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JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO. 73/89

BEFORE: THE HON MR. JUSTICE WRIGHT, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.
THE HON. MR. JUSTICE GORDON, J.A. (Ag.)

REGINA

VS.

VINCE STEWART

Roy Fairclough for appellant

Brian Sykes for the Crown

October 25, 1989 & February 14, 1990

GORDON, J.A. (Ag.):

The appellant was convicted by Her Honour Miss J. Straw, a Resident Magistrate for St. James, on February 15, 1989 on an indictment which charged him for robbery with aggravation. A second count on the indictment for malicious destruction of property was dismissed. At the conclusion of the hearing of the appeal, we allowed the appeal, quashed the conviction and entered a verdict of acquittal. We now place on record our reasons for so doing.

These are the facts on which the conviction is based. The complainant, Zachariah Clarke, a 9 year old school boy, was riding his bicycle at Ironshore, St. James in the area where he lived on 8th July, 1988 at about 2:30 p.m. He was set upon by three men and at knife point

robbed of his bicycle. In the robbery the man with the knife cut the complainant on his hand. He claimed that the appellant, whom he had known for one year, was one of his assailants and that the appellant rode the bicycle away while the other two men ran into a short cut. Some time afterwards, about 3:00 p.m., the boy saw his father, Evanston Clarke, driving his bus on the road, in Ironshore and made a report to him. The father then went to "Flankers to see if he could find the bicycle", and thereafter, in company with his son, reported the matter to the police at Coral Gardens. Later in the evening, while driving in Ironshore, he saw the appellant and summoned him. The appellant responded and was challenged with the report. He denied stealing complainant's bicycle. He refused to accompany Mr. Clarke to the police station. Men from Mr. Clarke's bus held the appellant and a struggle ensued during which he threw a stone which smashed the windshield of Mr. Clarke's bus. A stranger with a machete in hand intervened and the appellant was released. He then ran off, chased by men from the bus and by Mr. Clarke driving the bus. Later, while Mr. Clarke was at the police station, the appellant was taken there. The appellant denied the charges of robbery and malicious destruction of property.

The appellant, in defence, said he was at home at the time the robbery was alleged to have been committed. He later left his home and was on the road when Mr. Clarke accosted him at about 6:30 p.m., and asked him for his son's bicycle. The appellant said he knew nothing of the bicycle. Men from Mr. Clarke's bus set upon him and beat him with board and sticks. He was injured and bled. A stranger with a machete intervened and backed his assailants off; Mr. Clarke then came at him with a knife and he took up a stone, threw it at Mr. Clarke and ran. That was how the damage was caused to the windshield and not deliberately and

unprovoked as Mr. Clarke alleged. In running away he was chased by the men from Mr. Clarke's van; Mr. Clarke following in the van; he was backed up by the van and was rescued by Mr. Olesema. Mr. Olesema took him in his motor car, first to his parents' home and then to the police station at Coral Gardens. He then went to the Cornwall Regional Hospital, where his injuries were treated. The following day he went to a private doctor and obtained a medical certificate, which was tendered in evidence.

Mr. Emmanuel Olesema, a company director, told of offering protection to the appellant when he ran to him for rescue from men who were chasing him. He warned the men of the possibility of their being mistaken. He said he questioned Zachariah who was there. Zachariah said the robbery took place in front of the appellant's home and it was a man in short pants who took his bicycle and not the appellant.

Mr. Evanston Clarke and his witness denied beating the appellant but the learned Resident Magistrate found -

> "that accused was beaten by Evanston Clarke and others. Therefore a reasonable doubt is raised as to whether Accused threw stone in self defence or deliberately damaged windshield."

She rejected the evidence of Mr. Olesema, the only independent witness, who rescued the appellant. She said -

> "I found Zachariah Clarke to be a truthful and credible witness. He was not shaken or confused by cross-examination."

The evidence discloses that the appellant lives with his parents and the complainant and his father know the location of the home of the appellant in Ironshore. The home of the appellant was not visited nor searched by the police. When the complainant spoke to his father of the incident,

Mr. Clarke went to Flankers in search of the bicycle, then he went to the police station and made a report. It was some two to three hours later, with a bus-load of men on the bus, that Mr. Clarke saw the appellant and set upon him.

Mr. Fairclough, by leave and without objection, argued two grounds of appeal -

> "1. The learned Resident Magistrate erred in failing to warn himself of the danger of convicting the accused on the uncorroborated testimony of a child of tender years, viz., 9 years old.
>
> 2. The learned Resident Magistrate erred in failing to appreciate the evidential significance of a rejection of the alibi of the accused and wrongly concluded that such rejection was basis of a verdict of guilty."

Mr. Fairclough conceded that it was not required by statute that the Resident Magistrate declare all the factors she considered in arriving at a verdict. Section 256 of the Judicature Resident Magistrate's Act does not require reasons but findings of fact. However, he submitted, there are certain principles which apply to the evidence of children and it is considered desirable that it should appear that the court was aware of them. When the judge sits with a jury he must explain these principles in his directions to the jury, when he sits alone as judge and jury it should appear that he was aware of them and applied them. The evidence of the complainant may, indeed, have been impressive but experience has shown that children are subject to (1) flights of imagination, (2) undue influence; (3) coercion. The cases, he submitted, supported the proposition that where there is no corroborative evidence the Resident Magistrate is under an obligation to state clearly that there is no such evidence and that the tribunal has warned itself. He relied on the case of R. v. Clifford Donaldson et al S.C.C.A. 70-73/86

(unreported) delivered July 14, 1988. The conviction for rape in this case was quashed by this Court because the Judge sitting alone in the Gun Court did not go on record as having warned himself of the danger of acting on the uncorroborated evidence of an adult complainant in a case of rape. (R. v. Dacres (1979) 33 W.I.R. 33).

Mr. Sykes in reply referred to R. v. Chance (1988) 3 All E.R. 225. In this case the Court of Appeal held that where identification was in issue provided the judge gave adequate directions on it, it was undesirable for him to go on to deal with corroboration as it was likely to confuse the jury.

Zachariah Clarke was sworn after he was examined on the voire dire by the Resident Magistrate. "Generally speaking, children of 10 years and upwards are considered old enough to take the oath whilst those under 8 are considered to be too young. There is a grey area in between" R. v. Hayes (1977) 2 All E.R. 288 at page 291. The complainant in this case falls in the grey area.

It is settled that the sworn evidence of a child will, as a matter of practice, require itself to be corroborated. Where a child gives sworn evidence the jury must be directed that it is dangerous to convict unless the evidence is corroborated but that they may convict if convinced the child is telling the truth. The reasons the warning is necessary are (1) the fallibility of memory and (2) susceptibility to influence.

The complainant is a child of tender years and his evidence was uncorroborated but the Resident Magistrate in her findings did not refer to the desirability for corroboration nor was there material in her findings from which it could be inferred that her mind was adverted to this requirement. Section 256 of the Judicature Resident .

Magistrate's Act requires that the Resident Magistrate gives a brief summary of the facts found. It does not require otherwise, but the authorities indicate that where the decision of the tribunal is governed by the application of settled legal principles e.g., the desirability of corroboration, it must appear that the tribunal's mind was adverted to it - R. v. Donaldson (supra). Even if there is a presumption that the judge knows the law, there is no presumption as to its application "he must demonstrate in language that does not require to be construed that in coming to the conclusion adverse to the accused person he acted with the requisite caution in mind", per Wright, J.A. in R. v. George Cameron S.C.C.A. 77/88 (unreported) dated November 30, 1989.

We are unaware whether the Resident Magistrate had in mind the requisite caution and for these reasons we found that the conviction could not be allowed to stand.