IN THE CAYMAN ISLANDS COURT OF APPEAL
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

C.I.C.A. #22 OF 1991

BEFORE: THE HONOURABLE THE PRESIDENT MR. JUSTICE EDWARD ZACCA, O.J
THE RT. HONOURABLE MR. JUSTICE P. TELFORD GEORGES, P.C JA
THE HONOURABLE MR. JUSTICE JAMES S. KERR, J.A.

DAVID KENNEDY EBANKS V. REGINA

MR. DELANO HARRISON INSTRUCTED BY NEVILLE LEVY AND ASSOCIATES FOR THE APPELLANT.
MRS. ANGELYN HERNANDEZ, SOLICITOR GENERAL'S CHAMBERS, FOR THE CROWN.

22ND AND 26TH JUNE AND 12TH AUGUST, 1992.

The appellant appeals against his convictions by a jury by a 5-2 majority on two charges of having raped Marion Ruth Bodden and having committed an unnatural offence with her on November 2, 1989. The offence had been committed at her house in Waller Square where she lived with her sister who at the time had been asleep in a room across the passageway from hers.

She testified that she had gone to sleep about 12:30 a.m. that morning and had been awakened with a sensation that a person was close to her. She had then become aware of a man standing over her with a knife to her throat. He held her by the throat and threatened to kill her if she made any noise. He spoke gutturally in what seemed to her to be a disguised voice but in an accent she identified as Caymanian.

The attacker had stripped off her clothes, cutting off her panty with his knife and had had intercourse with her, turning her over from time to time to have coitus per anum then reverting to ordinary intercourse. After intercourse he had taken $5.00 which she had found for him in her purse after his search of the same purse had proved fruitless. He had also taken two gold chains she wore on her neck each valued at US $1000.00 doing so and warning her to stay as she was. She estimated that he had been in the room for one hour. Some two minutes after he had gone she had moved the

pillow and having confirmed that he had gone she had dressed, let herself out and driven to the hospital. She had reached there at 4:45 a.m. according to the hospital clock. She had made a report. The police had been contacted and two detectives, a man and a woman, had duly arrived to see her. She had given a statement that very morning.

She was unable to identify her attacker. She described him as being a little taller that she was, of slim build, with long slim hands, brown in complexion and with a stubbly growth on hs lips and chin. From his build she estimated his age at 25 -.32 years.

P.C. Pryce arrested the appellant at his home on November 5,1989 at about 1:30 a.m. Det. Sgt. Rina Edwards interviewed him the following day at 1:30 a.m. In reply to questions he stated that he knew Mrs. Bodden but denied that he had gone to her house on Thursday November 2, 1989, a date she specifically put to him, or at any other time. She then asked at what time he had gone home on Wednesday November 1, 1989. He replied that he had gone home at 3:00 a.m. She suggested that it had been 4:00 a.m. He said he had being merely estimating the time as he had no watch. She asked where he had been coming from when they saw him. He replied that he had been coming from Treasure Island where he had gone to make an overseas telephone call. She asked again stating a specific time whether he had gone to Mrs. Bodden's house and raped her on the morning of Thursday, November 2nd. He replied that he had not.

After the interview the appellant's house was searched. Nothing was found. On request he gave a sample of his semen. Samples of hair from his head and pubic area were taken. Mrs. Bodden's night clothes and her bed linen were also taken. All this material was sent to the United States of America for forensic examination and analysis. On receipt of the reports from the analysists Det. Sgt. Rina Edwards charged the appellant with raping Mrs. Bodden.

At the hearing Det. Sgt. Rina Edwards and P.C. Pryce testified that they had been patrolling in a car in the area of North Church Street on Thursday November 2, 1989 when they had seen

the appellant walking in the vicinity of the Cayman Liquor store coming towards them. The appellant agreed that he had seen the police officers but stated that this had happened on the morning of Wednesday November 1, 1989 as had been put to him during the interview in November 6, 1989 and as he had accepted then.

Miss Alysson Simons, a special agent of the Federal Bureau of Investigation and Chief of the hair and fibre unit of their laboratory, testified that she had compared hair found in Mrs. Bodden's linen with the sample given by the appellant and had concluded that they exihibited the exact same microscopic characteristics leading to the conclusion that it came from the appellant's head. In her opinion the concluson drawn from such a comparison was strong evidence of identification though not as strong as finger-print evidence. She could not say absolutely that the hair had come from the head of the appellant but in her experience it was extremely rare for two individuals to have hair which she could not distinguish microscopically even where the individuals were of the same race and generally had the same length and colour of hair. Examinations such as she conducted helped to eliminate suspects to enable the police to concentrate on more likely ones. It was possible but unlikely that there could be another person who would have hair with the same characteristics as that of the accused. She could not state what the statistical probability would be in numbers.

Mr. Deadman, who was an examiner of body fluids, found matching results in three of the tests he conducted comparing the semen stain on Mrs. Bodden's sheet with the appellant's sample of semen. A fourth test was inconclusive. From figures collated in the United States of America he concluded that there was one chance in 50,000 that the stain could have been made by semen from some person other than the appellant. He thought the probability frequencies used in the United States of America would be applicable in the Cayman Islands.

This opinion was challenged by Mr. Tracey, an expert called by the defence, though he agreed with the conclusion that there had been a matching of 3 genes. In a society where there were

many groups of persons closely related the probablities would be higher. He stated that while identity of 3 matching genes was good evidence, the routine number in DNA testing was to seek a match of 4, 5, or 6 genes. In the context of the Cayman Islands with large family interrelationships the probabilities would be much higher than the 1 in 50,000 used in the United States of America.

The appellant gave evidence on his own behalf. He stated that he had seen the police officers on Wednesday night as they had suggested to him at the interview. He was then walking towards Watler Square which the police car had already passed when it reached him. He stated that all his grandparents were Caymanians. He had about 17 uncles and he knew of 13 first cousins aged 23 to 36. He had three brothers.

The record does not show that the appellant was ever asked in examinination-in-chief where he was on the morning of November 2 when Mrs. Bodden was raped. In part this must have been because of the sharp dispute as to whether the police officers had indeed seen him that morning near the liquor store or whether that incident had taken place the morning before. He did, however, state in cross examination that he was not on the street Wednesday night or early Thursday morning.

There was satisfactory evidence from Dr. Ralph Atkinson that Mrs. Bodden had been raped. The issue was the identity of her attacker. The crime being of a sexual nature, a direction on corroboration was required. The trial judge correctly defined it thus-

> "As evidence from a source independent of Ruth Bodden which affects the accused by confirming in some material particular, not only any evidence given by Ruth Bodden, that the crime was committed, but also evidence given by her that the accused was the man who committed the crime."

Using that definition the judge gave a direction to the effect that if the jury was satisfied that the appellant had deliberately lied when he said that the police officers had not seen him on November 2, and that the motive for his lying was the

realisation of his guilt and his fear of the truth then they could regard the lie as corroborative in the sense in which he had defined it. It was contended that this was a grave misdirection.

The fact was that Miss. Bodden had given no satisfactory description of her assailant from which any identification was possible. No question of corroborating her evidence on the issue of identification could arise. Identification of her assailant would have to be established by independent evidence adequate to achieve this.

In Iyabode Ruth Lucas(1981) 73 Cr. App. R. 159, for example, an accomplice who pleaded guilty had given evidence implicating the appellant in the offence of importing cannabis into Gatwick. In those circumstances lies told by the appellant could be considered corroborative if they fulfilled the requisite criteria. The corroboration would have been corroboration of the truth of the story given by the accomplice - not of the identity of the accused.

Following logically on the view which he took of lies as corroboration the trial judge later directed the jury as follows-

> "If you followed me this far, the Crown's case may be put in one of these three ways -
>
> (1) it would say to you that without even considering the American expert evidence, just confining yourself to Ruth Bodden, the two public officers and Dr. Atkinson, there is sufficient evidence there to convict him if, of course, you found on the police evidence that there was a lie so far....."

This is plainly a misdirection. Acting in accordance with it would result in the appellant being convicted on the basis that he had been seen in the vicinity of the scene of the crime shortly after it had been committed and had lied about his

presence there. The proof of the lie would have been used to bolster lack of proper evidence of identificaton. If there had been evidence of identification which could have been criticised as weak on the criteria of the rules in Turnbull, a proven lie could possibly be used to strengthen it. Where there is no such identification, proof of the lie cannot be advanced as a substitute under the guise of corroboration. The description given by Mrs. Bodden was altogether too general to be the basis of identification of anyone.

Criticism was also directed at the trial judge's directions on the issue of the appellant's alibi. As has been indicated the evidence was concentrated on the dispute as to whether it was on the morning of November 1 or November 2 that the officers had seen the appellant in the car park. Save from that perspective the appellant's whereabouts on the morning of November 2 were not closely investigated.

Against that background the appellant stated on cross-examination-

> "Q Both police say it was early Thursday.
>
> A They are wrong. Both knew me. They are mistaken as to the day. On Thursday 2nd it started to rain after 3 p.m. I went nowhere. I stayed at home. I left my home on Friday at midday."

In the context this reply could well be interpreted to mean that the appellant had been at his home all of Thursday.

The trial judge dealt with the matter in his summing up as follows:-

> "The accused's evidence is that he saw the police on the early hours of Wednesday the 1st of November. Where he was in the early hours of Thursday the 2 of November, he doesn't say. He tells us nothing about where he was at the time. And the witness called by him to give evidence on his behalf speaks only of something that happened on the 1st of

> November. So that as regards the alleged allegation of the Crown that they saw him on the 2nd of November that morning that witness called by him has nothing to say. It is of no relevance. That being so he has not presented an alibi to rebut the evidence of the Crown that he was seen on the 2nd of November. An alibi evidence is evidence that either satisfies you that the accused was not where he is said by the Crown to have been or is of such weight that although you may not altogether believe it you are not sure that the accused was where he is said to have been by the Crown at the relevant time. But he hasn't presented any such evidence. So the issue really is, do you believe the police that he was where they said he was at about 4 o'clock on the 2nd of November 1989. That's the issue."

Miss Wong concedes, properly in our view, that the evidence given by the appellant could reasonably bear the meaning that the appellant was at home all of Thursday including the time when he was alleged to have been seen in the car park. To say that the appellant had presented no evidence on this issue was a misdirection. It was also a misdirection to state that the evidence of Miss. Bathke who confirmed the fact that the appellant had telephoned her on the morning of Wednesday November 1 was irrelevant. It was relevant in that it tended to support the appellant's story that he could have been walking from Treasure Island homewards about 4.00 a.m that morning. It was not disputed that the police officers and the appellant saw each other only one morning that week. Any evidence which indicated that it was more likely that that meeting was on Wednesday November 1 was relevant to what the trial judge himself acknowledged to be the issue - whether the appellant was really where the police stated that he was on the morning of November 2.

1989.

It should also be noted that while the directon on the issue of alibi is accurate it is desirable to emphasise specifically where an alibi is in issue, that the burden of proof never shifts to the accused, that it remains always on the Crown and that even if the alibi is rejected the jury must review the case for the prosecution in order to satisfy themselves that the guilt of the accused has been proved so that they can feel sure and certain about it.

Two further grounds of appeal dealt with misdirectons on the facts. It was submitted that the trial judge had failed to point out to the jury that when police officers saw the appellant on November 2, 1989 (as they alleged they did) he was walking towards the direction of Mrs. Bodden's house and not away from it as would have been the case had he left the house having raped her.

This is not an ommission of great significance. The evidence was on record. The jurors would be familiar with the geography of the locaton and would have been aware that the appellant would have been walking towards the house when the police officers saw him.

Another misdirection complained of was a reconsruction by the trial judge of a likely time frame for a sequence of steps Mrs. Bodden said she had taken between the departure of her assailant and her arrival at the hospital. She gave no estimate of the time when she was awakened and had become aware of the presence of her attacker. She said it was starting to be a little bright when he left and estimated it as around 4.15 a.m. From the clock at the hospital she noted that she had reached there at 4.45 a.m.

In his summing up the trial judge stated positively that Mrs. Bodden said that the rape began somewhere about 3.30 a.m. The record contained no such evidence. She did say it lasted a long time and that it seemed like an hour. Reviewing what she did after the attacker left before she set off by car to the hospital the judge asked whether using commonsense the jury might

not estimate that this process would not have taken 10 minutes. On that estimate she would have left the home about 4.15 a.m. her attacker would have left about 4.05 a.m. and thus could have been seen by the police officers at about that time in the car park where they saw him.

It is preferable not to speculate in a summing up and the trial judge did to some extent speculate. It was clear, however, that he was putting to the jury a theory which could have been put forward by the Crown to demonstrate that the time frame was consistent. The jury would have appreciated that and would have understood that using their commonsense they could as judges of the facts accept or reject it. The time of 3.30 a.m. which does not appear on the record can be calculated by working backwards from the time of 4.15 a.m. given by Mrs. Bodden when her attacker left. There was no likelihood of the jury being misled.

Another ground of appeal was that the trial judge had failed to put the appellant's defence to the jury adequately. One of the matters complained of was his treatment of Miss Bathke's evidence. That has already been discussed and the conclusion reached that he had erred in that regard. The other issue was an alleged one -line dismissal of the appellant's alibi.

Two police witnesses gave evidence to establish that the apppellant had been seen in the area where the rape had been committed at about the time it had been committed. Thursday- November 2 at 4.00 a.m. The appellant agreed that the officers had seen him, but on Wednesday November 1. If the appellant could raise a reasonable doubt on that issue the case for the prosecution would have been seriously weakened. The direct evidence of the appellant's presence at or near the scene of the crime would have been successfully challenged.

The evidence was as a result centred in that area and there was little evidence as to where the apppellant was on the early morning of Thursday, November 2. As has been indicated this could only be deduced by inference from his evidence in cross-examination. It was not dealt with in detail and no

witnesses were called in support. Little could be said about it and the trial judge cannot be faulted for not dealing adequately with it.

In the result the trial judge did err in two material matters. He wrongly directed that in the circumstances of this case the lie told by the defendant could, if the requisite conditions were satisfied, be held to be corroboration of Miss Bodden's evidence. He also stated wrongly that the appellant had given no evidence of his whereabouts on the morning of Thursday November 2 and had dismissed Miss Bathke's evidence as irrelevant to the issue of the alibi when it clearly was.

The character of these misdirections is such that the proviso cannot be applied. Indeed it is not often that the proviso can be applied where there has been a misdirection as to what is corroboration. In this case the jury was told that the proven lie could be used to corroborate evidence of identification which was too vague to be of any weight as evidence implicating the appellant.

The question remains as to whether there should be an order for a new trial.

The evidence implicating the appellant was essentially forensic- the similiarity of his hair samples with hair found on Miss. Bodden's sheet and the DNA matching on 3 tests of the seminal fluid with the stain found on the sheet. Mr. Deadman rated the DNA matching as having greater certainty than the comparison of hair specimens. It was also clear that in the context of the Caymans where there are large kinship groups the probability figures used for the United States of America can be questioned.

The evidence that the police officers saw the appellant on the morning of Thursday November 1 in the car park is flawed. In the interview conducted on November 6 the questions as to this incident were specifically directed to Wednesday November 1. An explanation was suggested that this was an error. Since the time, 4.00 a.m, was shortly after midnight, the date of the previous day was mistakenly used. A perusal of the interview shows that on

two other occassions in that very short interview the appellant had been asked about Thursday November 2, the date of the incident. This contrast makes the suggested explanation of the error unlikely.

If, as was stated, Det. Sgt. Rina Edwards remembered on November 2 at 6.00 a.m when she received from Mrs. Bodden the description of her assailant, that she had seen the appellant at 4.05 a.m that morning in the car park and that the description broadly fitted him, it is surprising that she did not promptly go to his home to pursue her enquiries. She knew where he lived. Jewellery had been stolen and a prompt search might yield successful results. The appellant was not arrested until the morning of November 5.

IN R v Reid (1970) 27 WIR 254 at p. 257 Lord Diplock delivering the judgment of the Privy Council discussed the factors to be weighed in deciding whether it was in the interests of justice to order a new trial when allowing the appeal in a criminal matter. Persons who have committed serious crimes should not escape because of a technical blunder on the part of the judge.

While the trial judge in this case did err the issue goes beyond this into the essential reliability of the forensic evidence of identification unsupported by other evidence of the presence of the appellant at or near the scene of the crime.

The retrial of this case will be an ordeal for both the virtual complainant and the appellant. Over 2 1/2 years have passed since the events to be examined have occurred.

Accordingly, we did not think that the interests of justice required the ordering of a new trial in the circumstances of the case and the appeal was allowed without further order.