JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL No. 13/1971

BEFORE: The Hon. President.
The Hon. Mr. Justice Smith, J.A.
The Hon. Mr. Justice Hercules, J.A.(Ag.).

REGINA vs. EDWIN CAMPBELL

H.G. Edwards Q.C., Noel Edwards and W. Bentley Brown
for Applicant.

P.T. Harrison for Crown.

4th, 5th, 6th October
and 12th November, 1971

HERCULES, J.A.(Ag.).

This applicant was convicted of Rape in the Home Circuit Court on 27th January, 1971. When the arguments on the application for leave to appeal were concluded before us, we treated the application for leave as an appeal and allowed the appeal. We promised to put our reasons for so doing in writing and this we now do.

Six original grounds of appeal were filed and leave was granted to argue four supplementary grounds. The Court found no merit in all save one original and one supplementary ground. We find it unnecessary to outline the facts to deal with these two grounds.

The original ground complained as follows:-

"The Learned Trial Judge erred in Law when having heard Legal submissions of No case to answer at the end of the Crown's case from Counsel for the Defence and the Crown, instead of making his ruling on the Law, abdicated his function and told the Jury that they were being asked if they wish to hear any more of the case to which they replied that they wanted to hear more. This is especially so in a case such as this where there was no evidence adduced by the Crown to support a conviction."

The submissions as to whether or not there was a prima facie case were all addressed to the learned judge albeit in the presence of the jury. They were based on questions of law, on questions of mixed law and fact, and on questions purely of fact. They were rather lengthy submissions taking up fifteen pages of the transcript and at the end of it all this is how the

learned judge dealt with the matter -

HIS LORDSHIP: Mr. Foreman and members of the jury, you are the sole judges of the facts. You have heard all the evidence. I now ask you to deliberate among yourselves and decide whether there is no case to answer or you wish to hear any more evidence.

FOREMAN: My lord, it is the unanimous decision of the jury that they would like to hear the accused's defence.

HIS LORDSHIP: Please proceed.

Then the Applicant gave testimony on oath. It is our opinion that the learned judge ought to have taken a decision as to whether in law and/or on the facts a prima facie case had been made out. It was well within his power at that stage either to take away the case from the jury or leave it with the jury according to the view he took of the case. The submissions were addressed to him - not to the jury and a ruling from him was necessary in the circumstances.

Learned Crown Counsel conceded that the learned judge did not follow the accepted procedure, but contended that this did not result in any prejudice to the Applicant. We are afraid we do not accept that contention. Suppose for instance that the learned judge, having heard the witnesses and having observed their demeanour, had taken the view that a prima facie case had not been made out, then what he did was in effect to bow to the ruling of seven lay minds.

Mr. Ho a Edwards submitted that by calling upon the jury for a ruling the learned judge must have made the jury feel not only that there was a case to answer but there was also the danger that they might at that stage have felt that the Applicant was guilty of the charge. Moreover, continued Mr. Edwards, there was no warning whatsoever in the summing-up as to what a No Case submission meant and that the jury should keep their minds open and not prejudge the whole case, as from the end of the Crown's case, because there was a case to answer.

The learned judge did not merely ask the jury whether they wanted to hear any more of the case. He went further and invited them to deliberate among themselves and decide whether there is no case to answer. That invitation was in our view a complete abdication of his functions and constituted a danger of real prejudice to the Applicant.

But even if the jury were merely asked whether they wanted to hear any more of the case we would frown upon that procedure on the part of the

learned judge. As Lord Parker C.J. said in Regina v. Young 48 Cr. App. R.292 and (1964) 1 W.L.R. 717 at page 720:-

> "Before leaving the case, the Court would like to say that this appears to be yet another case where difficulties have arisen through a practice whereby judges invite juries to stop a case if they feel the prosecution case has not been proved ..... It may be that the time has come - the court does not desire to rule on it - when this practice should be only rarely if ever used, and that judges should more often take the responsibility themselves of saying to the jury that it is not satisfactory evidence upon which they could convict, and accordingly direct an acquittal."

The common-sense of the matter would seem to be that a judge by virtue of his training and knowledge and experience is in a much better position to decide whether or not a case should go to the jury. It is his duty to be ever watchful for the purpose of guiding and directing the jury.

The Supplementary ground of appeal reads as follows:-

"The contradictory directions in respect to Corroboration vide pages 9, 31 & 36 must have confused the jury and irreparably prejudiced the Appellant ....."

It is to be noted at this juncture that where there is no corroboration at all it is the duty of the judge to point this out to the jury, otherwise he may be inviting them to regard as corroboration something which is not corroboration (R. v. Johnson (1963) 5 W.I.R. 396.). It is also the function of the judge to point out to the jury the evidence capable in law of being regarded as corroboration and it is for the jury to decide whether or not the evidence does amount to corroboration (Archbold Criminal Pleading Evidence & Practice - 37th Edition, paragraph 568).

The learned judge quite properly expounded the classic definition of corroboration to the jury and pointed out that corroboration is required in relation to (1) identification of the Accused (2) that intercourse did take place and (3) that there was the absence of consent. He did not however make the point that those three factors or material particulars must co-exist in order to constitute corroboration in the strict legal sense and that where there is evidence in support of any of the three it is merely evidence in confirmation of that one factor or material particular and not corroboration in the strict legal sense. (See James v. R. 55 Cr. App. R. 299 at pages 302/3).

The learned judge duly warned the jury however of the danger of convicting on the uncorroborated evidence of the Prosecutrix.

Then on page 9 of the Summing up the learned judge stated quite categorically

> "Suffice it to say that there is no corroboration of the testimony of the prosecutrix from any independent testimony on the issue of identification; none on the issue of intercourse on the night of the 2nd July, 1970, and none on the issue of consent."

But on page 31 he said this:-

> "In that regard, members of the Jury, in relation to the injury on the elbow, if you believe the mother of this girl as to the cut on the elbows, she would corroborate the complainant in that regard."

Here the word "corroborate" appears to have been used loosely. The word should have been "confirm" but in any event, something is being referred to as corroboration after the jury were told on page 9 aforesaid that there was no corroboration. Later, on page 36, reference is made to the finding by Dr. Marsh of semen and spermatozoa on certain garments and the learned judge told the jury:

> "If you believe this ..... then this evidence may be capable of amounting to corroboration on the question of intercourse, depending on what view you take of the facts. It is for you to say whether in fact this bit of evidence corroborates the woman that there was this intercourse on the night of 2nd July, 1970."

Again the word "corroborates" appears to have been used loosely. The word "confirms" should have been used. But the critical point here is that matters capable of amounting to corroboration were pointed out to the jury after telling them categorically aforesaid that there was no corroboration.

Mr. Edwards submitted that these directions were confusing to the jury. Mr. Harrison conceded that it was possible that confusion could be caused by the unfortunate use of the word corroboration when confirmation was meant, but he urged that all the confusion should have been disposed of by the fact that the learned judge specifically directed the jury that there was no corroboration and the directions taken as a whole could not prejudice the Applicant. He added that in any event this case was caught by section 13(2) of the Judicature (Appellate Jurisdiction) Law, 1962, and a new trial should be ordered.

We took the view that the jury may have thought that the learned judge changed his direction that there was no corroboration when he pointed to matters capable of amounting to corroboration. In the strict legal sense there were no such matters and we considered that the confusion arising from the situation could place the Applicant at a very grave disadvantage. The jury might eventually have concluded that there was corroboration.

Therefore, on the two grounds dealt with in this judgment we acceded to the submission of the learned Crown Counsel. We granted the application for leave to appeal and treated the same as an appeal. We allowed the appeal, quashed the conviction and set aside the sentence, and ordered a new trial at the current session of the Home Circuit Court.