant and victim

The two men who approached the two young women, came up to them. These men spoke. Miss X could make out the man who placed the gun at her neck. This man she later identified as Donaldson. After the robbery, Donaldson embraced her and intimated that he was minded to have sexual intercourse with her. They both walked along in this way to the top of the hill. It was at this time that Donaldson attempted to sexually assault her. He then left and Irving whom she knew before came up. He raped her. Newman was in attendance; he was the man on sentry duty marching up and down the road. Obviously, these two applicants at one time or another were in quite close proximity to Miss X.

(iii) Previous knowledge of assailants

Donaldson was not known to Miss X but the other two men were known by their nicknames; Irving as 'Ballerina' and Newman as 'Rail-up'. The defence suggested that Newman and the victim's brother were involved in a fracas in 1983.

(iv) Duration

The whole incident lasted about twenty-five minutes. That was the estimate given by the victim.

We can now look at the submissions. The lighting was described by Mr. Phipps as inadequate, but we do not think that quite describes the situation. Plainly, the lighting was not ideal. It was not daylight. But the amount of lighting necessary for purposes of recognition or identification will depend on other factors. It does not stand in isolation. Proximity of the witness to the assailant or assailants cannot be ignored. The nature of the offences committed in the instant case, put the witness and the applicants at close quarters. In the lighting conditions described by the witness, she was quite able to discern features, and to recognize or identify her assailants. Then the duration of the episode, viz, 25 minutes provided more than ample opportunity for the witness carefully to scrutinize her assailants, the applicants.

The law as settled in R. v. Wylie (1977) 15 J.L.R. 163 enjoins that in cases where the evidence for the prosecution connecting the accused with the crime rests wholly or substantially on visual identification, then "what matters is the quality of the identification evidence" Per Rowe, J.A. (Ag.) as he then was at p. 166. On our analysis of the evidence of identification which we have been at pains to detail, we are of opinion that that evidence more than met the standard required.

There was evidence fit to be left to a jury as to the identification of these applicants, and thus to connect them with the offences charged. If the learned trial judge accepted Miss X as a witness of truth, as indeed he must have, then there was evidence upon which he could arrive at a verdict adverse to the applicants. The submission with respect to the lack of quality of the identification evidence, must, in our view fail.

It was strongly pressed before us that since the nature of the case called for corroboration, there was a duty on the part of the trial judge to make it clear that he had directed his mind to the dangers of acting on the uncorroborated evidence of the victim of a sexual assault.

This Court in R. v. Dacres (unreported) S.C.C.A. 6/87 dated 31st July, 1980, was called upon to consider a similar point. In that case, it was urged that the learned trial judge failed to adequately direct, warn and advise himself of the law and evidence in relation to identification. Rowe, J.A., (as he then was) delivered the judgment of the Court comprising Zacca, Carberry, JJ.A., and himself, said this at page 10:

> "The cases on identification evidence have not established any principle that in the absence of a particular warning as to the dangers of identification evidence there would be an irregularity in the trial notwithstanding the quality of the evidence."

We are now being urged to lay down a rule of practice that in sexual cases tried by a judge of the Supreme Court sitting alone in the High Court Division of the Gun Court, the judge should state that he has warned himself in terms that make it patent that he has in mind the risk of convicting on the uncorroborated evidence of the victim. This Court did not then accede to the invitation to lay down rules of practice regarding cases involving visual identification, but pointed out that with respect to sexual cases, different considerations applied. It was put in this way at page 10:

> "We entirely agree that the series of cases beginning with B. v. B and ending with Ali v. Ali places a duty on the judge not only to have the caution in mind but to express it fully, certainly where the matrimonial offence alleged is adultery. But this rule was developed in a very narrow and special class of cases which today hold a decreasing significance in England due to legislation abolishing specific matrimonial offences as the ground for dissolution of marriage."

We suspect that this opinion may well have given counsel confidence in advancing the present submission.

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 Lordship's 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. We return to R. v. Dacres (supra) where we said at page 12:

> "By virtue of being a judge, a Supreme Court Judge sitting as a judge of the High Court Division of the Gun Court in practice gives a reasoned decision for coming to his verdict whether of guilt or innocence. In this reasoned judgment he is expected to set out the facts which he finds to be proved and when there is a conflict of evidence, his method of resolving the conflict. The judge would have had the benefit of the speeches of Counsel, and it is to be remembered that in the Gun Court all accused persons are entitled to legal aid and are legally represented, and we do not think counsel could fail to draw the judges attention to any aspect of the case ....".

It is the duty of this Court in its consideration of a summation of a judge sitting in the High Court Division of the Gun Court to determine whether the trial judge has fallen into error either by applying some rule incorrectly or not applying the correct principle. If then the judge inscrutably maintains silence as to the principle or principles which he is applying to the facts before him, it becomes difficult if not impossible for the Court to categorise the summation as a reasoned one.

In a trial on a charge of rape in the Circuit Court or in the High Court Division of the Gun Court, the requirement for the tribunal to be aware of the dangers of conviction on the uncorroborated evidence of the victim is the same. In the former case, the trial judge is required to give the warning in his charge to the jury, in the latter,

the tribunal must warn itself: it is no less important that he must be seen to do so. The judge is at liberty to use such language as manifests the awareness on his part.

In the present case, the learned trial judge did not at any time advert to the rule that he was conscious of the dangers of acting on the uncorroborated testimony of Miss X, but despite the dangers he felt it safe to act on the evidence because he was convinced she was speaking the truth. We note from the addresses of counsel that neither counsel who appeared below, made any reference to the rule. That could have been due to inadvertence or good manners, but that cannot relieve the trial judge of his duty to demonstrate his awareness of the principles relevant to the case before him.

We have come to the conclusion that we cannot allow the counts upon which the applicants were charged with rape or the attempt viz., (counts 4 and 5) to stand.

It was also submitted that the evidence adduced did not amount to proof that the object placed by Miss X in Donaldson's hand was a firearm within the meaning of the Firearms Act.

We are quite unable to accept this submission and largely for the same reasons given by the learned trial judge. He said this at pages 255-256 of the record:

> "..... : it was a real firearm, otherwise what was anybody going to take and 'shoot de gal'. Twice Donaldson told one of the other men with whom he was in company, to shoot de gal, and the next next time Ballerina told another man, the man who was holding the gun while he was raping Miss Hanns to shoot de gal if she did not open up. So what were they going to shoot de gal with, a real gun, that is what they had, they had a real gun."

Newman was convicted on the charge of Illegal Possession of a firearm. That conviction was based on Section 20(5)(a)(i), which enacts as follows:

> "Any person who is in the company of someone who uses or attempts to use a firearm to commit -
>
> (i) any felony".

The prosecution alleged that while Newman was marching up and down like a sentry, Irving was engaged in raping Miss X. At the same time another man was menacing her and Irving was encouraging him to shoot her if she were not co-operative. Newman, it was said, was in the company of a man using a firearm to commit rape or to be more precise, aiding and abetting the commission of that felony by Irving. Seeing that the felony charge has failed, the statutory presumption is inoperable and in consequence his conviction must be quashed.

In the result, the applications for leave to appeal are treated as the hearing of the appeals. As to Donaldson, his appeal is dismissed in part. The convictions on Counts 1, 2 & 3 are affirmed while the conviction on Count 4 is quashed, the sentence set aside, and a verdict and judgment of acquittal is entered on that Count.

As to Newman and Irving, their appeals are allowed, their convictions quashed and their sentences set aside. A verdict and judgment of acquittal is entered in respect of each. The Court directs that the sentence in regard to Donaldson will begin to run from the date of conviction.

C.A. CRIMINAL LAW – Gun Court (No Jury) – All three convicted of illegal possession of firearm (Count 1) robbery with aggravation (Counts 2–3) Donaldson only attempted rape (Count 4) and Irving, rape (Count 5) – failure of judge to warn self – (a) identification (b) corroboration; – duty of judge sitting without jury to warn self

(1) Whether evidence of identification of assailants was so unsatisfactory that judge ought not to have called upon the applicants to answer – the verdict was unreasonable and could not be supported having regard to the evidence.

(2) Whether if there was a case to answer, judge's judgment defective in that, in absence of corroboration, judge did not say in his summation that he warned himself of the danger of acting upon the uncorroborated evidence of the victim of a sexual assault

Appeal allowed on ground of failure of judge to warn self of danger of conviction on uncorroborated evidence of victim of rape [– Conviction quashed for rape and attempt (Counts 4 and 5) – in consequence conviction of Newman under S 20(5)(a)(i) for being in company of someone who uses or attempts to use a firearm to commit a felony (i.e. rape) also quashed. See p 13 for more details]

[Cases referred to

R v Whylie (1977) 15 JLR 163

R v Davis (unreported S.C.C.A. 6/87 dated 31/7/80

R v Sawyers (1959) 43 Cr App R 187

R v Chynes (1960) 44 Cr App R 158

R v Trigg (1963) 1 WLR 305

Chi Nang Hong v Public Prosecutor (1964) 1 WLR 1279

Per curiam at p 11: "We think ... we should 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 the 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."