JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 213/87

BEFORE: THE HON. MR. JUSTICE CAREY, P. (Ag.)
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.

R. v. DAVE SEWELL

Delroy Chuck for appellant

Miss Yvette Sibble for Crown

7th November &
1st December, 1988

CAREY, P. (Ag.):

On 17th November, 1987, the appellant was convicted in the High Court Division of the Gun Court before Ellis, J., sitting alone on charges of illegal possession of firearm and robbery with aggravation. On 7th November, 1988, we allowed his appeal, quashed the conviction, set aside the sentence and in the interests of justice, ordered that a new trial should be had. We now set out our reasons for that decision as promised.

The matter came before the Court by leave of the single judge who certified that a grave irregularity had occurred in the course of the trial. Having regard to the conclusion at which we arrived, we do not think it necessary to rehearse the facts. We can therefore go straight away to identifying the irregularity. Mr. Chuck couched his ground of appeal thus:

"That the learned trial judge erred in law in refusing, or persuading the defence from calling two additional witnesses to support the appellant's alibi."

The circumstances were these: The appellant having made an unsworn statement in which he explained that he did not leave his place on the date of the robbery, called his mother to support him. The appellant's counsel then intimated that he desired to call two further witnesses material to the defence. These were persons to whom his mother had alluded in the course of her evidence, as being present at the home while her son was present. Thereafter, the following colloquy between the learned trial judge and counsel ensued: (see pages 54-56)

"His Lordship: To say what?

Mr. Williams: To say that at the material time they saw him at his mother's house.

His Lordship: What you are talking about, Mr. Williams, after they were not at the mother's home, they were at variance, him and his girlfriend and according to the evidence so far the girlfriend go and tell the police that he had a gun, then they saw him at the mother's house.

His Lordship: Who is Madge Green?

Mr. Williams: Madge Green is one of her customers who was there that Sunday.

His Lordship: That is corroboration, that is not adding anything to it, that is not adding anything to the alibi, that is what is known as additional witness saying the same thing, corroboration.

Mr. Williams: I would have thought that the fact that the accused man's mother testified as to where he was, then the court might want to look at the weight of that evidence.

His Lordship: But the mother is a competent witness, so what, why you are going to call somebody to say the same thing. Mr. Williams, between you and I, let me argue it with you here, you say I am entitled to look at this, give it the same weight here, this is the same thing I am going to do. If you go overnight and call these two people, let us be

"His Lordship: frank, I don't like to mince words, of course, I am going to look at it and give it the same type of weight I would give it, but where is it going to take you, how much further, they are going to come and say, yes, I saw the accused at Miss Mattis' house on the 26th, Miss Mattis also said so.

Mr. Williams: I am with Your Lordship, but I spoke about the weight of Miss Brandford's evidence because of her special relationship to the accused. Madge Green would be perceived rightly or wrongly in law as an independent witness, a witness without a direct interest to serve. The mother, My Lord, would be seen in a special category, she is related in terms of consanguinity.

His Lordship: There is nothing to prevent her evidence and there is nothing to prevent her testimony being believed if that is so.

Mr. Williams: Precisely so.

His Lordship: So what is the point, what you are calling more witness for, to say the same thing?

Mr. Williams: It is going to corroborate. But, My Lord, I have taken the cue from the court, if Your Lordship feels it is not ....

His Lordship: Don't take the cue from me because you have to conduct your case.

Mr. Williams: Precisely, My Lord and I was really desirous of the witnesses but since the mother has given evidence, we would forego calling those witnesses.

His Lordship: So in that event, that would be the case for the defence.

Mr. Williams: Yes, My Lord."

We are not in the least doubt that the trial judge was conveying to counsel his concluded view that the adduction of any further evidence was an absolute waste of time. He had heard the evidence of alibi given and he was convinced on what he had so far heard that no further evidence could change his mind. Since in the event, he convicted the appellant, it must be obvious that he had come to a decision of guilt, and that without the benefit

of other independent witnesses. Although the learned trial judge used the term "corroboration", its purport could not have been present to his mind. Until he heard the corroborative evidence, he would be entirely disenabled from considering whether the further evidence was supportive or not. Mr. Williams did attempt, timeously, to suggest that the independent evidence might carry some weight. But that was all swept aside. In our judgment, this conduct on the part of the trial judge was most improper. One of the indicia of a fair trial, is that the judge should come to his decision only after he has heard all the evidence in the case. An accused must be afforded the opportunity of presenting his defence in its entirety to the court.

This is no new proposition being laid down. In R. v. Johnson & Brown [1972] 22 W.I.R. 470, Luckhoo, P.(Ag.) said this at page 474:

> "In our view it was imperative to ensure that the applicant Brown who was unrepresented and in custody, had every opportunity of calling witnesses in his defence and for that purpose the trial judge ought to have given instructions for the required witnesses to be subpoenaed to attend. While appreciating the desirability of a speedy determination of the trial of an accused person especially when such person has been held in custody in relation to the offence charged for a considerable period of time it is to be borne in mind that that must always be subject to the right of the accused to be afforded the fullest opportunity of having his defence in its entirety presented to the court."

An accused is entitled to the substance of a fair trial and it is the responsibility of the trial judge to secure it for him. This judge did not: he found him guilty and said as much before the accused had closed his case. Such a failure will result in a substantial miscarriage of justice as has plainly occurred in the present case.

Learned counsel for the Crown did endeavour to raise some argument in support of the conduct, but was constrained to desist and concede that the conviction could not stand. We think it right to indicate our view that it is no part of Crown Counsel's duty to argue

merely for the sake of arguing. As ministers of justice, they should avoid such charlatanry: it is unworthy of their office.