**JAMAICA**

EV & FW

**IN THE COURT OF APPEAL**

**SUPREME COURT CRIMINAL APPEAL NOS. 147 & 148/2003**

**BEFORE:** **THE HON. MR. JUSTICE SMITH, J.A.**
**THE HON. MRS. JUSTICE HARRIS, J.A.**
**THE HON. MISS JUSTICE G. SMITH, J.A. (Ag.)**

**REGINA**
**V**
**PRINCE DUNCAN**
**and**
**HERMAN ELLIS**

**Oswest Senior-Smith for the Appellants**

**Lisa Palmer, Senior Deputy Director of Public Prosecutions (Ag.) and Natalie Ebanks, Crown Counsel (Ag) for the Crown**

**November 21, 23, 2007 and February 1, 2008**

**SMITH, J.A:**

On the 11th of July, 2003, after a trial in the High Court Division of the Gun Court which lasted some twelve (12) days over the period 6th of February, 2003 to 11th of July, 2003 the appellants, Prince Duncan and Herman Ellis (now deceased), were convicted on an indictment containing four (4) counts - illegal possession of firearm (count 1), burglary and larceny (count 2), rape (count 3) and illegal possession of firearm (count 4). Duncan was convicted of all the offences charged. Ellis was found guilty on counts 1, 2 and 3. A third person, Gawayne Gray, who was jointly charged, was acquitted.

Duncan and Ellis were sentenced to ten (10), fifteen (15) and fifteen (15) years on counts 1, 2 and 3 respectively and Duncan to a further (ten) 10 years imprisonment on count 4. They were granted leave to appeal their conviction on count 3 (rape) only. On the 23rd of November, 2007 we dismissed their appeals. We now put our reasons for so doing in writing.

Eight (8) witnesses testified for the prosecution. The alleged victim was Mrs. Kamala Dickson, a senior medical practitioner. Dr. Dickson's evidence was that in May 2002, she and her husband, who was ill, occupied a three (3) storey building in Jacks Hill, St. Andrew. They had lived in this house for over twenty-six (26) years. On the night of the 7th of May, 2002 they were at home. With them were a practical nurse and their housekeeper.

There were five (5) bedrooms and two (2) bathrooms upstairs. Dr. Dickson had gone upstairs and locked the door at the top of the stairs. Her husband had been put to bed. The nurse and the housekeeper had gone to their rooms. Dr. Dickson went to her bedroom minutes after midnight. She switched on the bedside light and noticed that the louvre window was open. She had earlier secured all the windows and doors. She picked up her nightgown and went to the bathroom. While returning to her bedroom she noticed that the main light had been switched on. On entering her bedroom she saw a suitcase on the bed. It was not there when she left for the bathroom. She then saw two (2) men in the room. "What are you doing here?" she

asked. "Where is the money?" they retorted. She told them that the money was in her bag. A third man came from behind the door and grabbed her from behind.

He put a pistol in her face and threatened: "Tell me where the money is or I kill you". He repeated this threat. One of them placed a pillow case over her head. They kept asking for 'the money'. In response to their demand she told them where the key for the door at the stairs was kept.

The men took her downstairs. They forced her to kneel on the floor with her arms folded in front of her and her head resting on her hands. One of them pulled up her nightdress and had sexual intercourse with her. This sexual assault was repeated. She could not say whether this was done by the same person or another. They then tied her hands and put her to sit on the floor. While she was sitting on the floor, they tied her legs together and pulled her nightdress over her head. It is not necessary to further describe the humiliating treatment to which her assailants subjected her. She heard them moving around, pulling out drawers, shuffling papers and removing things.

After they left, Miss Pearson, the practical nurse, came to Dr. Dickson's assistance and untied her. Dr. Dickson went upstairs and observed that the louvre blades were removed from a window in her bedroom. The house, she said was "in shambles". Her bags had been emptied, jewellery and other items were removed from the bedroom drawers, cupboard and wardrobe. The intruders took her television, radio, component set, record player, camera, video cassette recorder, money and other household items. They cut the telephone wires. Dr. Dickson drove to her neighbour's

home and from there she telephoned her son, Kwesi Dickson, the police and her gynaecologist. Shortly after she returned home, the police came. Her son had arrived before the police. Dr. Lloyd Goldson, the Gynaecologist, visited her and medically examined her.

On the 15th of May, 2002, at about 10:15 a.m., she went to the Papine Police Station and identified, among other things, a bracelet with turquoise at the end, a gold chain with stripe semi-precious stone which she designed, a chain with jade pendant, a pair of gold bangles made in Guyana, a jade and gold bracelet, a Garth Sanguinetti ring with floral design, a silver ring with butterfly, a ring with silver coloured stone (given to her by her father), a silver ring with turquoise, CDs of Mario Lanza, Teacher, Portuguese and classical CDs. These items were identified in the presence of the appellants as things taken from her house on the night of the 7th of May, 2002.

Mr. Kwesi Dickson testified that he received a telephone call from his mother at about 4:00 a.m. on the 8th May, 2002, and arrived at her house shortly thereafter. He noticed that some of the louvre blades had been removed from a window in his mother's bedroom. He saw those blades on the ground outside the house. He saw the police take the blades. He was present when the police dusted the blades for finger-prints. He also pointed out a cookie tin to the police and saw the police dust it for finger-prints.

Detective Sergeant Wayne McKenzie testified that on the 9th of May, 2002, at about 4:00 a.m. he, armed with a search warrant, went with other police officers to a

house on Scott Level Road in the Jacks Hill area. There, he saw the appellant Duncan sitting on a bed inside a one bedroom house. The police party searched the room but found nothing. They questioned Duncan who took them to an unfinished house behind the bedroom. There, he pointed to a spot on the ground where he said something was buried. By digging, the police extracted from the ground a blue tarpaulin with the ends tied together. The police untied the ends and saw jewellery, a component set, a VCR, a number of CDs, some tools and a black plastic bag. Inside the bag were a firearm and other items. Sergeant McKenzie told Duncan that the household items in the tarpaulin fit the description of those stolen from the Dickson's house down the road. He cautioned Duncan, who said that he "did not do anything, he only helped his Uncle Tony carry them up there and bury them."

Detective Sergeant McKenzie enquired of the whereabouts of 'Tony' and was told that District Constable Bogle knew where he lived. The appellant Duncan and the items found at the location were taken to the Papine Police Station. Detective Sergeant McKenzie contacted District Constable Bogle who, at about 6:30 a.m., took a party of policemen to Dallas Castle. Detective McKenzie and the party of police personnel were taken to a house. They surrounded the house. One of them knocked on the door. Someone inside asked, "Who is that?". "Police" was the reply.

Detective Sergeant McKenzie looked through a window and saw a man hurriedly taking off chains from around his neck, rings off his fingers and a watch off his left wrist. The man placed these things under a mattress. District Constable Bogle and the

police went inside. The man, who was seen through the window, was identified by District Constable Bogle as 'Tony' a.k.a 'Pope' and was later identified as the appellant Ellis. Detective McKenzie raised the mattress and removed the jewellery which Ellis had hidden there. He told Ellis that he suspected that the items of jewellery were stolen from the Dickson's house in Jacks Hill. Ellis replied "Officer, from mi come from prison, a mason work mi a do. A Prince and Drench give mi dem". Ellis and the items recovered were taken to the Papine Police Station and along with Duncan, were handed over to Detective Corporal Anderson.

Detective Corporal Michael Anderson testified that he received a report and went to the Dickson's house during the morning hours of the 8th of May, 2002. There, he saw and spoke to Dr. Dickson. Subsequently, the appellant Duncan was handed over to him along with a Samsung VCR, Kenwood turntable, Sony Hi-Fi stereo system, a quantity of jewellery, a home-made hand gun, among other things wrapped in a tarpaulin. At the same time the appellant Ellis was also handed over to Detective Corporal Anderson.

Both Duncan and Ellis were cautioned. Duncan said nothing. Ellis said "Officer, a mi girlfriend Hyacinth jewellery". On the 21st of May, 2002 Detective Corporal Anderson took the home-made shot gun to the Government Forensic Laboratory. On the 27th of May, he retrieved the home-made shotgun and received a ballistic certificate.

Pursuant to orders of a Magistrate, the finger-prints of both appellants were taken by the police on C.I.B. 21 Forms.

Detective Corporal Norris Nelson testified that at about 9:30 a.m. on the 8th of May, 2002, he and Detective Corporal Roye went to the Dickson's residence. There, Kwesi Dickson pointed out a cookie tin and two (2) louvre blades. Corporal Nelson dusted the blades and the cookie tin and developed latent fingerprints.

Detective Corporal Irving Roye testified that he took photographs of the prints developed by Detective Corporal Nelson and made photographic enlargements of them. Subsequently, he made photographic enlargements of right thumb impressions made on two (2) C.I.B. Forms. Detective Sergeant Devon Harris, a Fingerprint Expert, testified that he received from Detective Corporal Roye photographic enlargements of developed latent finger impressions. He also received from Detective Corporal Anderson C.I.B. Forms with ink-rolled finger impressions, one in the name of Prince Duncan and one in the name of Herman Ellis. He compared the finger-prints on the forms with the photographic enlargements of the developed latent impression. Thereafter, he handed the two (2) C.I.B. Forms 21 to Detective Corporal Roye with certain instructions.

He subsequently received from Detective Corporal Roye photographic enlargements of finger impressions made on C.I.B. Forms. He examined and compared the finger impressions on the C.I.B. Forms with the developed latent impressions.

According to the expert, the finger impressions of each appellant taken pursuant to the Court Order and finger impressions found on the blades taken from the scene of the crime were identical. The expert testified that in respect of each appellant, he found as many as sixteen (16) ridge characteristics in coincident sequence. He concluded that each appellant's fingerprint impressions were at the scene of the crime, and explained that no two (2) or more persons have the same fingerprints.

**The Defence**

Both appellants gave unsworn statements. The appellant Duncan's statement is to the following effect:

He is from Scott's Level Road, Jacks Hill. During the morning of the 8th of May, 2002, a number of policemen entered his home. Some entered his house in which he, his baby mother and his younger siblings were. The police frisked him and searched the house. They found nothing incriminating. He heard someone outside of the house say, "Bring the boy come, we find something." He was escorted from the house to the street where he saw a jeep. He was shown a tarpaulin with things thereon and asked what he knew about them. Before he could answer, the police began to beat him. He was beaten to a state of unconsciousness. When he came to himself, he realized that he was at the police station. He was questioned about the robbery at the Dickson's residence. He denied knowing anything about it.

The appellant Ellis' statement is, essentially, as follows:

He is from Dallas Castle, St. Andrew. On the morning of the 8th of May, 2002, he was getting ready to go to work when he heard knocking on the door. "Who is that?" he asked. "Police", the reply came. His girlfriend opened the door. Three (3) policemen and a soldier rushed inside. When, in answer to them, he told them his name, they told him that they had information that he had committed robbery and rape. He told them that he knew nothing about what they accused him of. He was beaten and taken to the police station.

At the Station the police showed him "some things in a tarpaulin" and asked him if he knew anything about them. He denied knowing anything about them. A policeman told him that he was "going to use pen and paper and put me away." The policeman took him to an office where he was fingerprinted.

**Grounds of Appeal**

Mr. Oswest Senior-Smith, Counsel for the appellants, was granted leave to argue the following supplemental grounds of appeal:

1. The learned trial judge's summation was seemingly unconsidered and did not reflect a sufficiently reasoned arrival at the verdicts.

2. The learned trial judge failed to warn himself of the danger of acting upon the uncorroborated evidence of the victim of a sexual assault and thus deprived the appellants of the protection of the law.

**Ground 1**

Counsel for the appellants submitted that the learned trial judge did not demonstrate in a palpable way his thought processes in arriving at his verdicts. He contended that the learned trial judge failed to present a review, analysis and/or appreciation of the law and the evidence. Further, he submitted that the burden and standard of proof were not adverted to by the judge and his judgment appeared perfunctory.

Miss Palmer, for the Crown, submitted that, although the Judge's summation could not be described as thorough, it was certainly adequate, in that the judge correctly and sufficiently addressed the relevant issues. Miss Palmer referred to aspects of the judge's summing up with a view to demonstrating that, in the circumstances of the case, it was adequate and fair.

We agree with the view expressed by both counsel that, in the circumstances of this case, a more detailed summation was desirable. However, we are not here dealing with a jury trial but with a trial by a judge alone. This court has stated on many occasions that when a judge sits alone it will be presumed that he knows the relevant law, but he must demonstrate that he has applied it. – See **R v Fletcher,** SCCA 85/98 delivered December 20, 2000, and **R v Cameron** (1989) 26 JLR 453. In **R v Fletcher**, the court said; "It is the language which the judge uses that will reveal his thought processes that he in fact applied the relevant law".

Although the learned trial judge did not specifically refer to the burden of proof and the standard of proof, he used language which, in our view, clearly indicates that he applied the relevant law. At **p. 287** of the transcript, the judge said:

> "Well, the main evidence on which the prosecution relied is that of fingerprints, so some care must be taken to review the evidence to see that the prints on which the prosecution relies were properly collected and the subsequent analysis thereof."

The learned judge then referred to the submissions of defence counsel that the prosecution had failed to establish that the blades came from the window of the Dickson's house. He thereafter proceeded to examine the prosecution's evidence in that regard. At the end of the exercise he said:

> "I accept the evidence that the blades were from that window".

Having made that finding of fact, the judge went on to consider the evidence of the fingerprint expert. No complaint was made as to his approach to the expert's evidence. At the end of the examination of the evidence of the expert and police witnesses, the judge said:

> "So then, an accused need not give any evidence to prove his innocence and it is the same principle that applies in this case, but if prints as I have accepted, were found at the house, and no explanation is given as to how the prints came to be on the window which was broken, then it is reasonable to conclude after hearing the unsworn statements of the accused men that they must have been at the house to leave their prints on the blades."

Having so found, the judge was entitled, as Ms. Palmer submitted, to conclude as he did, that the appellants were involved in the burglary and rape on the basis of common design. In **R v Junior Barton** S.C.C.A 21/85, **B** was convicted of the murder of Mr. Joslyn Guthrie. The facts are that the Guthrie's house was burgled by a number of men, one of whom shot and killed Mr. Guthrie. **B's** conviction was based entirely on fingerprint evidence. His fingerprint was found on a glass louvre blade situated above the space where two (2) panes of glass louvres had been removed by the persons who had broken and entered the house. **B** made an unsworn statement denying his involvement. On appeal, it was contended, inter alia, that the expert's evidence relating to fingerprints was incapable of establishing that the applicant was involved in a common design to commit murder.

In delivering the judgment of the court, Carey, J.A. said:

> "...it is enough to say that if the jury accepted that the finger-print was that of the applicant and was found in the region of where the louver blades had been removed, and a place where finger-prints are not usually to be found, then the inference was inescapable that the person must have been concerned with the crime committed on the basis of common design"

After dealing with the fingerprint evidence, the trial judge went on to consider the evidence in relation to the finding of items removed from the Dickson's residence and found in the possession of the appellants. He examined the circumstances of the

recovery of the items stolen from the Dicksons and Dr. Dickson's identification of these items. He accepted the prosecution's evidence in this regard. At page 304 of the transcript, the learned judge stated:

> "There is also ample evidence, evidence which I will not go over at this stage, to prove that count three and count four have been satisfied by the Crown. There is ample evidence also, to establish the proof of count two, burglary..."

He thereafter addressed the offence of burglary.

Earlier, at p. 301, the learned judge had given an outline of Dr. Dickson's evidence and also the evidence of Sergeant McKenzie. We do not agree with Counsel for the appellants that the learned judge failed to review and analyse the evidence. In our view, the learned judge sufficiently reviewed and analysed the evidence and clearly demonstrated an appreciation of the relevant law. We entertain no doubt that the language he used indicates that he was mindful that the burden of proof rests on the prosecution and of the requisite standard of proof. This ground, accordingly, fails.

**Ground 2 – Corroboration Warning**

The complaint in this ground is that the learned trial judge failed to warn himself of the danger of acting on the uncorroborated evidence of the victim of a sexual assault.

Mr. Senior-Smith submitted that this non-direction was a fatal misdirection rendering the conviction on count 3 (rape) unsustainable. Counsel relied on **R v**

**Clifford Donaldson et al** 25 JLR 274 and **R v Hubert Fletcher** SCCA 85/98 delivered 20th of December, 2000.

Counsel for the appellants contended that the instant case could be distinguished from the cases of **R v Chance** (1988) 3 WLR 661 and **R v Derrick Williams** SCCA No. 12/98 delivered 16th of April 2001. In the latter cases, he argued, identification warning was a part of the directions given during the summation. Thus, the warning as to the danger of acting on uncorroborated evidence would be superfluous.

Miss Palmer for the Crown submitted that in the circumstances of this case, no corroboration is required. The warning was not required, she argued, because the commission of the offence of rape was not a live issue. The Crown's case, she pointed out, rests on fingerprint evidence and evidence of recent possession.

In her submissions she made reference to **R v Castleton** 3 Cr. App. R 74, **R v Chance** (supra), **R v Derrick Williams** (supra) and **The Queen v. Rennie Gilbert** P.C. Appeal No. 10 of 2001 delivered 21st of March, 2002.

There has been a trend, in the development of the law, towards the abrogation of the corroboration requirement in sexual offence cases. In **R v Derrick Williams** (supra) **Forte P.** carefully examined the development of the common law in this regard.

At common law a judge was required to warn a jury that it would be dangerous to convict on the uncorroborated evidence of a victim of a sexual assault. This common

law requirement was fully enunciated by their Lordships' Board in **James v. The Queen** (1970) 55 Cr. App. R. 299.

In **R v Clifford Donaldson et al** (supra) this Court held that the rule applied with equal force where the only live issue was identification. However, in **R v Chance** (1988) 3 All E.R. 225, the English Court of Appeal held that in a case where the only issue was identification, the full corroboration warning need not be given.

In **R v Donovan Wright** SCCA 30/96 delivered January 12, 1998, this court stated that a distinction must be made between a case where there is a single charge of a sexual offence and a case where non-sexual offences, such as robbery and burglary, are also charged in relation to the same woman.

The Court was of the view that in the former case, even where the only issue was one of identification, the warning ought to be given, whereas in the latter case the **Turnbull** direction was sufficient.

In **R v. Anthony Legister** and **Lincoln Facey** SCCA Nos. 87 and 88/98 delivered December 20, 2000, the Court, following **Wright,** said that where the only charge was one of rape and despite the fact that the only issue was one of identification, the warning on corroboration and reason for it were obligatory. However, Cooke, J.A. (Ag.) (as he then was) referred to the changes effected by statute in England and expressed some doubt as to whether the "corroboration rules are necessary for the due administration of justice".

In **Derrick Williams** (supra) the offences charged were illegal possession of a firearm and rape and the major complaint on appeal was that the trial judge failed to warn himself of the dangers of acting on the uncorroborated evidence of the victim. Forte P., after reviewing the authorities to which we have referred among others, stated (p.11):

> "...Where there is no challenge to the fact that the offence (rape) has been committed, and the only defence offered is one of mistaken identity, rather than a purposeful identification made because of some ulterior motive, then it will be sufficient if the traditional warning given in cases of sexual offences is omitted, but the warning on the Turnbull principle is given".

Forte, P. was of the view that the corroboration warning in sexual cases had outlived its usefulness and recommended legislative intervention.

In early 2002 the rule requiring the corroboration warning in all sexual cases fell to be considered by their Lordships' Board in the **Queen v. Rennie Gilbert** (supra). This was an appeal from a decision of the Eastern Caribbean Court of Appeal (Grenada) (the ECCA). The ECCA had, in **Pivotte v. The Queen** (1995) 50 W.I.R. 114, rejected the approach adopted by the English Court of Appeal in **R v Chance** (supra) and held that the corroboration warning must always be given.

Their Lordships examined the justification for the rule. The Board reviewed the decision in **James v The Queen** (supra) in the light of the approach adopted by the English Court of Appeal in **Chance**. (see paras. 9, 10 and 11). Their Lordships

approved the view expressed by that Court of Appeal that the decision in **James** must be read subject to the qualification that what, if any, warning a judge should give, would depend upon what were the live factual issues on the evidence given at the trial. Their Lordships held that the ECCA erred in holding that in all sexual cases the full corroboration warning should be given. The Board expressed the view that "the mandatory corroboration warning does not add to the fairness of the trial nor aid the achievement of safe verdicts". The rule "was based upon the discredited belief that regardless of the circumstances the evidence of female complainants must be regarded as particularly suspect and likely to be fabricated. This belief is not conducive to the fairness of the trial nor to the safety of the verdict".

An important question was whether the rule requiring the said corroboration warning could only be abrogated by statute as had occurred in England by the Criminal Justice and Public Order Act 1994. Their Lordships held that the rule was not a rule of law and was "liable to be reassessed in the light of further experience or research and reformulated in order to better perform its function".

In their Lordships' opinion "the rule has become counter-productive and confusing". And "the rule of practice which now will best fulfil the needs of fairness and safety" is that set out in the following passage from the judgment of **Lord Taylor C. J.** in **Makanjuola** (1995) 1WLR 1348 at 1351:

> "...whether, as a matter of discretion, a judge should give any warning and if so, its strength and terms must depend upon the content and manner of the

witness's evidence, the circumstances of the case and issues raised. The judge will often consider that no special warning is required at all. Where, however, the witness has been shown to be unreliable, he or she may consider it necessary to urge caution. In a more extreme case, if the witness is shown to have lied, to have made previous false complaints, or to bear the defendant some grudge, a stronger warning may be thought appropriate and the judge may suggest it would be wise to look for some supporting material before acting on the impugned witness's evidence. We stress that these observations are merely illustrative of some, not all, of the factors which judges may take into account in measuring where a witness stands in the scale of reliability and what response they should make at that level in their directions to the jury. We also stress that judges are not required to conform to any formula and this Court would be slow to interfere with the exercise of discretion by a trial judge who has the advantage of assessing the manner of a witness's evidence as well as its content".

To summarise

...

(2) It is a matter for the judge's discretion what, if any, warning he considers appropriate in respect of such a witness as indeed in respect of any witness in whatever type of case. Whether he chooses to give a warning and in what terms will depend on the circumstances of the case, the issues raised and the content and quality of the witness's evidence.

(3) In some cases, it may be appropriate for the judge to warn the jury to exercise caution before acting upon the unsupported evidence of a witness. This will not be so simply because the witness is a complainant of a sexual offence nor will it necessarily be so because a witness is alleged to be an accomplice. There will need to be an evidential basis for suggesting that the evidence of the witness may be unreliable. An evidential basis does not include mere suggestion by cross-examining counsel.

> (4) If any question arises as to whether the judge should give a special warning in respect of a witness, it is desirable that the question be resolved by discussion with counsel in the absence of the jury before final speeches.
>
> (5) Where the judge does decide to give some warning in respect of a witness, it will be appropriate to do so as part of the judge's review of the evidence and his comments as to how the jury should evaluate it rather as a set-piece legal direction.
>
> (6) Where some warning is required, it will be for the judge to decide the strength and terms of the warning. It does not have to be invested with the whole florid regime of the old corroboration rules.
> ..."

This decision is, in our view, applicable to this jurisdiction. Therefore, unless otherwise enacted by statute, the guidance given by Lord Taylor should now be followed. The rule requiring a mandatory corroboration warning in sexual cases has been weighed in the balance and found wanting. It should now be only a matter of historical interest.

Turning to the instant case, we entertain no doubt that there was any need to give any warning in respect of Dr. Dickson's evidence. There is no evidential basis whatsoever to suggest that the evidence of the witness might have been unreliable.

It was for the above reasons we dismissed the appeals, confirmed the convictions and sentences and ordered that the sentences commence as of the October 11, 2003.