JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 72/92

COR: THE HON. MR. JUSTICE RATTRAY, P.
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE GORDON, J.A.

REGINA VS. LEOPOLD LEWIS

Frank Phipps, Q.C. and Tracey Hamilton for Appellant
Diana Harrison, Deputy Director of Public Prosecutions for Crown.

June 28 and July 26, 1993

GORDON, J.A.

On November 25, 1992 the appellant was convicted by a Jury in the St. Mary Circuit Court before Harrison, J. for the crime of carnally knowing and abusing a girl under the age of twelve (12) years. On July 1, he was sentenced to serve a term of imprisonment at hard labour for seven years. Granted leave to appeal against sentence, he pursued his application for leave to appeal his conviction, Mr. Phipps, Q.C. intimating at the outset of his submissions, abandonment of the appeal against sentence.

The evidence the jury had to consider was the uncorroborated story of the complainant. She testified that on October 6, 1991 she went to the house of the appellant. She walked through the rooms in the house to the verandah where the appellant sat reading a newspaper; she spoke to him and began retracing her steps when the appellant held her, placed her across his lap and sexually assaulted her. He then took her to his bedroom placed her on his bed and again penetrated

her. She, in her discomfiture and pain, cried out and he silenced her. When he was finished, he got up and went to the bathroom. She got up and observed she was bleeding from her vagina, she told him and he gave her a rag and told her to dip it in the toilet bowl and wipe her vagina.

She said that she made a report to the appellant's daughter, Rosie. She went home and told her mother, Patricia Riley and her sister, Ivorine Riley. She was examined by them, taken to the Port Maria Hospital where she was seen by a nurse and given tablets and subsequently taken by the appellant and her mother to a doctor in Oracabessa. Evidence was given by her mother and sister of her condition: bloody clothes, blood seen in her vagina and her visit to hospital and the appellant's offer to and his taking her to the doctor.

The appellant gave evidence. He said that the complainant came to him, told him "Good morning" and left. Ten to fifteen minutes later she returned to him and told him "Mr. Lewis, I don't know but I see blood coming down my foot." He said he got a piece of rag and gave her and subsequently he heard talking, he went to his gate and heard people saying he had interfered with her. He admitted he took them to the Port Maria Hospital. He denied committing the offence.

Mr. Phipps, Q.C. argued two grounds of appeal, viz.:

> "1. The learned trial judge misdirected the jury on the law applicable to corroboration when he directed them in a manner which gave the impression that there was evidence to support the testimony of the prosecutrix, ---- (vide pages 8 - 12).
>
> 2. The learned trial judge failed to direct the jury, in this type of case where there is an allegation of a sexual offence, there is a special need for the jury to fully understand that the evidence was potentially unreliable AND FURTHER it was dangerous to convict on the evidence of a young child in the absence of corroboration. The

> combination of the OFFENCE and the STATUS of the witness require a special direction to the jury in order to avoid a miscarriage of justice."

He submitted that the learned trial judge's directions on corroboration fell far short of what the law considered as appropriate and so amounted to a misdirection. The use of the word "support" interchangeably with the word "corroboration" gave the impression that there was corroboration of the complainant's evidence and this effectively nullified the warning that there was no corroboration. Because sexual offence cases fall in a special category it was very important that the directions on variations should be specific and the judge's directions of a general nature would have left the jury with the impression that the variations in her evidence were not important when in fact they were because her credibility was vital to the proceedings. The learned trial judge's failure to adequately address this aspect of the case amounted to a misdirection which should result in a quashing of the conviction.

Miss Harrison in response submitted that the learned trial judge followed his general directions on variations in evidence with specific reference to variation in the complainant's evidence and appropriate directions were given. The word "support" used by the learned trial judge was not in juxtaposition to or used interchangeably with the word "corroboration" She submitted that the jurors were adequately instructed on the nature of corroboration and properly advised of the lack of it.

We have looked carefully through the summing-up and examined the learned trial judge's directions on variation in the evidence. The judge gave general directions on variations on pages 4-5 of the transcript and on pages 5, 6 & 7, he referred specifically to what in his view was a variation in

her evidence. His general directions were unexceptionable and follow a pattern most judges find desirable. They alerted the jury on the correct approach to assessing evidence when there are variations. He then said:

> "Now, there is one aspect of the evidence of [redacted] which she gave evidence to you that created a variation to some extent, in her story, it is for you to say whether you find it serious, or it is minor; it is for you to say how you will deal with it. It is for you to say whether or not you will brush it aside and go and consider the rest of the evidence."

He then dealt at length with the variation he identified and concluded:

> "....that is how you view what might appear at first to be a variation in the witness' story but of course, a matter for you, because you are the judges of the facts, but you must use these bits of evidence to see whether or not there is in fact, a contradiction in her story, or is she really speaking the truth."

We are unable to find any support for the appellant's contention that the directions were inappropriate.

The passages which gave rise to the complaint on corroboration appear at pages 8 and 9 of the transcript thus:

> "The prosecution needs to prove to you that there was sexual intercourse with [redacted] that is penetration of the female sex organ by the male sex organ. You may find no difficulty in that respect with the evidence because she told you that he put her on his lap, lift her skirt, drew down her panty and put his penis in her vagina and then he got up, carried her to the bed, lie on top of her, put his penis in her vagina, she was crying out and he said, 'Stop the noise.' Now that is evidence if you accept it, that there was insertion of the penis in the vagina, that is insertion of the male sex organ in the vagina.

"You heard from Ivorine Riley that she said she saw the blood inside ----- vagina. Now that is evidence also that would go along to support, if you find that there was an entry to the vagina.

Now sexual cases require a certain degree of caution, that is, that it is dangerous and unsafe to convict a man of an offence of that nature in the absence of corroboration, that is in the absence of other evidence that goes to prove that sexual intercourse took place and that it was the accused who did it. That is, the law asks you to look in practice for corroboration, that is evidence independent of the evidence of ----- to show that sexual intercourse took place and it is the accused who did it in this particular case, that is corroboration.

The law requires you to look for corroboration because it is easy for a woman to say, 'I was raped' or a young girl to say a man had sexual intercourse with me and it is hard for a man to disprove it. Now you are also dealing with a young miss who is ten years old, now eleven, and it means that you have to be careful when you examine her evidence to see whether or not she is speaking the truth. Young girls it is said, or young children it is said are sometimes ruled by fantasy, they make up stories, sometimes their imagination takes them wide and they say things that are not necessarily true so you have to examine the evidence of the little miss, examine the manner in which she gave the evidence, examine what she has told you to see whether or not you are prepared to believe her. What you have to do is look at the rest of the evidence and see if there is support for what she says in addition to how she said it to you to see whether or not you are prepared to accept her word. When she tells you that after the accused had sex with her she saw blood running down her leg, there is some support that there was blood because her mother said she saw blood. What Ivorine said, she saw blood in her vagina. Constable Wylton got the clothing with blood on the clothing and also blood on the sanitary napkin."

In this passage the learned trial judge gave a clear definition of corroboration and the nature of corroborative evidence. There are no prescribed words, no required formula, that the trial judge must use in the warning given. Corroborative evidence is confirmatory evidence not supportive evidence. Corroborative evidence must confirm the testimony of the complainant in some material particular as to:

(a) the commission of the offence; and
(b) the involvement of the person charged

The word "support" as it appears for the first time in the extract above was used in the context of the discharge of the burden of proof that there was sexual intercourse. The presence of blood in the vagina, they were told "would go along to support, if you find that there was entry to the vagina." The word "support" appears on two other occasions. On the last occasion it was in effect, a repetition of the first reference to blood in the vagina, on the second mention the jury were invited to examine the evidence in totality with care to see if there was support for what the complainant said in evidence.

We entirely agree with submissions of Miss Harrison that the word was not used in juxtaposition to or interchangeably with corroboration. We find that the learned trial judge did not fall into error in his charge to the jury on this important area of his summing-up and that the contentions of the appellant fail.

Mr. Phipps, Q.C. invited us to say that it is a notorious fact that young girls do menstruate and we should take judicial notice of it. He said the learned trial judge in his summation withdrew this aspect of the defence from the consideration of the jury and this resulted in a miscarriage of justice.

The learned trial judge told the jury at page 7:

> "When counsel for the defence addressed you he also mentioned the fact that - in his words - about nature's curse, referring to the monthly period. How you

> "are not to speculate in that respect, you are not to speculate. What we have here is that after she made this complaint she was taken to the nurse, taken to the hospital, she got tablets at the hospital, she was taken back to the doctor the Monday, she was then taken to another nurse in Saint Ann's Bay. So this was a little miss who was being taken to the nurse and the doctor and she in fact got medication, she got tablets from the nurse. So you must not speculate about monthly period, there is no evidence of that before you. What you must do is use the evidence that you have and so come to your finding of facts and so come to your final verdict."

The complainant was 10 years at the time of the incident and 11 when she testified. The suggestion of the occurrence of a monthly menstrual cycle was not based on evidence adduced but was introduced by Counsel for the defence without any material support. The learned trial judge acted with propriety when he invited the jury not to speculate and we in like vein will not entertain the submission that we should give judicial support to this baseless notion.

Mr. Phipps, Q.C. submitted that the offence was one of a sexual nature and the complainant was a child, this therefore required of the trial judge a special care in directing the jury on the danger inherent in the evidence of a child and of the desirability of corroboration. The case he submitted was never left fairly to the jury hence there was a miscarriage of justice. In support of this submission he referred to Lord Ackner's judgment in Reid (Junior) v. The Queen (P.C.) (1990) 1 A.C. 363 at p.376 F-G.

> "Judicial experience has established that there are certain categories of evidence which are by their very nature, potentially unreliable and in respect of which, in order to avoid the serious danger of wrong convictions, special warnings and directions have to be given to juries. Such categories include the evidence of children who, although old enough to understand the nature

> "of an oath and thus competent to give sworn evidence, may yet be so young that their comprehension of events and of questions put to them, or their powers of expression, may be imperfect. In sexual cases, the victims of the alleged offences may have a variety of motivations, some of which may never have occurred to a jury, for giving false evidence."

The learned trial judge directed the jury on the nature of corroboration, and that it is dangerous and unsafe to convict of an offence of this nature on uncorroborated evidence. He stressed the need for caution in their assessment of the evidence. He told them of the ease with which an allegation can be made and the difficulty a man has to refute it. He further emphasized the fact of her tender age and the care they should exercise in examining her evidence. He then told them that her evidence was uncorroborated in these words:

> "Now in spite of the fact that there is no independent evidence no corroboration in this case, if you believe she is speaking the truth, if you are satisfied that you can rely on what she had told you today as to what transpired on that day, then you may act on it, members of the jury and come to your final verdict."

The learned trial judge did what he was in law required to do and we hold that there was nothing in the summing-up which could have misled the jury into believing that there was corroboration when there was none. It was submitted that the learned trial judge on pages 10-12 belittled the defence, was highly improper in his presentation and never left the case fairly to the jury.

The submissions were general in nature and no particular passage was indicated as giving offence. Looked at as a whole we see the learned trial judge discussing suggestions put to the complainant by defence counsel at the trial and the evidence of the appellant given thereafter. It was suggested to the complainant

that she reported to the appellant that she had got a cut on her foot and it was bleeding. It was further suggested to her that the appellant told her to go home and show the cut to her mother. These factual suggestions were rejected by the complainant and when the appellant testified on oath they were not supported by his testimony. His evidence was that the complainant came to him and told him she saw blood "coming down" her foot and he gave her a rag. This was supportive of complainant's evidence. The learned trial judge invited the jury to examine the evidence using their common sense to determine where the truth lies. The exercise of alerting the jury to the suggestions and the difference between them and the evidence of the defence was one on which the learned trial judge was required to embark in a fair presentation of the case. The decision on the facts was for the jury and this he made clear to them. We find that the defence was not unfairly dealt with nor was there any attempt to belittle the defence. The summing-up was fair and adequate.

The grounds of appeal fail and there being no other basis on which the conviction may be disturbed the appeal is dismissed, the conviction and sentence affirmed and we order that the sentence should commence on October 1, 1992.