C.A. CRIMINAL LAW — Robbery with aggravation and rape — Defence of alibi — burden of proof — Failure of judge to make it clear to jury in summing-up to jury that where accused raises an alibi as an answer to a charge he does not thereby assume the burden of proving that answer — a non-direction. [sufficient to cause Court of Appeal to interfere with verdict recorded.] Appeal allowed — conviction quashed — sentence set aside — new trial ordered. Case referred to: R. v. Wood (1968) 52 Cr. App. R. 74

JAMAICA

✓ Comp

Crim Pleas

EVIDENCE

IN THE COURT OF APPEAL

SURREME COURT CRIMINAL APPEAL NO. 92/88

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

R. vs. EARL WATSON

Dr. Randolph Williams for appellant

Miss Yvette Sibble for Crown

November 8, 1988

CAREY, P. (Ag.):

In the Home Circuit Court, before Edwards, J., sitting with a jury, the appellant, Earl Watson, was convicted on two counts of an indictment which charged him with robbery with aggravation and rape. He was sentenced to concurrent terms of 7 years imprisonment at hard labour, respectively.

The short facts which gave rise to his conviction are as follows, and it is necessary to give them in outline only, having regard to the decision at which we have arrived. On the 18th September, 1987 at about 8:30 p.m., the victim of these charges, a young woman, was on her way home when she was held up and robbed of her gold chain and a bag which contained a pair shoes and cash amounting to some $140 or $150.00. Five persons were involved in this episode and all these persons were armed with knives. The young woman also testified that she was taken from the roadway by her five assailants and sexually assaulted by each in turn. After her ordeal, she made a report at a police station and was told to return the following day. When she did so, and

while she was still present in the police station, she observed two men bringing another to the police station and the two men made some report to the police officers. At this point she identified the person brought in as being one of her assailants. The defence of the appellant was an alibi. He said, on his oath, that at the material time he was at home and, said he, after his arrival thither, he never ventured out for that knight.

The matter comes before the court by leave of the single judge who was concerned at the directions of the learned trial judge on the burden of proof when alibi was raised. Learned Counsel who appeared before us filed two g grounds, one of which dealt with the issues certified by the learned judge, and having regard, as we have said, to conclusion at which we have arrived, we do not think it is necessary to advert to the other ground which related to the question of the admissibility of evidence showing that the appellant had committed some other criminal offence and in respect of which there was no warning or direction on the part of the learned trial judge to the jury as to how they should view that inadmissible evidence.

We have examined with counsel the summing-up of the learned trial judge and we note that he gave the usual general direction as to the burden of proof cast upon the prosecution, and it is true, he also said that the jury could only convict if they rejected the story which the appellant had put forward. The burden of the complaint is that at no point in the summing-up did he make it clear to the jury that where an accused person draises alibi as an answer to the charge, he does not thereby assume the burden of proving that answer. We think that that is a non-direction sufficient, in our view to cause us to interfere with the verdict which was recorded in this case.

In R.V. Johnson 46 CR. App. Rep., Ashworth J, made this point quite clearly when he said at page 57 -

> "If a man puts forward an answer in the shape of an alibi or in the shape of self defence, he does not in law thereby assume any burden of proving that answer".

The impression which could be conveyed to the jury, in our view, by such directions as given by the learned trial judge was that there was some burden on the appellant. Moreover, the absence of directions in this regard would prevent the the jury from a proper consideration of the answer which this appellant put forward.

We would call attention to the helpful case of R. v. Wood (1968) 52 Cr. App. R. 74 where Parker, L.C.J., pointed out that there was no general rule that where alibi is raised, the trial judge should tell the jury that it is for the prosecution to negative the alibi. He went on to say at page 78 -

> "In the opinion of this Court, there is no such general rule of law. Quite clearly if there is any danger of the jury thinking that an alibi, because it is called a defence raises some burden on the defence to establish it, then clearly it is the duty of the judge to give a specific direction to the jury in regard to how they should approach the alibi."

In all the circumstances, we are constrained to allow the appeal, quash, the conviction that was recorded against him and set aside the sentences imposed. And in the interests of justice, the court will order that a new trial be had.