JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL No. 95/1974

BEFORE: The Hon. Mr. Justice Edun, J.A. (Presiding).
The Hon. Mr. Justice Graham-Perkins, J.A.
The Hon. Mr. Justice Hercules, J.A.

REGINA v. NEVILLE STORA

R.A. Stewart for the Crown.

K.D. Knight for Appellant.

5th and 27th June, 1975

HERCULES, J.A.:

On 10th March, 1975, a single judge refused leave to appeal against conviction and sentence in this case, but when by due process it came before the Court on 22nd April, 1975, leave to appeal was granted and the matter was adjourned. On 5th June, 1975, the appeal was allowed and a new trial ordered. We promised then to put our reasons in writing. This we now do.

The Appellant was convicted before Ross J. and a jury in the St. Catherine Circuit Court on 10th May, 1974, of Rape and aiding and abetting to rape. He was sentenced to a total of 8 years imprisonment at hard labour.

It is quite unnecessary to narrate the facts in order to deal with the matter. Two grounds of appeal were argued, but only the first one proved to be substantial. It reads as follows:-

> " 1. That the learned Trial Judge erred in law when he directed the jury that the evidence of the witness Garriques was capable of "supporting" the testimony of the complainant in her allegation of rape and the precise circumstances of it thereby (i) strongly suggesting that the witness' testimony was corroborative of the complainant and (ii) negativing his earlier direction that there had been adduced no evidence which corroborates or supports the evidence of the complainant ....."

Once again this Court has to deal with the vexed question of corroboration in cases of sexual offences. We had hoped indeed that this question had been put to rest by recent judgments of the English courts

and also of this court. But so be it.

On pages 6/7 of the summing-up the learned trial judge sought to expound the classic definition of Corroboration thus:

> "Now, you will ask what is corroboration? Corroboration or support of the evidence of the complainant is some independent evidence of some material fact which implicates the accused person and tends to confirm that he is guilty of the offence charged, or to put it another way, it is some independent evidence which affects the accused by tending to connect him with the crime, that is, evidence which implicates the accused and which confirms in some material particular, not only the evidence given by the complainant that the crime was committed, but also that the person committed it. So that corroborative or supporting evidence would have to be some evidence which shows, which goes to prove not only that the crime was committed, but also that the prisoner committed it, and that being so, that evidence has to be independent evidence ..... There is no evidence which corroborates or supports the evidence of the complainant ..... but there is no evidence which could be regarded as corroborative or supporting evidence, it is for me to point it out to you ....."

So on pages 6/7 there are four occasions on which the terms corroborate or support were used. This was repeated once on page 18 and once again on page 19.

We do not seek to lay it down that the terms 'corroboration' or 'support' or 'strengthen' or 'confirm' cannot be used interchangeably (See Director of Public Prosecutions v. Hester (1972) 3 All E.R. 1056, in particular, Lord Diplock at page 1073). Indeed, in the earlier case of John Joseph O'Reilly (1967) 51 Cr. App. R. 345 the English Court of Appeal held that it is unnecessary that the actual word "corroboration" or any particular form of words should be used (See Salmon L.J. at page 349).

Whatever synonym is chosen however it must always be understood to embrace the triple concept of (1) sexual intercourse, (2) the absence of consent and (3) the implication of the accused. If it is used only in relation to one factor of the triple concept, this must be made absolutely clear. In the Privy Council case of Eric James v. R. reported in (1971) 55 Cr. App. R. 299 and also in (1970) 16 W.I.R. 272, at pages

274/5 of the latter, Viscount Dilhorne, who delivered the judgment of the board on 2nd November, 1970, put it this way:

> "Where the charge is of rape, the corroborative evidence must confirm in some material particular that intercourse has taken place and that it has taken place without the woman's consent, and also, that the accused was the man who committed the crime. 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 is just as important as such evidence confirming that intercourse took place without her consent."

That judgment was duly followed by this court on 12th November, 1971, in Supreme Court Criminal Appeal No. 13/1971 - the first case of Edwin Campbell. Then soon after there was the second case of Edwin Campbell - Supreme Court Criminal Appeal No. 4/1972. In that second case the trial judge had told the jury:

> "I have already told you that there is no corroboration to support the complainant's allegation that she did not consent to this sexual act. There is no corroboration as to the identity of the accused as the person who committed this act. So you cannot convict the accused unless you accept the evidence of (the complainant) as a reliable witness and a witness of truth ... You cannot convict this accused unless you are completely satisfied with her as an honest and reliable witness for the simple reason that it is on her evidence only that you have to rely as to (1) the identity of the accused as the man who she said raped her, and (2) the fact that the accused had sexual intercourse with her without her consent."

With regard to that direction, this Court, in a judgment handed down on 22nd June, 1972, said:

> "In the light of this specific direction, and bearing in mind the earlier direction as to the three material particulars which must co-exist in order to constitute corroboration in the strict legal sense, we are satisfied that the danger which was effective in Eric James to bring about a quashing of the conviction in that case by the Privy Council is non-existent in this case. We are satisfied that, viewed as a whole, the directions of the learned trial judge had sufficiently acquainted the jury of the nature of corroborative evidence and had adequately

guided them as to the significance of the absence of such evidence in this case."

It is clear that this Court sought to distinguish the situation in Campbell's case from that which obtained in Eric James v. R. on the ground that whereas in the former the trial judge had told the jury that there was no evidence corroborative of the complainant, in the latter case he had not done so. The reality of this distinction depended on the consideration that the language used by the trial judge in Campbell's case had sufficiently alerted the jury as to the significance of the absence of corroborative evidence. It would follow that in Campbell's case this Court did not, because of the language in which the trial judge's directions were couched, think that there could have existed the kind of danger to which their Lordships adverted in Eric James, namely, "that the jury might well have thought that if they accepted the medical evidence they were entitled to disregard the warning (the trial judge) had given against the danger of acting on uncorroborated evidence." And this would, in the Court's view, have resulted from the directions "viewed as a whole". We do not, however, take the view that the Court, in Edwin Campbell, could have intended to lay it down as a rule that in every case in which a trial judge had told a jury that there was no corroboration of a complainant's evidence a direction that certain evidence which did not come within an earlier definition of corroboration was, in law, capable of amounting to corroboration, was to be regarded as not constituting a misdirection sufficiently serious to warrant the quashing of a conviction. Indeed, we apprehend that for a trial judge to define corroboration to a jury and then proceed to direct them that certain evidence is, in law, capable of amounting to corroboration when it is not so capable will, in most cases, involve a real danger of confusing and misleading a jury. A summing-up is no mere exercise in semantics. It must always seek to put before the jury the real issues arising on the evidence in a manner not calculated to mislead.

We are here reminded of the recent case of R. v. Lemard, the judgment which was delivered in this Court on April 9, 1975. In that case the learned Chief Justice did not, throughout his summing-up

use the word 'corroboration'. He had used such words as 'support', 'confirm', and 'strengthen'. It was clear, moreover, that while eschewing the use of the word corroboration the learned Chief Justice, nevertheless, sought to convey to the jury the triple concept involved in corroboration by means of a definition of the words support, strengthen and confirm in precisely the same sense in which the word corroboration is understood. This Court held that whatever synonym was chosen to convey the concept involved in corroboration, the jury ought to have been told that evidence in support or in confirmation of the complainant's version was required to support or confirm that version in a material particular in the sense that it implicated the accused.

There was no conflict between the cases of Lemard and Campbell. There was not in the former the situation where the trial judge, having defined the term corroboration, thereafter identified as capable of constituting evidence in corroboration evidence which did not come within the terms of his definition. An examination of the judgment in Lemard revealed that it dealt with a totally different situation.

Earlier on in the judgment of this Court in the second case of Edwin Campbell, Fox J.A. also stated:-

> "It will be observed that by way of this direction the learned trial judge had correctly given the word 'corroboration' and the phrase 'corroborative evidence' a special meaning. The word and phrase had become terms of art. If, thereafter, this word and this phrase are used in relation to evidence which does not satisfy the definition of legal corroboration, the danger of the jury being confused is likely to arise. This was the position in R. v. Eric James reported at (1971) 16 W.I.R. 272. In that case, having given a correct direction as to the meaning of corroboration, the judge went on to apply that term to evidence which obviously did not satisfy the definition. When the appeal came before this Court, the view was taken that in the light of the manner in which the direction had been phrased the possibility of the jury being misled was so slight that it could safely be disregarded. Supreme Court Criminal Appeal 38/68 - 27th February, 1969 (unreported). But when the complaint was discussed in the judgment of Viscount Dilhorne in the Privy Council, the danger in the misdirection was obvious to their Lordships and they were

of the clear view that, as given, the direction was "entirely wrong".

Since that decision of the Privy Council in Eric James, this Court has endeavoured by way of its judgments to advise trial judges to confine the use of the word 'corroboration' and the phrase 'corroborative evidence' to material which satisfies the definition of legal corroboration, and that when it is intended to refer to evidence which supports a particular fact not amounting to legal corroborative evidence, that the word 'confirm' or 'support' or some other neutral term be used."

Apparently, this advice is, unhappily, not being heeded by trial judges. In the instant case the learned trial judge used the terms corroborate and corroborative evidence in juxtaposition with the terms support and supporting evidence. This has already been abundantly shown above in excerpts from the summing-up.

The vice of this treatment is to be found alas at page 19 of the summing-up. It is to be remembered that at page 7 he had categorically directed the jury that "There is no evidence which corroborates or supports the evidence of the complainant." Nevertheless on page 19 he gave the following directions:-

"We had Dr. Williams who told you about the minor wounds which he found and about taking the swab. He told you he examined the female organ of Miss Armstrong and on the examination it did not show any bruising or bleeding. He took a swab, and you remember in connection with this, that the swab which he took from the female organ of Miss Armstrong was, according to the evidence, sent to the Forensic Laboratory and there examined microscopically and chemically, as I understand it, by Mr. Garriques who told you that there were traces of blood in this, but that these traces of blood were not visible to the naked eye; that is, the doctor would not have seen them. He had the advantage of looking at the specimen under a microscope and he told you about it. That evidence, as I understand it, was adduced by the prosecution to suggest to you that it supports the evidence of the complainant. But you will bear in mind Mr. Garriques' evidence that the evidence of traces of blood could have been caused in more than one way. He told you too about his examination of the various garments which were taken to him by Constable Gauze and of his findings; the finding of semen and spermatozoa on these articles of clothing and he told you what semen is -

> a secretion which can come only from the male; and again the suggestion by the prosecution, in so far as this particular piece of evidence is concerned, is that it supports Miss Armstrong's evidence that she had on these articles of clothing and that someone had sexual intercourse with her while she was going along this road and this isn't something which she has imagined or thought up."

What was the view of the learned trial judge regarding these suggestions of supporting evidence by the prosecution? When it is borne in mind that he had defined corroboration, but proceeded to use corroboration in juxtaposition with support, did the support suggested by the prosecution amount to corroboration, as defined, of the complainant's evidence? The learned trial judge omitted to answer this question, and without specific assistance on such a critical question from the learned trial judge, when one remembers his earlier direction that "There is no evidence which corroborates or supports the evidence of the complainant," the jury would have been bemused.

The learned judge on page 7 recognised that "where there is no evidence which could be regarded as corroborative or supporting it is for me to point it out to you," but he failed to implement this admitted procedure when he dealt on page 19 with the evidence of Dr. Williams and Mr. Garriques. In their bewilderment it was left open to the jury to conclude that there was corroboration as defined after all, thus rendering the evidence of the complainant more credible and causing it to appear safe to convict.

In the circumstances we allowed the appeal, thereby quashing the convictions and setting aside the sentences, and in the interests of justice ordered a new trial at the next sitting of the St. Catherine Circuit Court - the Appellant meanwhile to remain in custody.