JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL No. 116/1974

BEFORE: The Hon Mr. Justice Graham-Perkins, J.A.
The Hon. Mr. Justice Hercules, J.A.
The Hon. Mr. Justice Robinson, J.A.

R. V. URIAH LEMARD

K. St. Bernard for the Applicant.

Miss Joyce Bennett for the Crown.

October 10, 11, 1974,
March 21, April 9, 1975

GRAHAM-PERKINS, J.A.:

The applicant was, on June 12, 1974 convicted in the Circuit Court for the Parish of Kingston on an indictment which charged him with carnally knowing and abusing Marcia Williams, a girl of the age of 12 years and 11 months, on January 2, 1974. He was sentenced by the learned Chief Justice to a term of 12 months at hard labour. Following upon his conviction and sentence the applicant sought leave to appeal against his conviction. His application was refused by a single judge. Thereafter he requested that his application be considered by the Court.

In support of the case advanced by the prosecution, Marcia and her mother, Miss Ethlyn Stephens, gave evidence to the following effect. On the evening of January 2, 1974 Marcia was at her mother's home having come up from the country to spend her holidays there. The mother arrived home from work some time that evening to find a cabinet glass broken and threatened to beat Marcia. As a result of this threat Marcia left home and went to an

aunt's home. While there her mother arrived and again threatened to hit her. Marcia left this aunt's home and went to an uncle's home and not finding him there eventually went to the home of the applicant and asked him to allow her to sleep the night there. Marcia swore that she arrived at the applicant's home between 9 and 9.30 p.m. She was then wearing a blouse, shorts and panties. The applicant invited her to sleep in the bed on which he had been sleeping wit with his young daughter. According to Marcia, some time during that night she awoke to find the applicant on top of her and having sexual intercourse with her. She said that her shorts and panties were at her knees. She screamed and the applicant got off her and sat on the other side of the bed, his daugh being in the mmiddle. The applicant, Marcia said, was wearing a merino and underpants. She left the bed and sat on a chair where she remained "until daylight". The applicant, who had gone back to sleep after this sexual assault upon her, awoke at this time, made tea and offered her a cup which she accepted Some time later that morning she and the applicant's daughter were at a swing in the applicant's yard. He suggested to her that it was time she went to her mother's home. She was not, however, anxious to leave. When the applicant was about to leave for work he insisted that she leave his yard and she did so. She then went to her mother's home. Her shorts were "bloodied up", as were her panties. Marcia admitted that her period had started and that she was bleeding before she went to the applicant's home on the previous evening. In spite of repeated requests by her mother she did not disclose where she had spent the night, nor the fact that she had been "bleeding". Upon seeing the condition of her shorts, and because of Marcia's failure to disclose where she had been, her mother went to a police station and made a report. Some time later that day, that is, the 3rd January, Marcia was taken to the station Here too she was reluctant to disclose anything about her whereabouts the previous night. It was only when she was threatened by a police officer that she would be "locked up" that she first alleged that she had been sexually ssaulted by the applicant in the circumstances described above.

In answer to the charge the applicant testified on oath that Marcia did in fact spend the night at his home and that she did sleep in the bed wit im and his daughter. He stoutly denied, and from the very first opportuni

that he had interfered with Marcia in any way. He swore that Marcia came to his home between 11.30p.m. and 12 midnight and asked him if he could let her sleep the night there as her mother had gone out, having locked up the house, and would not be back, she thought, until quite late and that she was afraid to remain outside the house alone. Marcia was a friend of his daughter and he had seen them playing together some time before that date. He said that when Marcia came to his home he was then asleep and had been awakened by her knock on his door. His daughter was also asleep. He got back into bed and told Marcia that, in the circumstances, she could spend the night at his home. Marcia got into the bed on the other side, his daughter being in the middle. He awoke the following morning to find Marcia and his daughter still asleep and under the bedspread. He pulled the spread off them and told them to get out of bed as it was time for him to leave for work. He had to take his daughter to a friend's home. He made tea and gave a cup to Marcia. When Marcia had drunk the tea he told her she should go home. Marcia made no attempt to leave. He next saw her at the swing in his yard. Again he insisted that she should go to her mother's home as he did not want to leave her in his yard by herself. The three of them left the house together and Marcia went to her home. Later that day he received certain information as a result of which he went to Marcia's home and spoke to her mother. He told her that he had not interfered with Marcia, and related to her the events described above. Marcia was not present when he spoke to the mother and he asked her mother to call her so that he could confront her. While speaking to Marcia's mother two police officers arrived. They took him to his home nearby and took from him his underpants and merino which he admitted he was wearing at the time of the alleged assault on Marcia. Marcia also identified the merino and underpants as those worn by the applicant at the relevant time. The officers also took from his room the bedspread which was admittedly on his bed at the material time.

Marcia's shorts and panties, together with the applicant's underpants and the bedspread were examined by Dr. Noel Marsh of the Forensic Laboratory. On Marcia's shorts and panties he found blood, but no semen. A vaginal swab and smear taken from her showed blood but no spermatozoa. On the applicant's

underpants was found semen, but no blood. On the bedspread were found three areas involving stains. The first area contained blood " in pale brown stains". In another area Dr. Marsh found semen containing sperm. The third area identified by the doctor is best described in the words of the learned Chief Justice as follows:

> "Then now, members of the jury, and this is the important part, in an area which is marked with blue pencil, he found an admixture - this is what Mrs. Walcott stressed - an admixture of both blood in pale brown stains and seminal stains."

There was evidence that the applicant had had sexual intercourse on his bed with his girl friend, a Miss Williams, at some time between 6.00p.m. and 8.00p.m. on January 2, that is, some one and a half to three hours prior to the alleged assault on Marcia. Dr. Mendes examined Marcia at about 1.45p.m. on January 3. He thought that the absence of spermatozoa from the swab could be accounted for by the possibility of their having been washed out. It does not appear that anyone sought to enquire into the nature of the agency by which this washing out was effected. It is, for example, a matter of very common knowledge that even a douche does not necessarily remove all spermatozoa from the walls of the vagina. The point we make is that the absence of spermatozoa from the vaginal swab is equally consistent with intercourse not having taken place. More particularly is this so when it is borne in mind that Dr. Mendes did not say whether <u>at the time</u> of his examination he directed his attention to the possibility of spermatozoa having been washed out. The fact that he took the swab might suggest the contrary. It is indeed unfortunate that Dr. Marsh, a qualified pathologist, unlike Dr. Mendes, was not asked a single question about the absence of spermatozoa from the swab he examined.

In examination-in-chief Dr. Mendes said that on examining Marcia he found that "she was menstruating - her external genitalia was covered with blood" and that he formed the opinion from what he saw that sexual intercourse <u>could have taken place</u> recently, i.e. within forty-eight hours. This opinion, he asserted, was based on "several things, the age of the patient, the rupture of her hymen, the fact that the vagina admitted two fingers, and the discomfort complained of." When cross-examined, however, he admitted that he did not actually see a scar but reached the conclusion that it had healed because he

saw no blood. It seems to us that Dr. Mendes' evidence on this aspect of the case could fairly be described as somewhat fanciful. It is not easy to understand why he sought to testify about a scar he had not seen. As to Marcia's age he offered no explanation as to the relevance of this to the possibility of intercourse within the previous forty-eight hours. He did, however, in the words of the Chief Justice, "reluctantly admit that Marcia could have had previous experience." This, of course, was in relation to the capacity of her vagina to accommodate two fingers with some discomfort which discomfort, he admitted, could have been caused by the insertion of his fingers into her vagina. In our view the evidence of Dr. Mendes could have provided not the least assistance to the jury.

The substantial complaint advanced by the applicant is that the learned Chief Justice in effect directed the jury, and wrongly so, that (i) the presence, on the applicant's bedspread, of the admixture as to which Dr. Marsh had testified, and (ii) the evidence of Dr. Mendes that Marcia could have had intercourse within the previous forty-eight hours, were matters which were capable of amounting to corroboration in the accepted meaning of that term. We think this complaint unanswerable.

It is true that nowhere in his summing-up did the Chief Justice use the word "corroboration". He used such words as "support", "confirm" and "strengthen". We think that no legitimate complaint is sustainable on that ground alone. In this connection we would respectfully adopt the following passages from the speeches of Lord Pearson and Lord Diplock respectively in Director of Public Prosecutions v. Hester, (1972) 3 All E.R. 1056. At p. 1070 Lord Pearson said:

> "... the word 'corroboration' in itself has no special legal meaning; it is connected with the Latin word 'robur' and the English word 'robust' and it means 'strengthen': perhaps the best synonym is 'support'."

At p. 1075 Lord Diplock said:

> "My Lords, to incorporate in the summing-up a general disquisition on the law of corroboration in the sort of language used by lawyers, may make the summing-up immune to appeal on a point of law, but it is calculated to confuse a jury of laymen and, if it does not pass so far

> over their heads that when they reach the jury room they simply rely on their native common sense, may, I believe, as respects the weight to be attached to evidence requiring corroboration, have the contrary effect to a sensible warning couched in ordinary language directed to the facts of the particular case".

We agree, however, that whether the word "corroboration", or some synonym, is used the concept to be conveyed to the jury is always the same, that is, some independent evidence supporting in a material particular that which is to be supported or confirmed and implicating the accused. As this Court understands it a "material particular" is one matter adduced by the prosecution which tends to the proof of the guilt of the accused. This is what we apprehend to be involved in the classic definition in R. v. Baskerville (1916) 2 K.B. at p. 667 as follows:

> "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."

For some considerable time prior to Baskerville's case (supra) there had been constant conflict between two schools of thought concerning the nature and extent of corroboration. One view was founded on the proposition that any independent evidence which tended to support any part of the evidence of the witness in respect of whom corroboration was required was sufficient. The other view demanded that evidence in corroboration should demonstrate not only that the evidence requiring corroboration was true but also the implication of the accused in the crime charged. It was this conflict that was finally resolved in R. v. Baskerville in favour of the latter view. Since Baskerville the only reported case that appeared to prefer the former view was Frombold v. Frombold (1952) 1 T.L.R. 1522 in which Denning, L.J., as he then was, thought that any confirmatory evidence would be sufficient in proceedings for divorce based on cruelty. The fact is, however, that Denning, L.J. has stood alone since R. v. Baskerville.

In a case of rape the jury will be warned as to the desirability of corroboration in respect of the fact of intercourse without the victim's consent and identity of the accused. In a case such as this, where consent is immaterial, the corroborative evidence will be relevant only to the fact of intercourse and the accused's identity. But whatever the epithet used to describe that evidence - corroborative, supporting, confirming, strengthening - it must be evidence which is inherently and demonstrably capable of performing a particular function. As Lord Morris said in D.P.P. v. Hester (supra) at p. 1065:

> "The purpose of corroboration is not to give validity or credence to evidence which is deficient or suspect or incredible but only to confirm and support that which as

> evidence is sufficient and satisfactory and credible; and corroborative evidence will only fill its role if it itself is completely credible evidence."

To the foregoing we would add that it must be completely credible evidence in relation to the commission of the crime - in this case, the fact of intercourse, and the identity of the accused. See also that part of the speech of Lord Diplock, in D.P.P. v. Hester, in which he examines the concept of corroboration at common law (pp. 1072-1074).

We turn now to the terms of the warning to the jury by the Chief Justice as to what he described as the danger of convicting an accused where a complainant's evidence was not "supported, strengthened or confirmed by other evidence". He said:

> "Now I am in law obliged to give you a warning in this type of case ... I have to warn you that ... it is dangerous and unsafe to convict a man of this type of offence unless you find that the evidence of the girl is supported, is strengthened, is confirmed in some material particular by other evidence, that is evidence from a source independent of the girl, So that is the position ... you should look to see whether her evidence is strengthened, is confirmed is supported in some material respect by evidence coming from a source independent of the girl. If you find there is no evidence of an independent source, then,... you will have her word alone.

The Chief Justice then proceeded to advise the jury that notwithstanding the warning he had given them they were entitled to find a verdict adverse to the applicant if they were convinced that Marcia had spoken the truth. We pause here to observe that nowhere in the foregoing passage did the Chief Justice seek to convey to the jury the idea that any evidence which, in their view, appeared to support or strengthen Marcia's version should also tend, by its very nature, to implicate the accused in the commission of the crime. Up to this point the jury were given the very clear direction that they could convict if they found some support, in some material particular, for Marcia's evidence. But unhappily, they were not told what a material particular was - a matter that not infrequently poses nice questions for lawyers. The jury, it seems to us, could well take the view that the admission by the applicant that Marcia had slept in his bed provided some support, in a material particular, for her evidence. But that admission could not, without more, tend to prove that the applicant had had intercourse with her. It is perhaps, to state the obvious to say that evidence may well support or strengthen, but not implicate, or tend to the proof of guilt of, an accused. The Chief Justice continued:

> "Now what is this support? You should look to see whether in two respects her evidence is strengthened or confirmed or supported by independent evidence. You have to see whether, first of all, her evidence that she had sexual intercourse

> that night is strengthened and confirmed or supported by independent evidence of the mere act of intercourse without any question yet of who the person was. You should look to see or find support for that aspect of her evidence that she had sexual intercourse that night; and then you look to see if her evidence that it was the accused who had, assuming you find that she did have intercourse, whether it is the accused who did it. You look to see whether her evidence that it was him is strengthened and supported by independent evidence. There are two limbs on which you must look to see whether there is this independent evidence supporting what she said in a material particular. So I hope that you are not confused by that direction. As I say it sounds contradictory, but that is how I am required to give it."

Here again it is made unmistakably clear to the jury that they are required to look for independent evidence confirming or supporting Marcia's evidence as to "the mere act of sexual intercourse" without reference to the identity of the applicant. This was the first of two limbs in respect of which the jury were told to look for evidence in support of what Marcia had said. Having regard to the warning that had been given, what were they to do in the event that they found some support for her evidence on the first limb but not on the second? We think that there can be no doubt that on the totality of the directions on evidence in support of Marcia the jury must have been left with an imperfect appreciation as to the manner in which they should approach this highly critical area of the case advanced by the prosecution. We say critical because of the several factors that appear to have spoken only too eloquently in favour of the applicant. It is unnecessary to catalogue them all here, but we advert to one. Marcia swore that during the act of intercourse with her the applicant was wearing the underpants taken from him the day following the incident of which she ultimately complained. Dr. Marsh was of the clear view that if the applicant was wearing those underpants during an act of intercourse with a female who was menstruating he would certainly have expected to find blood stains on them. He found not a trace of blood on those underpants.

As indicated earlier the Chief Justice told the jury that Dr. Marsh's evidence as to the admixture of blood and seminal stains, and Dr. Mendes' evidence as to the possibility of intercourse, were capable of supporting Marcia's evidence in a material particular. With respect to Dr. Mendes the jury were told that his evidence was capable of supporting Marcia as to the fact of sexual intercourse. With respect to Dr. Marsh they were told that his evidence was capable of supporting Marcia as to the identity of the applicant as to the person who had sexually assaulted her. Thereafter, of course, it was for the jury to find whether the evidence of the doctors did, as a matter of fact, provide the support they were asked to look for. We regret, however, that we must hold these directions to be wrong.

As to Dr. Mendes' evidence and the considerations on which it was based we need say no more than we have already said. We would observe, nevertheless,

that his evidence failed, rather hopelessly we think, to approximate evidence which could fairly be described as supporting in any degree that Marcia had had sexual intercourse with anyone, let alone the applicant.

Dealing with Dr. Marsh's evidence as to the stains on the bedspread the Chief Justice said:

> "Now you have a case where on a spread you have blood, which is negative, as far as it indicates anything, because it could come from the girl who was bleeding while she was sleeping on the bed quite innocently ... You have the semen which could have got on it in any old way, and the chances are that it might have got on it from the act of intercourse between the accused and Miss Williams, assuming that you believe that he and Miss Williams had intercourse on that same sheet that same night or some night before, it could have been there still perhaps it couldn't have been there too long because semen, sperm was found on it, so it would suggest that perhaps it was there very recently. Semen can be on a garment three months but sperm three days, so the fact that sperm is in that semen suggests recently, perhaps from Miss Williams and (the accused), but this admixture? Miss Williams said she was not bleeding when she had intercourse with the accused on the second. The evidence, if you believe it, is that the girl was menstruating so she was bleeding. Now, what do you make of the finding of an admixture of blood and seminal stains together, <u>all in one</u>, an admixture of both blood in pale brown stains and seminal stains?..... Well, (Williams) says she had sex on the bed, and she was not bleeding, so where did that admixture of blood and semen come from? ..... it is for you to say .... does that support or confirm the evidence that sexual intercourse was had with her resulting in this admixture?..... There is only one man that is said was on the bed that night, and that is the accused."

It is clear, we think, that the foregoing directions were predicated on the assumption that the blood and seminal stains - the admixture - were brought about by the deposit of blood and semen at the same place at the same time. It is somewhat unfortunate that Dr. Marsh's evidence as to the admixture accounted for a mere four lines in some nine pages of transcript. Not a single question was addressed to him as to what he meant by an admixture, or what was involved therein. It rather appears that the Chief Justice thought that the admixture of which Dr. Marsh spoke was a solution. We say this because of his use of the words "all in one". Where two elements are mixed and the identity of each is retained this, no doubt, is an admixture as distinct from a solution in which two or more elements are combined so as to produce a quite distinct substance. In the former case one element may be superimposed on another - that other having come into existence prior to the superimposition - with consequential diffusion in such a way as to bring about an admixture. If it be conceded, as the Chief Justice warned the jury, that the separate blood stains and the separate seminal stains established, in the context of the evidence, nothing adverse to the applicant why should it be supposed, in the absence of expert opinion that the

admixture was capable of so doing? Let it be assumed that the seminal stains in the admixture came into being prior to Marcia's entry into the applicant's room and that her blood was deposited in that area subsequently so as to bring about an admixture why is this to be taken as capable of implicating the applicant in an act of sexual intercourse in the absence of any evidence whatever pointing to the possibility or otherwise of such an event. We are unable, in the particular circumstances of this case, and in view of the obvious inadequacy of the expert evidence, to discern the warrant for any such conclusion. We have reached the clear view that the jury may have been misled, albeit unwittingly, into regarding as "corroboration" evidence which, in the absence of any explanation by Dr. Marsh, was not necessarily capable of being so regarded.

It is fair to say that Miss Bennett, with her usual candour, admitted, after examining the transcript of Dr. Marsh's evidence, which the Court ordered, that she could not support the directions of the learned Chief Justice.

For the foregoing reasons we are of the opinion that the applicant's conviction cannot be allowed to stand. We treat the hearing of the application as the hearing of the appeal and set aside the conviction and sentence. We are also of the view that the circumstances of this case do not require us to order a new trial.