**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CRIMINAL APPEAL NOS. 113/94**

**COR:** **THE HON MR JUSTICE FORTE JA**
**THE HON MR JUSTICE GORDON JA**
**THE HON MR JUSTICE PATTERSON JA**

**JUNIOR TRAVERSE v. REGINA**

**Mr. Terrence Williams for Appellant**

**Audrey Clarke for Crown**

**25th, 26th July, & 2nd. October 1995**

**GORDON JA**

At the conclusion of submissions in this appeal we dismissed the appeal and confirmed the conviction for carnal abuse entered on 13th October, 1994 and the sentence of six years imprisonment at hard labour and six strokes with a rod of Tamarind switches imposed. We ordered that the sentence should commence on 21st November, 1994. As promised then we now record the reasons for our decision.

In the early evening of the 4th July, 1993, in the parish of Westmoreland the mother of a six year old girl "Jane Doe" left her and her baby sister in the care of the appellant with a request that he put the baby to sleep. This was an exercise that this appellant, a trusted

neighbour, had undertaken before. The mother then went to her shop nearby and subsequently sat watching the television. Strange sounds coming from the bedroom attracted her attention so she went there removing her shoes at the door and saw the appellant in bed with the two infants. The posture of the parties called for further investigation so she pulled off the covering sheet and found "Jane" lying on her stomach legs apart, with her panties displaced and wet at the crotch. A wet rag was between the legs of the child.

She asked the applicant what was afoot and his negative response not found satisfactory she asked him to turn over as he then lay on his stomach. She said his voice sounded nervous and he was trembling. He refused and she forcibly spun him over and he was exposed with his trousers zip down and his penis erect protruding from the open fly.

Incensed, the mother rained blows on the appellant who appealed to her not to make any noise and suggested they could talk it over. She made an alarm while striking him and righting himself he fled through a window. He was chased held and handed over to the police.

"Jane Doe" testified giving details indicating how the appellant had sexual intercourse with her. Her panties the rag and vaginal swabs and smears taken from her were subject to examination by the Government Analyst. Evidence was given of semen and spermatozoa found on the crotch of her panties and blood in the vaginal swab. The Doctor who

examined "Jane" found an absence of her hymen and a discharge from her vagina. He was of opinion that sexual intercourse had taken place but was unable to say when it had happened.

The appellant denied committing the offence. He said he was not lying in bed when "Jane's" mother returned but standing by it and he was reading a bible story. "Jane's" mother he said enquired how she was in that condition but he took no note of what she talked about. She left with "Jane" returned and began to beat him. He made good his escape from the house.

Leave to Appeal was given on the basis that the:

> "Directions on Corroboration were unsatisfactory. Warning as to the danger of convicting on the uncorroborated testimony of young children as also of convicting on uncorroborated evidence in sexual offences not pointed out to the jury. Judge failed to identify whether or not there was corroboration."

The grounds of appeal followed the lead given above and added that the learned trial Judge erred in law in failing to direct the jury that there was no corroboration. Mr. Williams in a spirited presentation made his submissions and provided the authorities on which he relied in support of his prayer that the appeal be allowed and the conviction quashed.

The passage in the summing up challenged for its inadequacy appears at page 4 of the transcript and runs thus:

> "Now, experience has shown us that evidence given by children, particularly in young children, is not always reliable, so it is dangerous to convict on sworn evidence unless corroborated. Corroboration means evidence in a case against the accused which is confirmed in some material particular, not only that the crime has been committed, but that the accused committed it."

This definition of corroboration we readily accept is not classic but it contains the essential ingredients applicable to this case. In sexual offences the definition is tri-partite:

(a) commission of the sexual act,

(b) absence of consent,

(c) Act committed by accused.

This case being one of carnal abuse the issue of consent does not arise and in that (a) and (c) above are incorporated in the definition it is in our view adequate to convey to the jury what the law requires. "Jane Doe" gave sworn evidence and the trial judge's direction on the evidence given by young children was given in the context of this case. The jury had to so consider it. It was not couched in usually recited terms but it was sufficient to alert the jury to the dangers inherent in the testimony of young children and the need for corroboration.

It was suggested to "Jane Doe" in cross examination that she told the court what she had been instructed by her mother to say. She denied this. She said she had been instructed to tell the court what happened. In dealing with

this in his summation the trial judge told the jury at page (8.):

> "you have to view this evidence very carefully. Remember the warning I gave you. From the evidence which "Jane" gave you, is she a child capable of belief? She told you her panty was drawn half way. The mother came and supported it. Further we have something coming from the Government Analyst who said she found semen in the panty. The doctor told you also that he found no hymen. You must ask yourself the question, how did this semen get into the crotch of her panty. You will have to ask yourself the question, was the accused man the author of that."

Later in his direction he enlarged on what he said on the evidence of the infant complainant by endorsing and presenting views expressed by the defence.

> "...The defence is asking you to say you must treat the evidence of the little girl with suspicion, as I told you, that little children of tender years fantasize. In other words, she was just fantasizing that this happened to her, and it wasn't the accused man who did it, and that it came about because (her mother) went into the house, and she was suspicious." P.19.

There was a warning given of the care that was required in dealing with the evidence of a child and the reason for the exercise of care by the jury. There was also a direction of the danger in convicting on the uncorroborated evidence of a young child. Corroboration was defined but the trial judge did not in his summation say that the evidence of "Jane" was uncorroborated neither did

he say that there was evidence that was corroborative of her testimony save in the instance where he said at p.7.

> "So here, the mother is supporting the daughter corroborating her story saying yes, there he was lying in the bed on his stomach."

The word "corroborating" is used very loosely here but is explained in the context that the mother's evidence supported "Jane's in a limited sense, viz: that the appellant was lying in the bed. "Corroborating" which might, unexplained, have been cause for concern is thus rendered a non vitiating factor.

I now turn to a consideration of some cases in which the failure of the trial judge to give adequate warning of the danger in acting on the uncorroborated evidence of complainants was the focus of appeals. In **R v. Leonard Trigg** (1963) 47 Cr.App.R 94. The headnote reads as follows:

> "Where no warning with regard to corroboration has been given in a case where corroboration is required as a matter of law or practice the Court will generally refuse to apply the proviso to section 4(1) of the Criminal Appeal Act 1907.
>
> Conviction quashed in case of sexual offence, where the only issue was that of identity of the offender and where no warning with regard to corroboration had been given."

In his judgment Ashworth J said at P.99.

> "I now turn to what is of substance. There was no direction whatever in regard to corroboration and counsel is unable to recollect whether in fact the topic was referred to at all during the trial. That there should have been such a direction is now well

> established. In the case in this court of Sawyer 1959) 43 Cr. App. R.187 the headnote reads: On a charge of a sexual offense 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 P102 (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 identity.'"

In **The State vs Alfred Kellman** (1975)26 WIR 438 two girls were carnally abused by their step father. Each child was an eyewitness to the offence involving the other. The medical evidence was unhelpful and there were no physical signs of injury. The trial judge did not warn the jury that it is dangerous or unsafe to convict on either count on the uncorroborated evidence of children of tender years; he never used the word "warn or caution"or told them of any danger or risk in convicting if they did not find corroboration although he did explain that corroboration is always looked for as a matter of law in sexual cases.

On appeal to the Court of Appeal in Guyana it was contended on behalf of the appellant that the cumulative effect of the judge's directions did not amount to a sufficient warning to the jury that it was unsafe to convict on either count on the uncorroborated evidence of children of tender years.

> Held "(Per Haynes JA) (i) That the jury were not in terms or effect warned as they ought to have been, in

> a sexual offence on children of tender years that they should be cautious before convicting the appellant on uncorroborative evidence. This prima facie, would be fatal to the conviction unless there has been no substantial miscarriage of justice
>
> (ii) That the crucial question is whether the state has in relation to each count, such substantive corroboration apart from the evidence of the other child that the court feels sure that if a proper warning had been given, a reasonable jury would inevitably have convicted the appellant
>
> (iii) That the only other bit of evidence which could possibly be corroborative is that of Mary Hellman, the children's mother, about Barbara's distressed condition, but it was not entitled to much weight as it was not observed until some four hours after the alleged assaults."

The convictions and sentences were set aside and a new trial ordered (Emphasis supplied).

Coming home we find in **R.v. Everton Williams** S.C.C.A. 112/88 delivered on 6th October, 1988 (unreported) this court allowed the appeal quashed the conviction and sentence and ordered a new trial because the trial judge had failed to give the requisite warning on corroboration. Carey J.A. therein said:

> "The requirement to warn a jury of the dangers of convicting on the uncorroborated evidence of the victim of a sexual assault has not been modified or abolished."

This case is distinguished from those above cited in that the trial judge did give some direction on how the

evidence of the young child should be approached by the jury and he did mention that there was a requirement that they should look for corroborative evidence. Any defects in the summing up should be assessed in the light of the fact that Counsel in their addresses alerted the jury to the desired approach in assessing the evidence of the complainant. This is evident from the passage quoted in which the judge endorsed the submissions of the defence. There is no formula, no catecism that the judge is required to incant for the benefit of the jury. His duty is to make it clear to them that the evidence of a young child should be approached with caution as it is dangerous and unsafe for them to act on such evidence unless it is corroborated. He is to instruct them why this caution has to be exercised. In addition he must give the general warning applicable to the evidence of complainants in sexual offence cases and to define corroboration.

The trial judge should also instruct the jury that there is no evidence capable of being regarded as corroborative where there is none and to indicate the evidence that may be so categorised where there is any. The trial judge herein failed to do either of these things but on the totality of the summing up he did indicate the evidence that was corroborative of the complainant's and invited the jury to give it due consideration. He could not tell them that there was no evidence capable of being corroborative because there was such evidence. He also

directed the jury that they could if they accepted the evidence of "Jane Doe" act on it. This is a standard corollary to directions when there is no corroboration.

The jury by the time they took to consider their verdict, namely five minutes, accepted the prosecution case as overwhelming. We accept that there was such substantive corroboration that we feel sure that if the conventional warning had been given the jury would inevitably have convicted the appellant (Killman's case). Ashworth J. in **R. v Trigg** (supra) at P.101 said:

> "In principle this court feels that cases where no warning as to corroboration is given where it should have been should, broadly speaking, not be made the subject of the proviso to Section 4. There are cases where the evidence has been such that this Court has felt it possible to apply the proviso, but those cases, in the view of this Court, must be regarded more as exceptional than as in any sense a regular matter."

We accept the correctness of this statement. This is one of those exceptional cases in which we felt were we so persuaded we would apply the proviso to Section 14 (1) of the Judicature (Appellate Jurisdiction) Act. For the reasons herein-before expressed the Appeal was accordingly dismissed.

Cases referred to
1) R v Leonard Trigg (1963) 47 Cr. App. R 94
2) The State vs Alfred Killman (1975) 26 WIR 458
3) R v Everton Williams S.C.C.A. 10/85 6/12/85