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NEUROTIC FEMALES, FANTASYING WOMEN AND LYING GIRLS

Bryan Sykes
Judge of the Supreme Court of Jamaica

Introduction

> *It is hoped that in due course, the legislature will examine the validity of this warning which has developed through the common law and which casts a "slur" on the character of our women. The so called necessity for the warning is based on the presumption that our women for "various reasons" may fabricate allegations of sexual offences against our men. There can really be no rational reason in our time, for coming to such a conclusion but even so, a tribunal of fact should be capable of determining her credibility, as it does of witnesses in almost all other cases, without having the support of corroborative evidence. The abolition of the requirement has been accomplished in other jurisdictions and it is our view that the time has come for this to be addressed in our own.*
>
> (per Forte P *Regina* v. *Derrick Williams*[1])

This is perhaps one of the most explicit and scathing criticism, by a Jamaican court, of the mandatory corroboration warning that the common law dictated should be given in sexual offence cases. According to the common law this warning must be given once the

1 SCCA 12/98, slip op 11 (April 6, 2001), Court of Appeal of Jamaica. This is the third expression by the Jamaican courts increasing dissatisfaction with the law in this area. See also *R* v. *Donovan Wright* (unreported) SCCA 130/96 (January 12, 1998) per Bingham JA and *Anthony Legister & Lincoln Fray* v. *R* (unreported) SCCA 85 & 88/98 (December 20, 2000) per Cooke JA (Ag).

offence is a sexual one and it matters not what the specific issue is in the case.

What developed, initially, as a prophylactic against the possibility of erroneous convictions based upon potentially unreliable or suspect testimony began to subvert convictions that rested upon reliable testimony from victims in cases where identity was the sole issue at the trial and none of the "various reasons" that would prompt the corroboration warning was present. The corroboration warning, it would seem, had become an end in itself and not the means to end; the end being a fair trial for both defendant and victim having regard to the issues raised at the trial.

This article focuses on adult female complainants. The burning question is, should the testimony of female adult victims of sexual offences be subject to the corroboration warning when the sole issue is identification in the absence of any reason that would suggest that such a warning would be desirable or necessary? Or to phrase the question another way, shouldn't the identification warning be sufficient to assist the jury to determine the real issue in the case?

While it is agreed that there is the need for reform, unlike the learned President of the Court of Appeal of Jamaica who believes that the legislature should act, it is the contention of this writer that the courts have accomplished what it is suggested the legislature should do. If this conclusion is stated too positively let it be restated in this way: the courts can now achieve the same result through judicial development of the common law.

By an examination of the specific problem of whether the corroboration warning should be given when the sole issue is one of identification it will be demonstrated that the current state of the law has undermined one of the main reasons why the common law required that the warning should be given. It can now be said that the warning is no longer required merely "because ... the offence charged is a sexual offence"[2] irrespective of the real issues for determination. The common

2 Section 32(1) of Criminal Justice and Public Order Act 1994 (UK) reads

Any requirement where by at a trial on indictment it is obligatory for the court to give the jury a warning about convicting the accused on the uncorroborated evidence of a person ***merely*** because that person is –

(a) an alleged accomplice of the accused, or

law, therefore, has achieved the same result as the section 32(1) of the Criminal Justice and Public Order Act 1994 (UK) in respect of the testimony of victims of sexual offences other than children.

The ultimate conclusion of this analysis is that a trial judge now has a wide discretion in the trial of any sexual offence, other than those in which children are victims, to decide whether any warning should be given and the content of such warning. No longer should there be a mechanical application of the law, the warning should be case specific having regard to the factual issues raised.

The reasons for warning

The corroboration warning developed at common law because it was believed that certain categories of witnesses were unreliable at worst or suspicious at best and to convict anyone on their testimony alone was undesirable unless the deciders of fact were fully alerted to the possible unreliability of the witnesses as well as the reasons for their unreliability.

These categories were children of tender years, accomplices, complainants in sexual offences and persons of bad character.[3] As stated earlier the common law practice requiring the corroboration warning developed to prevent wrongful convictions based upon possible unreliable testimony. It was felt that the potential for unreliability while well known to lawyers might not be fully appreciated by lay juries. Once the common law decided that this was the policy behind the warning it now had to formulate a way to "operationalise" this policy. The implementation of the policy took the form of warnings that were to be given to the jury whenever they were considering the testimony of these "suspect" witnesses.

These witnesses were so badly regarded that the jury were told to rigorously scrutinize the "suspect" witness's testimony before they (the jury) relied on it. The jury were to be alerted to the inherent danger of relying on such evidence. The purpose of the warning was to drive home the point that it was always better to have corroboration of the testimony of the "suspect" witness but if there was none then the defendant should

(b) where the offence charged is a sexual offence, the person in respect of whom it is alleged to have been committed; is hereby abrogated. (my emphasis)

It is quite likely that the learned President is mind provisions like this.

3 *DPP* v. *Kilbourne* (1973) 57 Cr. App. R. 381, 395 per Lord Hailsham; *R* v. *Spencer* (1986) 83 Cr. App. R. 277, 281 per Lord Hailsham and per Lord Ackner at 286–288.

not be convicted unless the jury examined the evidence of the "suspect" witness extremely carefully. It is clear, therefore, that the directions were not based on the issues in the case but rather on the source of the evidence.

If this were not complicated enough, the common law demanded that the trial judge vary the content of the warning depending on the presence or absence of corroborative evidence. If there is no corroboration then the judge should so inform the jury and explain its significance. He should also say why it would be dangerous to convict without corroboration.[4] On the other hand if the judge decides that there is evidence capable of providing corroboration then he should point out this evidence to the jury but ultimately leave it to them to decide if the potentially corroborative evidence corroborated the witness.[5] The corollary of this is that if the jury concluded it did not corroborate the witness then they should treat the evidence of the "suspect" witness as uncorroborated.

The reasons for the warning *as appropriate for each category of "suspect" witness* should also be pressed upon the jury.[6] This meant that the *content of the warning* would vary according to the category in which the "suspect" witness fell. In other words, the requirement for category-specific warning meant that the content of the warning was informed by the specific reasons why the testimony each category of "suspect" witness should be approached with caution.

One writer on the law of evidence submits that in the case of children suspicion arose because "of the risks of hysterical invention, childish imagination and collusion".[7]

Judson J of the Supreme Court of Canada formulated the reasons in respect of children in this way:

> *The basis for the rule of practice which requires the judge to warn the jury of the danger of convicting on the evidence of a child, even when sworn as a witness, is the mental immaturity of children. The difficulty is fourfold:* (1) *His capacity of observation.* (2) *His capacity of recollection.* (3) *His capacity to understand questions put and frame intelligent answers.* (4) *His moral responsibility (Wigmore on Evidence, 3rd Ed. para 506).*[8]

4 *R* v. *Spencer* (1986) 83 Cr. App. R. 277, 286.

5 Id.

6 Supra note 4 at 286, 288.

7 Murphy, Peter, Ed., *Blackstone's Criminal Practice* (1993), at 1820.

It is submitted that these reasons advanced by Judson J on careful reading and thoughtful reflection may apply equally to some adults. This formulation by Judson J reflects his acceptance of the proposition that the risk of unreliability of a child's testimony based upon immaturity and possible misunderstanding of what he or she saw or experienced are very real and should never be underestimated. It has also been said that children are quite suggestible and may repeat what they believe an influential adult wishes them to say or they may simply be "coached" do damn the defendant. May be it is time that the law looks at what has been happening in the behavioural sciences to see if the courts 'common sense' position is actually supported by empirical evidence. Be that as it may, this is how the law regards the testimony of children.

The danger of acting upon the uncorroborated evidence of accomplices, in the eyes of some, is self evident. But having said this it is not entirely clear that the full warning is needed in every case. It is certainly true that accomplices may attempt to avoid or minimize their role in the crime being prosecuted or they may simply fabricate evidence. Accomplices who testify for the prosecution are often criminals who are seeking the *quid pro quo* of a lighter sentence or to escape prosecution altogether in exchange for their testimony. Indeed, when one looks at the ranks from which these persons come it is perhaps not surprising that the common law sought to alert juries to the dangers of acting upon their evidence alone.[9]

With regard to complainants in sexual cases the reasons often stated for suspecting their credibility are: the charges are easy to make and hard to refute the victims may be neurotic or just plain liars. Perhaps the most modern, sexist statement of why the corroboration warning is considered necessary when the victims are female is that of Salmon LJ in *R* v. *Henry; R* v. *Manning*[10]

> *What the judge has to do is to use clear and simple language that will without doubt convey to the jury that in cases of alleged sexual offences it is really dangerous to convict on the*

8 *Arthur James Kendall* v. *The Queen* (1962) SCR 469, 473 quoted by Haynes JA in *The State* v. *Alfred Keliman* (1975) 26 WIR 436, 440.

9 Supra note 7 at 1821.

10 (1969) 53 Cr. App. R. 150.

evidence of the woman or girl alone. This is dangerous because ***human experience has shown that in these courts girls and women do sometimes tell an entirely false story which is easy to fabricate, but extremely difficult to refute. Such stories are fabricated for all sorts of reasons, which I need not now enumerate, and sometimes for no reason at all.***[11] (My emphasis)

A clearer judicial statement that female victims in sexual offences are pathological liars could hardly be found. While it is accepted that some alleged victims lie, to conclude that the lie is told *because* of the victim's gender is a difficult proposition to establish either a *priori* or empirically. It is strongly suspected that no behavioural scientist would attempt to establish such a proposition empirically. Even if it is said that the neurotic or lying witness may be either male or female, it is quite a stretch to argue that victims in sexual offences are more prone to lie than victims of any other type of crime merely because they are the alleged victims of a sexual offence. Has it ever been suggested, for example, that female victims of common assault, a charge that can be easily made (some would say it may be easier to make) are less prone to lying than female victims of sexual offences? Are common assault victims less neurotic? No one has suggested that the law should demand a corroboration warning in common assault cases.

Salmon LJ was expressing, in the twentieth century, a centuries old prejudice long held by the judiciary of women who were complainants in sexual offences. This view has found expression in the ancient texts of Sir William Hawkins and Sir Matthew Hale.

The prejudice existed not only in the United Kingdom but also in the West Indies. Satrohan Singh JA, speaking for the Eastern Caribbean Court of Appeal in *Pivotte* v. *R*,[12] after quoting Salmon LJ, added approvingly, *"[s]ome of the reasons mentioned therein were sexual neurosis, fantasy, spite or refusal to admit consent because of shame".*[13]

In a less charitable time Sir William Hawkins said that if a woman conceived after she was raped that may be evidence of consent.[14]

11 (1969) 53 Cr. App. R. 150, 153.

12 (1995) 50 WIR 114, 117.

13 Id at 117.

14 1 Hawkins, William, *A Treatise of the Pleas of the Crown*, ch. 42 § 2 p. 108, (Garland Publishing, Inc. 1978).

Sir Matthew Hale wrote of some women:

> *But on the other side, if she concealed the injury for any considerable time after she had opportunity to complain, if the place, where the fact was supposed to be committed, were near to inhabitants or common recourse or passage of passengers, and she made no outcry when the fact as supposed to be done, when and where it is probable she might be heard by others; these and the like circumstances carry a strong presumption, that her testimony is false and feigned.*[15]

Sir Matthew, informed more by male prejudice than by reason, was laying down a "law" of female behaviour. If she was quiet in circumstances when she could have screamed or made no complaint for some "considerable" period of time after the crime she was presumed to lie! Although the law accepted that rape was a serious crime the victims of sexual offences were second class citizens in the legal kingdom simply on the basis of the crime they alleged was committed against them.

What is corroboration?

This question was answered in English jurisprudence by the famous case of *R* v. *Baskerville,*[16] a case dealing with accomplices. It is necessary to set out the much quoted passage in order to make some important observations.

> *We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed but also that the prisoner committed it.*[17]

The Baskerville definition was in response to a question that the court itself had posed namely whether evidence can be said to be corroborative if it relates only to an incident in the crime but does not connect the accused with it or if it relates to the identity of the accuse but does not connect him to the crime.[18]

15 1 Hale, Matthew, *The History of the Pleas of the Crown* ch. 43 p. 635 (London Professional Books Ltd., 1971).

16 Cr. App. R. 81.

17 Id at 91.

18 Id at 89.

Corroboration in sexual offences

In *R* v. *James*[19] the complainant, an adult woman, was raped. The fact of the rape was not in issue. The issue was who raped the victim. The facts suggest that the complainant might have had some difficulty in identifying the attacker despite the fact that he spent over five hours in the home of the complaint. He attacked her at 10:30 pm as she was about to enter her room, forced her inside, raped her and stayed there until 5:10 am. At 4:45 pm the same day she purported to identify the defendant while standing at her house when she saw three men walking down the road. When he was held by the police he vehemently denied any involvement in the crime.

In his summation to the jury the learned trial judge made a number of critical errors including directing the jury that medical evidence of sexual intercourse alone could amount to corroboration. This was clearly incorrect since evidence of sexual intercourse is consistent with both consensual and non-consensual intercourse. In the context of the case, the most egregious error made by the learned trial judge was his failure to alert the jury to approach the identification evidence with great care. This latter omission was sufficient to reverse the conviction. Nevertheless Viscount Dilhorne took the opportunity to cast the *Baskervillian* shadow over this area of Jamaican law by stating that in cases of rape the corroborative evidence must confirm "in some material particular" that (a) sexual intercourse took place, (b) it was without her consent and (c) it was committed by the accused.[20] This way of formulating the law was said, in a later case, to give "rise to practical difficulties".[21] The definition of corroboration applied by the Privy Council was obviously the Baskerville definition.

Viscount Dilhorne sought to justify his proposition by suggesting that there is an enhanced possibility of erroneous identification in a sexual offence. His Lordship said:

> *In sexual cases, in view of the possibility of error in identification by the complainant, corroborative evidence confirming in a material particular her evidence that the accused was the guilty man in just as important as such evidence confirming that intercourse took place without her consent.*[22]

19 (1971) 55 Cr. App. R. 299.

20 Id at 302.

21 *R* v. *Gilbert* [2002] 2 WLR 1498 (PC).

It is somewhat far fetched to suggest that victims of a sexual offence are more prone to error than victims in other types of cases when sexual offences by their nature bring the assailant in close proximity to his victim. His Lordship's observations would have greater force if the phrase "possibility of error in identification" were modified to read "possibility of fabrication". In the modified version there would be an "error" but the cause of the "error" in identification would not be an honest mistake but a lie. At least this would be consistent with some of the reasons expressed earlier why the corroboration warning was developed in sexual offences. If, however, my attempt at providing a better reason than that provided by the learned Law Lord is just as unacceptable as those which he adduced, it is nearly impossible to justify isolating victims of sexual offences for the dubious honour of being more error prone in identifying their attackers than victims of other crimes. Not even the developments in the law of identification have gone so far as to suggest that some kinds of witnesses are more prone to error in identification than others.[23]

To be fair to Viscount Dilhorne his reasoning is consistent with two of the three commonly cited cases emanating from the English Court of Appeal that decided that the corroboration warning should be given in sexual offences when the sole issue is identification. These three cases are now examined.

The English Position

The three significant cases are *R* v. *Sawyer*;[24] *R* v. *Clynes*;[25] and *R* v. *Trigg*.[26] Close analysis will show that the first of these cases did not decide what has been subsequently attributed to it. Consequently, the later decision of *Clynes*[27] which purported to follow *Sawyer*[28] is based on a misunderstanding of that case. The error was repeated in subsequent cases. This misunderstanding was introduced into Jamaican juris-

22 Supra note 19 at 302.

23 See *R* v. *Turnbull* [1977] QB 224; *R* v. *Scott* & *Walters* (1989) 89 Cr. App. R. 153.

24 (1959) 43 Cr. App. R. 187.

25 (1960) 44 Cr. App. R. 158.

26 (1963) 47 Cr. App. R. 94.

27 Supra note 25.

prudence, an error from which the recovery process has started but is not yet complete.

In *Sawyer*[29] the appellant was convicted of an indecent assault upon a nine year old male child. The defence at the trial proceeded on the assumption that the assault had taken place but that the complainant was mistaken in his identification. The Deputy Chairman in directing the jury told them that he would not *"worry [the jury] with the questions of law and corroboration in this charge which one has to deal with in normal cases"*.[30] There was in fact evidence from another young boy that was capable of corroborating the testimony of the victim.

The Court of Criminal Appeal quashed the conviction on the grounds that the directions were wrong and the jury must be warned of the "the danger of acting upon the uncorroborated evidence of the complainant".[31] The Lord Chief Justice while reaffirming the existence of the corroboration warning rule said:

> *This is particularly so when the complainant was a child who, true, was sworn yet in fact was only nine years old. It is true that there was evidence capable of amounting to corroboration in that the other small boy, Michael [the potentially corroborating witness] had himself been with Andrew [the victim],' but even so, in regard to that small boy there ought, in the opinion of the court, to have been at least a general warning given to the jury as to the danger of acting on the evidence of small children, whether the child in question was the complainant or was a child claiming to corroborate the complainant.*[32]

A careful reading of this passage reveals the following points. The court implicitly accepted that one child can corroborate another. In spite of this, the frailty of child-testimony should have been pressed upon the jury. This was not done. As noted already, the testimony of children has always been regarded as potentially unreliable regardless of the nature of the offence. Added to this weakness was the fact that the case involved

28 Supra note 24.

29 Id

30 Supra note 24 at 190. The case was undoubtedly treated by the court as one of identification. The difficulty was that the witnesses were children.

31 Id

32 Id. at 190

a sexual offence. In effect there were two strikes against the complainant in this case: he was a child and he was a victim of a sexual offence. There is nothing to suggest that the circumstances of the identification were questionable. It is submitted that the concern of the court was that jury were not told of the danger of acting upon the evidence of young children.

There is another passage from the judgment that requires closer scrutiny. The court expressly recognized that if there was in fact corroboration, the failure to give the warning may not necessarily be fatal.[33] What did the court mean? The court was saying but for the fact that the evidence involved children, a fact that attracts at the very least a direction to approach child testimony with caution, it might have been prepared in appropriate cases to uphold convictions if the corroboration warning was not given. If this is correct then it is submitted that the court was not laying down a general proposition that once the offence is a sexual one there must necessarily be a corroboration warning but rather the court decided that child witnesses form a special category which attracts the corroboration warning regardless of the offence committed. This submission is reinforced by the pointed statement made by the court that it was concerned that the jury were not directed on the dangers of acting upon the evidence of "these small children".[34] It is submitted that, properly understood, the case was disposed of by applying the law relating to the testimony of young children and not the law of identification *per se*. Therefore, it is unlikely that a conviction for any offence would have been upheld given the omission to direct the jury adequately on the testimony of children.

In *R* v. *Clynes*[35] an adult woman was indecently assaulted. The appellant was identified as the perpetrator. The only issue was the identification of the assailant. On appeal, the court rejected the submission of the prosecution that where the only issue is identification there is no necessity for the court to give the corroboration warning. This submission eventually prevailed in *R* v. *Chance*.[36] In rejecting the submission, Streatfield J relied on *Sawyer*:[37] in his Lordship's view

33 Id at 191.

34 Id at 191.

35 Supra note 25.

36 [1988] 3 W.L.R. 661.

37 Supra note 24.

Sawyer[38] decided that even where the only issue in a sexual offence was identification the corroboration warning must be given.[39] It is submitted that Streatfield J misstated the basis of the decision in *Sawyers*.[40] This misstatement occurred because Streatfield J formulated his major premise at a higher level of generality than was required for the case before him.

This error by Streatfield J has been present in English law until *Chance*.[41] There was no analysis of the reasons why a corroboration warning should be necessary in the case of an adult woman where none of the reasons that prompt the warning is present.

The *Clynes case*[42] also suffered from a number of other defects. The jury were not properly directed on how to deal with an alleged lie the appellant told the police which might have amounted to corroboration. The learned trial judge multiplied his errors when, in the opinion of the court, he referred to evidence that was not capable of amounting to corroboration as being potentially corroborative of the complainant. The final "sin" committed by the learned trial judge was that he did not define what he meant by corroboration. The jury were therefore left to fend for themselves in the legal thicket created by the trial judge without being given adequate tools. They were being asked to apply a legal concept without it being defined. Not surprisingly the conviction was quashed.

In the final analysis, the case was presented to the jury as one with corroborative evidence when this was plainly not the case. Having regard to the number and significance of the errors committed by the trial judge the case could have been disposed of without relying on *Sawyer*.[43] Therefore, the pronouncement of the court on the effect of the *Sawyer case*[44] was obiter.

The last case in the trilogy is *R* v. *Trigg*.[45] The adult victim was raped. The only issue in the case was the identity of the rapist. The

38 Id.

39 Supra note 25 at 161.

40 Supra note 24.

41 Supra note 36.

42 Supra note 25.

43 Supra note 24.

44 Id.

45 Supra note 26.

summation of the trial judge omitted to give the corroboration warning. The court relied on *Sawyer*[46] and *Clynes*[47] for the proposition that the corroboration warning must be given where the sole issue is one of identification. The intriguing thing here is that the court did not articulate any reason, good or bad, why there should be corroboration when the sole issue is one of identification. The necessity for articulating clear and convincing reasons why the corroboration warning is needed was even more critical in this case since the court described the testimonies of the witnesses as "very positive".[48]

The appellant was positively identified by three witnesses. There was no suggestion that the victim or witnesses had any of the "various reasons" to fabricate evidence. The decision is made even more remarkable because of the acknowledgement by the court that there was evidence capable of providing corroboration.[49] Despite all the strengths of the case and the absence of the "various reasons" that would suggest that the corroboration warning is necessary the court felt it could not apply the proviso. This is a clear demonstration of the rule becoming an end in itself and not a means to an end.

Could it be suggested in this case that the adult victim was neurotic, lying or fantasizing?

In giving the judgment of the court in *Trigg*[50] Ashworth J cited *Clynes*[51] as well as the headnote of *Sawyer*[52] and accepted the headnote as a correct statement of the law. The headnote reads:

> *On a charge of a sexual offence it is essential that the summing-up should contain a warning on corroboration and; if the alleged victim was a child, on the approach to the evidence of children generally on the lines laid down in Campbell, 40 Cr. App. R. 95 at p. 102; [1956] 2 Q.B. 432 at p.* 435, *even though the fact of the commission of the offence is not disputed and the only issue is one of identify.*[53]

46 Supra note 24.

47 Supra note 25.

48 Supra note 26 at 101.

49 Id at 100.

50 Supra note 26.

51 Supra note 25. 52 Supra note 24.

53 Supra note 24 at 186.

The headnote makes it quite clear that the evidence of children should be treated with special care but clearly it did not provide a basis for extending the same rule to adult women when the reasons for the rule did not arise where the only issue is identification.

In *R* v. *O'Reilly*,[54] a sexual offence case, Salmon LJ after citing approvingly the trilogy of cases said of the corroboration warning

> *The law, as this court understands it, is that there should be a solemn warning given to the jury, in terms a jury can understand; to safeguard the accused.*[55]

The question is what is the accused man being protected from if the often stated reasons are absent? If there is no question of neurosis, fantasy, spite or shame of prior consent, from what is the accused being protected? If there is no evidence of animosity between victim and defendant, why is an identification warning insufficient? The issue is simply whether the complainant is mistaken. Of course this argument assumes that no child, accomplice or person of bad character is a witness for the prosecution.

What is clear is that these cases show that the Baskerville definition of corroboration was applied to sexual offences. One unfortunate result was that English courts did not in any of the cases question, until *Chance*,[56] whether the Baskerville definition should be applied to sexual offence cases regardless of the issue. This last submission is supported by the observation of Jacob J of the High Court of Australia in the case of *Kelleher* v. *R*[57] His Lordship said:

> *I can appreciate that the strengthening of the rules relating to warning on the dangers of convicting on the uncorroborated evidence of an accomplice was a salutary development, but I do not see that the same rules, stricter that those previously thought to apply, should extend to corroboration in sexual cases.* ***Where there is a development of the law in one field it does not necessarily carry over into a similar field...But when one branch develops, as without so deciding I would think it has in respect of warnings on accomplices, I would need to be satisfied that the same factors which led to that development ought to be carried over into similar but not identical subject-matter of warnings on corroboration in the case of sexual offences*** ... But I must confess that I am puzzled why there is a greater need for corroboration of identification of an alleged rapist or indecent assaulter than of a murder attempter.[58] (my emphasis)

54 (1967) 51 Cr. App. R. 345.

55 Id at 349.

56 Supra note 36.

57 (1974-75) 131 CLR 534.

His Lordship has so eloquently exposed the fundamental error of the English courts. They transplanted, uncritically, the law as developed in relation to accomplices into the law relating to sexual offences without any analysis of whether there should be any modification of the law. The underlying reasons for the warning in the case of accomplices, though similar, are quite different from the reasons for the warning in sexual offences.

The *Kelleher* case[59] laid the foundation for a revision of the law in this area. In this case the defendant was convicted of rape of an adult victim. It was conceded that the complainant was raped and that the defendant was present when she was raped. He denied raping her. The learned trial judge did not give the corroboration warning. This was the point taken in the application for leave to appeal. The court rejected the submission. Barwick CJ failed to appreciate the need for a corroboration warning when the sole issue was whether the complainant was honestly mistaken in her identification of the assailant. The learned Chief Justice found that "the rule of practice as to the warning to be given to the jury is related to reasons which have prompted it."[60] He concluded that no warning is required "where those reasons have no play."[61]

Another way of putting this is to say that the corroboration warning is not required merely because the offence is a sexual one.

It was this reasoning that commended itself to the English Court of Appeal in the case of *Chance*.[62] The complainant ,suffered black eyes, broken teeth and a bruised arm. This was after her house was burgled and she was raped. It could hardly be suggested that she was neurotic, fantasizing, motivated by malice, spite, consented to sexual relations with the convict but is now ashamed. Nor could it be suggested that because she was female simply a liar.

58 Id at 568.

59 Supra at 57

60 Supra note 57 at 543.

61 Id.

62 Supra note 36.

The patent absurdity of requiring the corroboration warning when the sole issue is identification and there are no special circumstances that would suggest the desirability of the corroboration warning was highlighted by Roche J in *Chance*.[63] He said:

> *[I]f one applies the corroboration rules strictly, the woman's evidence about the identity of the intruder requires no corroboration if he confines himself to robbing or stealing, but must be the subject of the usual warning if, having stolen or robbed, he then goes on to rape the woman, despite the fact that the rape would be almost certainly give her more opportunity and more incentive to observe and memorize his appearance than the robbery or theft.*
>
> *If the law demands that in those or similar circumstances the usual warning should be given by the judge, it puts an unexpected and unwelcome premium on rape.*[64]

This passage is really an example of the "practical difficulties" referred to earlier as it shows the difficulty of maintaining the proposition that a corroboration warning should be given in a sexual offence where the only issue is identification. Contrary to Viscount Dilhourne's view that the victim of a sexual offence is likely to have difficulty recognizing her assailant Roche J felt that the victim would in all probability have a greater opportunity to see her assailant – a position consistent with common sense and experience.

The Jamaican and Eastern Caribbean position

The law in Jamaica was in the same unsatisfactory state until the Court of Appeal of Jamaica in *R* v. *Derrick Williams*[65] emphatically rejected its previous decision of *R* v. *Donaldson*.[66] The facts in the latter case were that the three applicants were convicted on an indictment containing six counts: the first count charged them with illegal possession of a firearm, counts two and three with robbery, count four with attempted rape and counts five and six with rape. There were convictions on all counts except the sixth. The convictions on counts four and five were challenged on the basis that the learned trial judge failed to warn himself of the dangers of convicting on the uncorroborated evidence of the

63 Id.

64 Id at 666H – 667A.

65 Supra note 1.

66 (1988) 25 J.L.R. 274.

complainant. The convictions on those counts were quashed. The learned trial judge approached the case as one in which the real and indeed only issue was one of identification. The court through Carey JA said:-

> *There can be little doubt that the cases establish that a jury must be warned against the danger of acting upon the uncorroborated evidence of the victim of a sexual assault, **and that this rule applies with equal force in cases where there is no dispute that the sexual offence has been committed and where the only live issue is identification.***[67] (my emphasis)

The question that arises is how different is this case from *Chance*?[68]

In the Eastern Caribbean Court of Appeal a similar problem arose. In *R* v. *Pivotte*[69] the defendant was convicted on an indictment charging him with housebreaking and attempted rape. He appealed his conviction on the ground that the learned trial judge did not give the corroboration warning. The court agreed and quashed the conviction on the attempted rape count but affirmed the conviction on the housebreaking count! The court correctly appreciated the difference in policy reasons for the identification warning and the corroboration warning but concluded that the identification warning was insufficient for a case of this nature.[70]

Pivotte[71] like *Donaldson*[72] produced the thoroughly unsatisfactory result that on a multi-count indictment that contained sexual and non-sexual offences where the issue was the same in respect of all counts, namely the identity of the criminal, the complainant's evidence was acceptable on the non-sexual offences counts without the necessity of a corroboration warning but debased in respect of the sexual offences.

The much necessary corrective having been done in Jamaica[73] it was now the turn of Grenada. Mr. Gilbert was convicted on indictment that contained a single count of attempted rape. The sole issue at the trial was the identity of the attacker. Mr. Gilbert did not dispute the fact of

67 Id. at 280.

68 Supra note 36.

69 (1995) 50 WIR 114.

70 Id at 117-118.

71 Supra note 69.

72 Supra note 66.

73 See *R* v. *Donovan Wright*, supra note 1.

the rape; his defence was "I am not the rapist." The learned trial judge quite sensibly treated the case as simply one of identification and omitted to give the corroboration warning. He, however, gave the *Turnbull* warning. It is unlikely that the judge unaware of *Pivotte*.[74] It seemed a case of studious and deliberate avoidance of an obviously bad decision. The conviction was reversed in the Court of Appeal. It applied its previous decision of *Pivotte*.[75] The issue for the Privy Council was whether *Pivotte*[76] would be upheld or whether it would approve of the new approach as reflected in *Wright*[77] and *Chance*.[78] The Privy Council applied *Chance*.[79] *Wright*[80] was not cited to the Board.

Lord Hobhouse, speaking for the Board, demonstrated that the decision of the appellate court was based upon the now *"discredited belief that regardless of circumstances the evidence of female complainants must be regarded as particularly "suspect" and particularly likely to be fabricated"*.[81] Lord Hobhouse had great difficulty accepting the proposition that the full corroboration warning must be given regardless of circumstances and what the issues were in the particular case.[82]

In commenting on the corroboration warning Lord Hobhouse said:

> *But the rule was in truth a rule of practice and said to be based upon "long judicial experience" ... The rule is always liable to be reassessed in the light of further experience or research and reformulated in order to better to perform that function. In their Lordships' opinion the rule of practice which now will best fulfill the need of fairness and safety is that set out in the passage they have quoted from the judgment of Lord Taylor of Gosforth in R v. Makanjuola [1995] 1 WLR 1348, 1351-1352. The guidance given by Lord Taylor of Gosforth CJ should now be followed.*[83]

74 Supra note 69. It should noted that *Pivotte* was also an appeal from Grenada which was binding on the learned trial judge. *Pivotte's* case was decided by the Eastern Caribbean Court of Appeal in 1995, four years before the trial of Gilbert. The trial judge seems to have been the same in both cases so ignorance of the *Pivotte* decision is an unlikely explanation for not applying it.

75 Supra note 69.

76 Supra note 69.

77 Supra note 1. *Wright* was decided by the Court of Appeal of Jamaica ten months before *Gilbert* was heard in the Privy Council

78 Supra note 36.

79 Supra note 36.

80 Supra note 1.

81 Supra note 21 at 1507H.

82 Supra note 21 at 1503D-H.

What this means is that the corroboration warning is no longer automatically required "merely" because the offences is a sexual offence. This conclusion is supported by *R* v. *Makanjuola*.[84] *Gilbert*[85] did not involve any statutory provision similar to section 32(1) of the English Criminal Justice and Public Order Act 1994. It was pure common law. It is impossible to overstate the significance of this development.

Makanjuola[86] was an appeal in which section 32(1) of the Criminal Justice and Public Order Act 1994 fell for consideration. The purpose of section 32(1) was to abolish the automatic corroboration warning in sexual offences. The appellant optimistically submitted that the warning ought to be given despite the enactment of section 32 because the "corroboration rules developed in case law was that ... complainants [in] sexual offences may lie or fantasise for unascertainable reasons or no reason at all".[88] These reasons it was further argued "cannot evaporate overnight".[88] Therefore he concluded, "the traditional warnings to juries should continue".[89]

In giving the court's understanding of section 32(1) Lord Taylor of Gosforth said:-

> *If that were right, Parliament would have enacted section* 32(1) *in vain: practice would continue unchanged. It is clear that the judge does have a discretion to warn the jury if he think it necessary but the use of the word "merely" in the subsection shows that Parliament does not envisage a warning being given just because the witness complains of a sexual offence or is an alleged accomplice.*[90]

The court was not prepared to turn back the clock in the light of clear legislative enactment that sought to free trial judges from the duty of giving the automatic "traditional warnings". The learned Lord Chief

83 Supra note 21 at 1508H-1509A.

84 [1995] 1 WLR 1348

85 Supra note 21.

86 Supra note 84.

87 Supra note 84 at 1350E.

88 Id

89 Id

90 Supra note 84 at 1350E.

Justice then gave guidance on the application of section 32(1).[91] This is the guidance Lord Hobhouse approved. This was done even though Grenada, at the time, had no statutory equivalent to the English provisions and the *Gilbert* case[92] was an appeal dealing with the common law.

Section 32(1) was the statutory response to the recommendation of the English Law Commission's Report on the *Corroboration of Evidence in Criminal Trials*[93] which endorsed *Chance*.[94]

There can be no doubt that Lord Hobhouse regarded section 32(1) of the Criminal Justice and Public Order Act 1994 as correctly expressing what the revised rule of practice ought to be. His specific endorsement of the *Makanjuola* guidance leaves no room for arguing the contrary.

The approval by the Board of section 32(1) and *Makanjuola*[95] is not to be taken as extending to accomplices and children because the *Gilbert*[96] case was a sexual offence involving an adult female. There was no issue of accomplice or child testimony. More fundamentally the policy reasons underlying the corroboration warning in those instances are different from those underlying sexual cases. In sexual cases, to repeat, the rationale was that victims are prone to neurosis, fantasizing and lying. Lord Hobhouse should be understood as saying that where in a sexual offence the witness is not a child and neither is the testimony under suspicion for any reason and the sole issue is identification then the corroboration warning is not required. In effect, Lord Hobhouse has arrived at the following proposition which can now be stated with full confidence: the corroboration warning in respect of adult females (and adult male) is not to be automatically given *merely* because the offence is a sexual offence. This, in effect, confers a discretion on the trial judge to decide whether a corroboration warning is required and if it is, what form it should take. The warning should no doubt be influenced by the factual circumstances of the case and the issues that are to be determined when all the relevant evidence has been admitted.

91 Supra note 84 at 1351D-1352C.

92 Supra note 21.

93 Supra note 21 at 1505C.

94 Id.

95 Supra note 84.

96 Supra note 21.

Conclusion

The courts through judgments of Lord Hobhouse, Forte P, Roche J and Barwick CJ in *Gilbert*,[97] *Williams*,[98] *Chance*[99] and *Kelleher*[100] have eroded the main pillar of the automatic corroboration warning in sexual offences where adult females are the victimes. The judges have demonstrated that the corroboration warning based upon the likelihood of adult females lying, being neurotic, fantasizing or ashamed of consenting to sexual relations is no longer valid ... if it ever was. It is submitted that the courts now have a discretion to determine whether a warning of any type should be given in sexual offences in which adult females (and adult males) are the victims. There is now no logical or practical reason to restrict the development of the law to cases where identification is the sole issue and the victim is not a child.

Is this not the same as saying that the corroboration warning need not be given by reason "merely" that the offence is one of a sexual nature? The slur has indeed been removed.

97 Supra note 21.

98 Supra note 1.

99 Supra note 36.

100 Supra note 57.