J A M A I C A

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO. 4/72

Before: The Hon. Mr. Justice Fox, Presiding
The Hon. Mr. Justice Smith
The Hon. Mr. Justice Robinson (Ag.)

R. v. EDWIN CAMPBELL

W. B. Brown for the appellant
R. Alexander for the Crown.

22nd June, 1972.

FOX, J.A.:

This is an application for leave to appeal against conviction and sentence. The applicant was convicted on 14th January, 1972, of having on 2nd July, 1970, had sexual intercourse with Rosetta Hamilton without her consent. The indictment also alleged that at the time when he committed this offence the applicant was armed with an offensive weapon, to wit a knife. He was sentenced to 10 years hard labour and 6 strokes with an approved instrument.

The essential complaint as to conviction was misdirection of the jury in relation to corroboration of the evidence of the complainant. Mr. Brown contended, in effect, that the directions in this respect were insufficient, inadequate and tended to mislead the jury.

In her evidence complainant said that at about 11.00 p.m. on the 2nd of July, 1970, she was walking alone on the Molynes Road to Seaward Drive where she lived. At the Molynes Road bridge she was attacked by the applicant. He was armed with a knife. He put the knife in her mouth and warned her not to "bawl out". He dragged her into the gully. He was a short man. A second and a taller man appeared. Both men in turn ravished her. She submitted because the applicant held the knife in his hand and she was afraid of him. After both had had intercourse with her the applicant used threatening words to her. She was afraid he would kill her so she offered to give him £150.0.0 which she had at her home if he would save her. The applicant put his arm around her and walked with her to her home. The tall man followed a short distance behind. The

complainant said that she had not been able to see the applicant clearly when the two men were committing the offence in the gully but that whilst walking with the applicant to her home she was able to see his face by the light of passing motor vehicles. Arriving at her home she entered the house leaving both men standing at her door. Her mother and the landlord were at home. She spoke to them. Speaking sufficiently loud for the men at the door to hear the landlord said, "pass mi gun". Both men scampered away. Complainant made a report to her mother.

In her evidence the mother of the complainant said that when she came home complainant looked frightened and was looking for money. The complainant's mother did not know the men and she did not attempt to identify them. The complainant said that at about 10.00 a.m. on the following day she was at a 'bus stop at Molynes Road awaiting a 'bus to take her to the Slipe Pen Road clinic. She saw the applicant at the 'bus stop. When it arrived she and the applicant entered the No. 13 'bus. This 'bus eventually stopped near to the Half-Way-Tree police station. Two policemen then entered the 'bus. Complainant said that she spoke to one of these constables, Constable McCain, who was in uniform. She was sitting in the front of the 'bus. She went to the back of the 'bus where the applicant was and there she pointed him out to the constable as one of the two men who had raped her the night before. She made this report in the presence and hearing of the applicant.

There is no mention in the review of the complainant's evidence that the accused said anything, but it is clear that at that stage the applicant instantly denied the accusation. This position emerged when the jury were reminded of the evidence of constable McCain. Complainant said further that the applicant was searched by the policeman. A knife was taken from his pocket. She identified that knife as the one which the applicant had in his hand the previous night. The complainant's version as to what happened after the constable came on the 'bus was substantially confirmed by the evidence of Constable McCain. Under cross-examination, the complainant said that amongst the matters which enabled her to identify the applicant was a mark which she saw in his face whilst he was walking with her to her home. The applicant admittedly had such a mark in his face.

The substance of Mr. Brown's complaint was that although the trial judge had correctly described the nature of corroborative evidence as it specifically relates to rape and kindred offences, by use of the word 'corroboration' and of the phrase 'corroborative evidence' in relation to evidence which did not satisfy the definition of legal corroboration, erosion of that definition had occurred.

At page 6 of the summing up the learned trial judge said this:

> "Corroboration in cases of rape means evidence in corroboration "or in support of the complainant's testimony and this must "be independent testimony which affects the accused by "connecting or tending to connect him with the crime. In "other words it must be evidence which implicates him, "that is, confirms in some material particular not only "the evidence that the crime has been committed, but also "that the accused is the person who committed it".

A few lines further on the learned judge said this:

> "The recent authority has said when the charge is of rape, "the corroborative evidence must confirm in some material "particular (1) that intercourse took place; (2) that it "had taken place without the woman's consent; and (3) that "the accused is the man who committed it".

It will be observed that by way of this direction the learned trial judge had correctly given the word 'corroboration' and the phrase 'corroborative evidence' a special meaning. The word and phrase had become terms of art. If, thereafter, this word and this phrase are used in relation to evidence which does not satisfy the definition of legal corroboration, the danger of the jury being confused is likely to arise. This was the position in R. v. Eric James reported at (1970) 16 W.I.R. page 272. In that case, having given a correct direction as to the meaning of corroboration, the judge went on to apply that term to evidence which obviously did not satisfy the definition. When the appeal came before this Court, the view was taken that in the light of the manner in which the direction had been phrased the possibility of the jury being misled was so slight that it could safely be disregarded. Supreme Court Criminal Appeal 38/68 27th February, 1969 (unreported). But when the complaint was discussed in the judgment of Viscount Dilhorne in the Privy Council, the danger in the misdirection was obvious to their lordships and they were of the clear view that, as given, the direction

was "entirely wrong".

Since that decision of the Privy Council in Eric James, this Court has endeavoured by way of its judgments to advise trial judges to confine the use of the word 'corroboration' and the phrase 'corroborative evidence' to material which satisfies the definition of legal corroboration, and that when it is intended to refer to evidence which supports a particular fact not amounting to legal corroborative evidence, that the word 'confirm' or 'support' or some other neutral term be used.

In this case the learned trial judge did not follow that advice. At page 5 of the summing up he said:

> "Let me say there is no corroboration as to the absence "of consent".

At page 6 he says this:

> "There is some supporting evidence as to the fact of sexual "intercourse with a male and in this regard, bearing in mind "what I have just told you, one could say that there is corro- "boration in fact of the complainant having had sexual inter- "course with someone, bearing in mind the Pathologist's "evidence of semen and spermatazoa.....On the question of the "identity of the accused, you have no supporting corroboration. "You have only the evidence of the complainant herself".

It was after this particular direction that the learned trial judge went on to give the legal definition of corroboration and the nature of corroborative evidence which has already been stated. Thereafter the learned judge went on to advise the jury (correctly) that despite the absence of corroborative evidence they could, nevertheless act upon the uncorroborated evidence of the complainant if, bearing in mind his warning as to the danger in doing so, they were convinced that she was a witness of truth. The learned judge then continued (page 7):

> "So let me say in concluding this aspect of the matter "that there is corroboration of the complainant having "had sexual intercourse but there is no corroboration - "that is evidence from an independent source supporting "the complainant's story as to the fact of her not con- "senting as she alleges or that the accused is the man "who committed the crime. There is no corroboration in "these last two".

The learned judge then referred to the evidence of the mother of the complainant that when she arrived home the complainant was in a

distressed condition, and said, page 8:

> "If you are satisfied that this was so and that her conduct "and attitude were not feigned that night, you may place "some weight on it in considering it as corroboration of "the fact that she had sexual intercourse".

In dealing with the medical evidence that spermatazoa had been found upon the clothing of the complainant and the complainant's statement that she had used her dress to wipe up herself after the offence had been committed, the learned judge said this page 18:

> ".....whether it was used to wipe up or whether it was used "as a sheet, the fact remains that there was semen and "spermatazoa on those garments, and if you accept that they "were in use at the time when the complainant alleges she "was raped then that would be corroborative evidence of "having had sexual intercourse with a man. You wouldn't go "on to suppose who was the man or whether it was with or "without consent. It is merely corroborative evidence as "to the fact of sexual intercourse with a male".

Mr. Brown contended that in view of the loose use of the word 'corroboration' and the phrase 'corroborative evidence' in discussing particular facts which did not satisfy the legal definition of the word and the phrase, the effect of the judge's directions as to the legal meaning of corroboration had been so eroded and the element of confusion so distinctly imported that the jury were bound to be misled. Shortly put, Mr. Brown submitted that an Eric James situation had arisen and that as a result this Court had no alternative but to be guided by the decision of the Privy Council in that case.

We do not agree. In Eric James, there was no evidence capable of amounting to legal corroboration of the complainant's evidence. The judge should have told this to the jury. He did not do so. This was a serious misdirection. It made the quashing of the conviction by the Privy Council inevitable. This is not the case here. In our view, the learned trial judge succeeded in making it quite clear to the jury, that there was no evidence in this case capable of amounting to corroboration of Miss Hamilton's evidence. At page 27 of the summing up the learned judge says this:

> "I have already told you that there is no corroboration to "support the complainant's allegation that she did not consent

"to this sexual act. There is no corroboration as to the "identity of the accused as the person who committed this act. "So you can not convict the accused unless you accept the "evidence of Rosetta Hamilton as a reliable witness and a "witness of truth.....You cannot convict this accused unless "you are completely satisfied with her as an honest and "reliable witness for the simple reason that it is on her "evidence only that you have to rely as to (1) the identity "of the accused as the man whom she says raped her, and (2) "the fact that the accused had sexual intercourse with her "without her consent".

In the light of this specific direction, and bearing in mind the earlier direction as to the three material particulars which must co-exist in order to constitute corroboration in the strict legal sense, we are satisfied that the danger which was effective in Eric James to bring about a quashing of the conviction in that case by the Privy Council, is nonexistent in this case. We are satisfied that, viewed as a whole, the directions of the learned judge had sufficiently acquainted the jury of the nature of corroborative evidence and had adequately guided them as to the significance of the absence of such evidence in this case. In our view, therefore, those grounds of appeal which were based on the allegation of misdirection as to corroboration fail.

In grounds 5 and 6, complaints were made,

(a) that the learned judge had failed to put the evidence in favour of acquittal of the accused in one part of the summation; and,

(b) as to failure to deal adequately with discrepancies as a whole, and with five particular discrepancies which were alleged.

The basis for the submissions on these grounds was this statement in Eric James at page 275:

"One further criticism must be made of the summing up. "Although the judge in the course of his summing up reminded "the jury very fully of the evidence that had been given, "he failed to relate that to the issues in the case which the "jury had to determine. In particular he failed to stress the "need for care on questions of identity and to put the evidence "in relation to that together in one part of his summing up "for the consideration of the jury".

The complaint was that the judge had not collected in one place and discussed the particular discrepancies which had emerged in the

evidence. Counsel said that this failure violated the directions in Eric James to such a serious extent as to oblige this Court to quash the conviction. We do not think that anything said in the Privy Council demanded that discussion of discrepancies should always occur in this way. Viscount Dilhorne was not laying down the particular scheme which must always be followed. In general terms the learned judge told the jury the proper approach when considering discrepancies. At various places in the summing up he drew attention to particular inconsistencies. There was no duty on him to list them all to the jury.

We have examined this record with care. At several places during the course of his discussions with the jury, the learned judge pointed out those matters which could result in the acquittal of the accused. He stressed the need of them being satisfied as to the identity of the accused. Finally he reviewed the applicant's evidence in relation to his defence of alibi. The learned judge said, page 28:-

> "The onus lies on the Crown to prove to your satisfaction "the identity of the accused as the person who committed the "act and to prove the fact that he was present at the "commission of the offence whereof he stands charged. You "cannot convict him unless you reject the defence of the "alibi. But even if you do reject this defence, you may "not convict until after you shall have reviewed the case "for the prosecution to see whether the Crown discharged the "onus of proof placed upon it, and satisfy you as to his "guilt".

In conclusion the judge pointed out in entirely satisfactory terms the way in which the jury were to approach a consideration of the verdicts which were open to them.

In addition to the grounds referred to in this judgment, other grounds were alleged and discussed in the course of Counsel's submissions. We indicated then the utter lack of merit in any of these. In our view, there is no merit in the grounds of appeal which attacked the conviction.

As to sentence. A large part of the printed record is devoted to this subject. Longthy submissions were made to the trial judge. He was invited to say that despite the provisions of Section 39 of the Offences against the Person Law Chap. 268 as amended by the provisions of

The Prevention of Crime (Special Provisions) Act, 1963, Act 42 of 1963, the judge had a discretion to pass a sentence other than the one prescribed in the section. Section 39 as amended provides:

> "39(1) Whosoever shall be convicted of the crime of rape "shall be guilty of felony, and being convicted thereof -
> " (a) where at the time of commission of the crime he was
> " armed with a dangerous or offensive weapon or instrument,
> " shall be liable to imprisonment for life or for a term
> " not less than ten years, and shall in addition be flogged;
> " (b) in any other case shall be liable to imprisonment for
> " life or for a term not less than seven years and shall
> " in addition be flogged."

At the trial Mr. Brown referred the trial judge to authorities which he said enabled disregard of the provisions of Sec. 39. We gather from Counsel that these authorities consisted of the decisions of individual judges of first instance (unreported) whereby a sentence other than that prescribed in Sec. 39 was passed on an offender found guilty of rape. These authorities were of persuasive but not compelling value. The learned judge refused to follow them. In our view he was very clearly right.

There is no merit whatsoever in the contention that the phrase "shall be liable" in Sec. 39 imports a discretion in the judge to inflict a punishment other than the one prescribed. This question was considered in R. v. Brown reported at (1964) 7 W.I.R. page 47. Sec. 34(1) of The Larceny Law Chap. 212 as amended by the Act 42 of 1963, provides that every person who committed the offence of robbery with any of the circumstances of aggravation therein set out -

> "shall be guilty of felony and on conviction thereof
> "liable to imprisonment with hard labour for any term not
> "less than five years and not exceeding twenty-one years
> "and shall in addition be flogged".

In relation to these provisions, Lewis J.A. had this to say in R. v. Brown at page 48 ibid:

> "It is clear that the intention of Parliament was to
> "restrict the discretion of the Court before which the
> "offender was convicted as to the term of imprisonment,
> "to increase the maximum term of imprisonment and to
> "prescribe the mandatory punishment of flogging".

R. v. Brown is also important in that for the first time it identified

an 'escape hatch' as an alternative to the mandatory provisions as to punishment for offences of robbery with aggravation. The 'escape hatch' was by way of Sec. 57(3) of The Larceny Law Chap. 212. That section authorises alternative punishment; "instead of or in addition to any other punishment which may lawfully be imposed". By way of the decision in R. v. Brown, the Courts of this country came to be afforded a limited opportunity to mitigate the harsh consequences of the provisions of the larceny law providing for mandatory punishment, in those particular cases where the statutory penalty was too severe and therefore unjust. No such situation exists in relation to the crime of rape. Neither the Offences against the Person Law nor any other law describes any 'escape hatch' whereby in a deserving case an offender found guilty of rape may be saved from unjust punishment because the statutory penalty is, in the circumstances, too severe. The mandatory provisions of Sec. 39(1) of the Offences against the Person' Law stand harsh, stark and unqualified. There is no legal ground upon which they can be avoided. Having said that, we must say that taking into account the circumstances of this case, the sentence imposed cannot be regarded as either manifestly excessive or wrong in principle.

For these reasons we think that the application as to sentence should fail. The applications as to conviction and sentence are therefore refused.

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