IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 181/87

BEFORE: The Hon. Mr. Justice Carey, P. (Ag.)
The Hon. Mr. Justice Downer, J.A.
The Hon. Miss Justice Morgan, J.A.

R. v. CLIFTON STYNE

Ronald Parris for appellant

Miss Yvette Sibble for Crown

7th & 29th November, 1988

CAREY, P. (AG.)

At the St. James Circuit Court held in Montego Bay on 8th October, 1987 before McKain, J., and a jury, the appellant was convicted on an indictment which charged him and two other men with the offence of rape. In the event, the others were acquitted and no longer concern us.

The facts which need only be outlined were these: The victim, Miss J. had gone to a dance to collect money owed her by a friend but had remained with the friend and her escort and had some drinks and danced. At some point in time, the three persons who were charged, forcibly removed her from the dance hall to some room in a house where each man, in turn, raped her. She knew the appellant before because he had made overtures of friendship but she had not responded to these. Subsequently, she pointed out all three men to the police as the persons who had sexually assaulted her. The appellant told the police then that she was his woman and he alone had intercourse with her. This the appellant confirmed in his statement from the dock.

The issue then for the jury was consent vel non. On the Crown's case, this was sexual intercourse without consent, by force or fear. On

the defence, it was consensual sexual intercourse. On the authority of R. v. Robinson (unreported) SCCA 109/79 dated 22nd January, 1979, the trial judge was obliged to direct the jury on the mens rea of the applicant. The learned trial judge, in the present case, did not, at any time, advert the jury's attention to the applicant's subjective intention. If this were the sole ground of appeal, we would have been constrained to apply the proviso to Section 14(1) of the Judicature (Appellate Jurisdiction) Act, for on the facts, even with the correct directions, the jury would, in our view, inevitably have returned the same verdict.

But there was a more fundamental matter with which we must now deal. The learned trial judge as she was required, gave directions on corroboration. She began in this way at page 9:

> "Now, I have to warn you at this stage of the danger of convicting all or any of these men on the uncorroborated statement of this witness alone. The law, I would say, in its wisdom, says that it is not that it is strictly necessary, but because people can cry rape for all sorts of purposes and reasons, it is always safer to have some supported evidence from some person other than the complainant and to establish that the offence took place, and supported evidence calls for corroboration, that is, it can come from the very accused himself. So you will need some material, particular evidence and that I will show you in a while, a little later on."

We question the learned judge's statement that the warning is not strictly necessary. We think it is a requirement with which a judge is obliged to comply, at the peril of having an appeal against any conviction being allowed. The warning is, we would emphasize, an imperative and ought not to be watered down or glossed over. We said so in R. v. Anthony Lewis (unreported) SCCA 205/79 dated 26th October, 1981. See also R. v. Everton Williams (unreported) SCCA 112/88 dated 6th October, 1988.

But the learned trial judge returned to the matter at page 35. She expressed herself thus:

> "Let us look at the matter of consent. Is there any evidence, Mr. Foreman and members of the jury, which will support the complainant's allegation that she had sexual intercourse with each of these men under the circumstances, and that she did not consent. The rule is applicable, as I mentioned before, in all sex cases; it is easy for a woman to cry rape and call any man's name and say so and so raped me, it is easy to level the charge and it is difficult to disprove, and the law in its impertinence or ignorance, used to say that women are so confused they don't know what they are thinking or what they are saying and they have several reasons to cry rape when rape has not taken place."

In R. v. Williams (supra) at page 8, the Court underscored the seriousness of the warning:

> "We live it is true, in an age when sexist observations are anathema to some sections of society. But the requirement to warn a jury of the dangers of convicting on the uncorroborated evidence of the victim of a sexual assault, has not been modified or abolished. The observation that it is easy to cry rape and difficult to refute the allegation, is, we think, as valid today as when it was first expressed. Human nature, we venture to think, remains the same over the centuries. At all events, the authorities by which the judges are bound, require that the warning to the jury is not one to be glossed over or for which apologies need be made. The law is that it is dangerous and unsafe for a jury to convict on the uncorroborated evidence of a woman or girl. They may only do so having paid due heed to that warning."

We are wholly unaware of any attempts to alter, modify or abolish the warning either in this jurisdiction or indeed in any other Commonwealth jurisdiction. The desirability of retaining this rule has been considered by Law Reform Committees in the United Kingdom and Australia. See footnote 15 at page 222 Cross on Evidence (6th Edition).

These directions which we have cited are absolutely impermissible and inexcusable. We must condemn them in the strongest terms. The clear duty of a trial judge is to direct the jury on the law applicable to the case. It is no part of the judge's duty to express personal idiosyncratic views on the law in the course of a summing-up; the Court room is not a lecture theatre.

We note that following this diatribe on the raison d'etre of the rule, she did give the warning in terms that are unexceptionable. But the damage had already been done. It could not be said that she had brought home to the jury the seriousness of the warning.

The learned trial judge then went on to consider whether there was corroboration of the victim's story on the issue of consent. She said this at page 36:

> "We will look at the different aspects. With the first man, is there any corroboration in this, that is Mr. Styne, is there anything which would show you that she did not consent? So you have to look on all the circumstances of the case and you have to take in what he said also because if you believe what she told you and what his witness is telling you, when you look on the whole circumstances you say well, according to how that is going, a person who consents doesn't have to do this and that and that, as they say, then you would have said that too would support it. You may also look on anything that you might find that is untrue, that the accused has told you in this court or said anywhere else because the law says a lie is capable of amounting to corroboration too, so long as you are satisfied that the lie was told in this court, is deliberate and it is related in any material particular to the issue. You have to remember that when you come to see if it is particular to the issue, you have to remember that maybe it would be that an accused man told you a lie perhaps to white-wash himself or to avoid the consequences of his own wrongdoing or that he is conscious of the fact that he has done wrong or he has to tell you a lie to extricate himself. You have to look at the facts of the circumstances."

Later at page 37 she told the jury that there was no corroborative evidence in the case.

We think that in the extract set out above, the learned trial judge told the jury two things. First, she said a lie told by an accused is capable of amounting to corroboration and secondly, what the accused said in his defence in Court which, if the the jury found to be untrue, was capable of amounting to corroboration.

This was a clear misdirection. The accused defence or answer to the charge which the jury reject as untrue, does not become

corroboration of the victim's story. In Tumahole Bereng & Ors. v. R. [1949] A.C. 253 at page 280, Lord Macdermott - "Corroboration may well "be found in the evidence of an accused person; but that is a different "matter, for there confirmation comes, if at all, from what is said, and "not from the falsity of what is said." In an Affiliation proceeding in South Australia, Napier, J., in Pitman v. Byrne [1926] SASR 207 at page 211, Napier, J., said - "The Court cannot as is sometimes suggested, pre- "fer the evidence of the mother to that of the defendant and then use its disbelief of his evidence as the basis of an inference to be used in corroboration of the mother's evidence."

It was said in Credland v. Knowler 35 Cr. App, R. 48 that a lie may afford corroboration if it gives to a proved opportunity a different complexion from that which such opportunity would otherwise have borne.

The learned trial judge seemed to have had in mind R. v. Lucas [1981] 2 All E.R. 1008 where Lord Lane, C.J., said at p. 1011:

> "To be capable of amounting to corroboration the lie told out of court must first of all be deliberate. Secondly it must relate to a material issue. Thirdly the motive for the lie must be a realisation of guilt and a fear of the truth. The jury should in appropriate cases be reminded that people sometimes lie, for example, in an attempt to bolster up a just cause, or out of shame or a wish to conceal disgraceful behaviour from their family. Fourthly the statement must be clearly shown to be a lie by the evidence other than that of the accomplice who is to be corroborated, that is to say by admission or by evidence from an independent witness."

It should be pointed out that lies told in court can amount to corroboration as the Lord Chief Justice recognized and acknowledged in the same case.

In this case the learned trial judge said -

> ".....because the law says a lie is capable of amounting to corroboration for, so long as you are satisfied that the lie was told in this court, is deliberate and it is related to any material particular."

It is clear, however, that statements made by the accused to bolster up a just cause or out of shame, or to "whitewash himself" as the learned trial judge

herself stated, cannot amount to corroboration.

There was in this case no evidence of a lie being told by the appellant by any evidence from an independent source. See also Corfield v. Hodgson [1966] 2 All E.R. 205.

For the reasons we have indicated, we are driven to conclude that the learned trial judge's directions on corroboration were thoroughly unsatisfactory. In identifying as corroboration, evidence that was not, the learned trial judge made a serious misdirection which must result in the appeal being allowed. We, therefore, quashed the conviction, set aside the sentence and entered a verdict and judgment of acquittal.

Cases referred to

R v Robinson (unreported) SCCA 109/79 dated 22/1/79.

R v Anthony Lewis (unreported) SCCA 205/79 dated 26/1/81

R v Everton Williams (unreported) SCCA 10/88 dated 6/10/88

Tumahole Berang & Ors v R (1949) A.C. 253

Pitmann v Byrne (1926) SASR 207

Credland v Knowler 35 Cr App R 48

R v Lucas (1981) 2 ALLER 1008

Corfield v Hodgson (1966) 2 ALLER 205