J A M A I C A

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL No. 97 of 1980

BEFORE: The Hon. Mr. Justice Zacca, P.
The Hon. Mr. Justice Rowe, J.A.
The Hon. Mr. Justice Carey, J.A.

REGINA v. WESTON DYER

Mr. I. Ramsay and Mr. C. Williams for appellant.

Mr. D. Maragh and Miss H. Walker for Crown.

May 4, 5, 6, 7, 8
& July 17, 1981

ZACCA, P.:

The appellant was convicted before Chambers, J. and a jury on June 4, 1980, for the offences of soliciting to commit murder (count 1) and conspiracy to murder (count 2). He was sentenced to imprisonment for 10 years on the first count and 6 years on the second count. The sentences to run concurrently. From these convictions he has appealed.

In view of the decision which the Court has reached we do not propose to deal with the facts in any great detail. In so far as the grounds of appeal are concerned, we propose to concern ourselves only with ground 2 as we did not find any merit in the other grounds of appeal.

The Crown's case rested solely on the evidence of Winston Reid. The Crown sought to establish through the mouth of Winston Reid that the appellant solicited Tony Brown and George Flash and other persons unknown, to murder Edward Ogilvie and also that the appellant conspired together with Tony Brown and George Flash and other persons unknown to murder Edward Ogilvie.

The appellant was employed in the Ministry of Works as an Assistant Superintendent of Special Works. A scheme called the McGregor Gully scheme was in operation and the appellant was responsible for giving out the work, supervising and certifying that the work was properly carried out, and that the expenditure was within the authorized limit. It appears that there was over-spending on the scheme and Edward Ogilvie, the Permanent Secretary in that Ministry ordered an investigation into the over-spending. The appellant was present when this order was given by Ogilvie.

On June 16, 1977 Edward Ogilvie was fatally shot by gun-men. The Crown's witness Winston Reid was at the time associated with the appellant. Reid admitted to receiving $13,000 weekly for merely sitting in the appellant's office. Apparently he did no work and regarded himself as the appellant's right-hand man. It is clear that Winston Reid was a dishonest person and was involved in the misuse of Government funds. He was in fact detained and subsequently released following on the death of Edward Ogilvie.

As stated the Crown's case rested solely on the evidence of Winston Reid who testified that on several occasions leading up to the death of Edward Ogilvie the appellant made the following utterances in his presence and the presence of other men.

> "A man named Ogilvie, through him investigating the money, the money nah come, and Ogilvie is a labourite and him fi dead."
>
> "Bally boy unoo a joke, the quicker Ogilvie dead is the quicker the money wi' come from the Ministry, because him investigating it, it can't come."
>
> "You a joke because the man never dead. You have bike and car."
>
> "How the man don't dead, what happen."
>
> "He is going to let them know Ogilvie."
>
> "He was going to show then a way, an easy way, and give them his address."
>
> "Told them that Ogilvie lived at 18 Lydia Drive, Havendale."

"When asked 'if the man really fi dead, appellant replied 'yes'."

"If the man don't really dead poor people nah get no more money because big contractors going come take over. "

"You a joke. Me a tell you long time seh if Ogilvie no get dead money can't flow." (George Flash and Tony Brown being present).

"You a hear mi boss. Me and mi brethren going go do di job and when the money start him Dyer must deal wid dem and not wid him (Reid), with money."

"Ogilvie go fi lunch 'bout 12 o'clock and him him have an alarm system in his house. He drives a 120 Y Datsun Motor Car."

"Piece of paper with licence number handed to Winston Reid."

The learned trial judge left with the Jury for their consideration the fact that Winston Reid was a person with an interest to serve. In the circumstances the learned trial Judge properly warned the jury on the danger of convicting on the uncorroborated evidence of such a witness. However, he failed to tell the jury that there was no evidence in the case capable of corroborating the evidence of Winston Reid.

Mr. Ramsay argued ground 2 of the grounds of appeal which was an as follows:

"That the learned trial Judge failed to assist the jury as he ought by omitting to direct them squarely that no corroboration existed in the case as a matter of law: That such omission amounted to a misdirection and made it possible for the jury to speculate or otherwise improperly consider bits of straws of evidence which the said jury in its unguided wisdom might take to be corroborative, e.g., the evidence of the death of Ogilvie coupled with the evidence relating to the green motor-cycle and the persons connected thereto."

Learned Counsel urged that a failure to tell the jury that there was no corroboration was a serious misdirection on the part of the trial Judge and this could lead to the conviction being quashed.

For the Crown it was argued by Mr. Maragh that the learned trial Judge was overgenerous in leaving the issue of, "a person with an interest to serve", to the jury. However, although not explicitly telling the jury that there was no evidence in the case capable of corroborating Winston Reid, he implicitly told the jury that there was no corroboration in the case. He cited the following passages in the summing-up to support his contention that the trial judge implicitly gave the jury the proper directions:

At p. 24 "..... bearing in mind that the only evidence in regard to what was said by accused and any other who you may not find was in a conspiracy with the accused came from a witness, Reid, came from the witness Winston Reid who may or who you may find have some interest to serve and in which case you look for some evidence of corroboration; but even in the absence of corroboration you are entitled to convict if you are convinced that Winston Reid was speaking the truth."

At p. 27 "Now the only evidence of what was said by the accused to anybody, if you accept it, came from Winston Reid, as I told you earlier - a person who might have had an interest to serve, and it is suggested that he is a person of a kind of shady character."

At p. 37 "Members of the jury, in brief, the case presented by the Crown is put through the mouth of Winston Reid who is a person that might have some interest to serve; and I warn you that in the absence of corroboration it is dangerous to convict on that evidence, but even in the absence of corroboration if you are convinced he was speaking the truth you can convict on his evidence. "

At p. 49 "The Crown's evidence is based mainly on one witness, Winston Reid, ... "

We have considered the above directions and are unable to say that the learned trial Judge either explicitly or implictly told the jury that there was no corroboration in the case.

It is conceded that there was no evidence in the case capable of corroborating the evidence of Winston Reid. Mr. Ramsay submitted that having regard to the learned trial Judge's directions at pages 28, 37 and 38, the jury not having been told that there was no corroboration, were left to speculate whether there was evidence which might amount to corroboration.

At p. 28 "If, however, you feel that the witness Winston Reid was speaking the truth on this occasion before you, then examine his evidence along with the evidence of the various other witnesses in the case, (emphasis mine) and taking into account the unsworn statement of the accused, ..."

At pp. 37 - 38

"We have evidence given by the doctor of the death of Edward Ogilvie on the 16th of June, 1977, and what caused his death. We have evidence from a schoolboy Peter who says he knows 18 Lydia Drive; he knew where Mr. Ogilvie lived, and that around 1 o'clock when he was going on the second shift to school he saw two men on a green motorcycle. He can't identify the motorcycle; he couldn't identify who was on the motorcycle; that he hear about four shots, and then he went back, after the two people on the motorcycle rode off - he doesn't know who they were, all he can say it is a green motorcycle - and he saw a car facing the drive-way of Mr. Ogilvie's gateway and he saw Mr. Ogilvie over the steering-wheel bleeding, and he saw two bullet wounds through the glass of the car."

At p. 43 "But he told you that there was a green bike on the scene and we had, he couldn't tell you who was riding it, but it was just at the time of the murder of Ogilvie; and Reid tells you that he saw his two brethren riding that motorcycle that same morning."

At p. 26 "There is also in this case certain circumstances arising or circumstantial evidence, but that circumstance or circumstantial evidence is of very little weight, if any, or cogency, if any, of two other persons, or two persons whom it is alleged by the witness, Tinker, was seen riding together on a green motorcycle on the day of the killing and there is also evidence from the witness Reid, Winston Reid that he saw the two persons charged in this indictment along with Tony Brown and George Flash riding a green motorcycle and which motorcycle was of similar make, colour and size as motorcycle called a Honda 354, seen at the scene of the crime, but that evidence would not be sufficient to connect them with the murder as that circumstance it might be anybody else at the scene as far as the identification of a green motorcycle seen at the scene, along with the two men Tony Brown and Flash and that riding; that evidence as I told you is that circumstances of very little weight, if any, or cogency, if any, namely that two of the persons, namely Tony Brown and George Flash whom it is alleged the accused conspired with or solicited to murder Edward Ogilvie was seen riding on the one motorcycle, a green motorcycle, a 354 Honda Motorcycle on the day of the killing, though not at the scene of the killing."

Having regard to these directions the learned trial Judge, having failed to tell the jury that there was no corroboration in the case, may well have left them to speculate that something to do with the green motor cycle or the actual killing of Ogilvie could be regarded as corroboration when clearly that could not be.

In our view Winston Reid was at the very least a witness having some purpose of his own to serve. In such cases it is desirable that the warning against uncorroborated evidence should be given. The learned trial Judge was correct in issuing the warning to the jury. See R. v. Prater 44 Cr. App. R. 83 at 85; D.P.P. v. Kilbourne [1973] 1 All E.R. 440 at 446 - 447; State v. Persaud 24 W.I.R. 97 at 144.

In the circumstances of the instant case, it is necessary to consider what are the consequences where the trial judge fails to tell the jury that there is no corroboration in the case.

In R. v. Johnson [1963] 5 W.I.R. 396 at 398, Cundall, P. said:

> "It is equally our opinion that where in cases such as this there is no corroboration at all, it is the duty of the trial judge so to point out to the Jury, otherwise he might well be inviting them to regard as corroboration something which is not corroboration at all."

In R. v. Anderson [1966] 10 W.I.R. 24 at page 25 Henriques, J.A. after reviewing the cases of R. v. Johnson (above) and R. v. Anslow [1962] Crim. L.R. 101 said:

> "In accordance with these decisions, we are of the view that in the instant case the judge should have specifically stated that there was, in fact, no corroboration to be found anywhere in the evidence. This he has failed to do, and his omission in our view has resulted in a miscarriage of justice."

In the State v. Persaud and others [1976] 24 W.I.R. 97 at page 105 Haynes, C. said:

> "If the trial judge was satisfied that there was no evidence capable in law of being corroborative, it was his duty to tell the jury; if not, this omission could be fatal."

And again at page 128 Boilers, C.J. said:

> "In this case, as far as the case against the No. 1 appellant was concerned, there was no corroboration in which case it is the bounden duty of the learned judge to have directed the jury that there was no such evidence, and that the whole case would depend upon whether they accepted the evidence of Ramnarace Singh as being a witness of truth or not, after paying attention to the warning. The danger in failing to so direct the jury would mean that the jury might well have looked for corroboration in the rest of the evidence which was not capable of amounting to corroboration. "

In R. v. Parker [1925] 18 Cr. App. R. at 104 where there was no corroboration of the evidence of the prosecution, the Court of Appeal in its judgment, stated at page 104:

> "In truth, there was no corroboration of the girl's story in the sense of evidence corroborating that story in a material particular and implicating the accused, but the jury were left to decide whether or not there was any corroboration. If the jury had been told that there was no corroboration, and that in the absence of it it would be unsafe to convict, and if they had nevertheless convicted the appellant, it might well have been that the conviction would stand. But their minds were left with the belief that they could find certain matters to be corroboration, whereas they could not. This appeal must therefore be allowed."

In Eric James v. R. [1970] 16 W.I.R. 272 where the trial judge incorrectly directed the jury as to evidence which amounted to corroboration, Viscount Dilhorne at p. 275 stated:

> "There was in this case no evidence capable of amounting to corroboration of Miss Hall's evidence that she had been raped, and raped by the accused. The judge should have told the jury that. His failure to do so was a serious misdirection, so serious as to make it inevitable that the conviction should be quashed."

In the instant case the omission of the learned trial Judge to tell the jury that there was no corroboration in the case might very well have led the jury to regard as corroboration evidence which does not amount to corroboration. In our view this omission is a serious misdirection which would warrant the conviction being quashed.

However, in the circumstances of this case we feel that the interests of justice dictate a new trial of the appellant.

Accordingly his conviction is set aside, but a new trial is ordered.