IN THE COURT OF APPEAL [1994] QCA 007

SUPREME COURT OF QUEENSLAND C.A. No. 121 of 1993

Brisbane

[R. v. M]

T H E Q U E E N

v.

M (Appellant)

MCPHERSON J.A.
DAVIES J.A.
WILLIAMS J.

Judgment delivered 14/02/1994

SEPARATE REASONS FOR JUDGMENT OF DAVIES J.A. AND WILLIAMS J. MCPHERSON J.A. AGREEING WITH DAVIES J.A. ALL CONCURRING AS TO ORDERS MADE.

APPEAL AGAINST CONVICTION DISMISSED.
APPLICATION FOR LEAVE TO APPEAL AGAINST SENTENCE REFUSED.

CATCHWORDS:APPEAL AND NEW TRIAL - FRESH EVIDENCE

CRIMINAL LAW - RAPE - indecent dealing. Appeal against conviction

CRIMINAL LAW - EVIDENCE - CORROBORATION - whether independent evidence or issues of penetration and non-consent required - whether evidence confirming one issue can be corroborative of complainant's account generally

CRIMINAL LAW - EVIDENCE - flight as corroboration - misdirection to jury - whether miscarriage of justice

CRIMINAL LAW - SENTENCE - stepfather taking advantage of position of trust

Counsel: Mr Hunter for the Crown
Mr Rafter for the Appellant

Solicitors: Director of Prosecutions for the Crown
Legal Aid Office for the Appellant

Date(s) of Hearing: 7 December 1993

REASONS FOR JUDGMENT - McPHERSON J.A.

Judgment delivered the Fourteenth day of February 1994

I have read and agree with the reasons of Davies J.A. The appeal should be dismissed.

REASONS FOR JUDGMENT - DAVIES J.A.

Judgment delivered 14/02/1994

The appellant was convicted on 10 September 1992 in the District Court at Southport on one count of indecent dealing with a girl under 14, one count of rape, and two counts of indecent dealing with a girl under 16. The indecent dealings were alleged to have taken place on dates unknown in 1980, 1985 and 1986 respectively and the rape on a date unknown in 1984. The appellant was sentenced to three years' imprisonment for each of the indecent dealing offences and eight years' imprisonment for the rape, the sentences to be served concurrently. The appellant appeals against his conviction on the charge of rape and seeks leave to appeal against his sentence.

The complainant was born on 6 February 1971 and was therefore aged eight or nine at the time of the first indecent dealing, 13 or 14 at the time of the second, 14 or 15 at the time of the third, and 12 or 13 at the time of the rape. She gave evidence that the appellant's conduct towards her had been continual from

1980 to 1986 but made specific reference to the details of the four incidents charged. In respect of the first offence, the complainant said that the incident took place in a shed near the house in which they were living, when the appellant rubbed her around her chest and vagina. As regards the rape, the complainant said that she returned home from school one day and the appellant followed her into her bedroom, undressed her, touched her body and then had intercourse with her. She did not attempt to resist him physically and did not say anything. The complainant said that her failure to take either action was caused by her fear of the appellant, which had in turn arisen because, when she was younger, he had threatened to kill her if she told anybody about his conduct and, on one occasion when she had protested, he had hit her. The second charge of indecent dealing concerned an incident in which the appellant again came into the claimant's room and started touching her when she was doing her homework. Intercourse followed. The Crown apparently chose to present this to the jury as an indecent dealing charge, relying on the acts of indecent dealing which occurred prior to and after the intercourse, because the time limitation for bringing an unlawful carnal knowledge charge had expired. No explanation was given for why a rape charge was not presented. As regards the third charge of indecent dealing, the complainant said that the appellant, while in the toilet, had placed her hand on his penis and then his hand on top of her hand and moved it up and down. He then took his hand off her hand but she kept rubbing his penis and he ejaculated into the toilet.

The notice of appeal against conviction originally contained a number of grounds. However, Mr Rafter, for the appellant, pursued only one of these before this Court, that being the ground of fresh evidence. This Court granted the appellant leave to add two further grounds of appeal. The first of these alleged that the instructions given to the jury in relation to the nature, purpose and use of potentially corroborative evidence were inadequate, and the second that the verdict of guilty of rape was unsafe and unsatisfactory. I will consider these in turn.

(1) Fresh Evidence

The appellant's counsel sought leave to admit fresh evidence from C, the complainant's uncle (the brother of J, the complainant's mother and the appellant's wife). On 24 August 1993, C made an affidavit in which he swore that while the appellant's trial was in progress, he (C) had had a conversation with the complainant in which she said to him "words to the effect that M had never raped her". During the hearing before this Court, the appellant's counsel called C as a witness in order to amplify the contents of his affidavit. In examination-in-chief, C said he was "nearly 100 per cent sure" that the words used by the complainant were that the appellant "didn't rape her". However, when cross-examined on this point, he said that when the complainant made the alleged statement to him, there were "people everywhere" and he conceded that there was therefore a chance that the word "rape" had not been used by the complainant. C also told the Court that he was currently living

with J and was on good terms with her, although he did not like the appellant. The Court reserved its decision as to whether to admit this evidence.

In response to C's evidence, counsel for the respondent read an affidavit of the complainant sworn on 24 August 1993 in which she said that although she recalled having had discussions during the trial with her family about the charge of rape having been reinstated against the appellant, and having had numerous conversations with C, she did not recall any conversation with C in which she said that she had not been raped by the appellant. The complainant also swore that at all times she understood that the incident complained of in count two of the indictment against the appellant constituted rape.

The appellant argued that the fresh evidence did not merely affect the general creditworthiness of the complainant but bore directly upon the issue of consent involved in the rape charge. In the appellant's submission, this evidence was credible, cogent, plausible, relevant and of such a character that there was a significant possibility that the jury, acting reasonably, would have acquitted the appellant of each of the four charges had the fresh evidence been before it at the trial: Mickelberg v. The Queen (1989) 167 C.L.R. 259 at 273. See also R. v. Condren; ex parte Attorney-General [1991] 1 Qd.R. 574 at 576-7, 578-9.

The respondent submitted that C's evidence was insufficiently

cogent to warrant a new trial on the basis of fresh evidence. I agree with this submission. C admitted that he could not be sure that the complainant had in fact used the word "rape", and even if the jury could be certain that she had, there would be no way of knowing exactly what the complainant had meant when she used that word. Further, in my opinion reasons exist for doubting the credibility of C's evidence. In a statutory declaration sworn on 18 June 1993, J stated that C had not informed her of the complainant's alleged statement until two or three weeks after the conclusion of the trial. One may wonder why, if the complainant had in fact made the alleged statement, C had not mentioned the conversation sooner. Further, according to the appellant, C told J that the relevant conversation between himself and the complainant took place after the conclusion of the trial. This appears to contradict C's affidavit and oral evidence that the statement was made "while the trial was in progress". When these factors are coupled with J's "feeling" for the appellant and C's own relationship to J, the credibility of C's evidence may be doubted.

I therefore consider that there is no substance in this first ground of appeal.

(2) Corroboration

The learned trial judge directed the jury that two groups of evidence were potentially corroborative: first, admissions made by the appellant to certain persons that he had been having a sexual relationship with the complainant since she was

approximately 13 years of age; and secondly, evidence that when the police arrived at the appellant's house to question him in relation to the complainant's accusations, the appellant ran out the back door and, for some time sought to avoid apprehension.

The appellant made admissions to three people on various occasions of sexual activity, including intercourse, between himself and the complainant. In particular, there was an admission to J, at a time when the complainant was aged 13 or 14, that he had had sex with her; an admission to a Mr SP, at a time when the complainant was 13 or 14 years, that he was having a sexual relationship with her; further similar admissions to Mr SP over a period of years; and admissions to Mrs RP in similar terms, the first being when the complainant was aged between 13 and 15 years.

The appellant argued that in order for evidence to be capable of being corroborative, it had to confirm the complainant's account not only with respect to the fact of penetration by him but also with respect to non-consent. In the appellant's submission, the evidence of the appellant's admissions could not be corroborative of the complainant's account in the present case because, although it supported her story that intercourse had taken place with him at about the time alleged, it did not confirm that such intercourse occurred without her consent.

The respondent, however, relied upon these admissions as evidence from which it could be inferred that the appellant had

an unnatural passion for the complainant when she was 13 or 14 years of age. Whilst accepting the appellant's contention that, as a general rule, there must be corroboration of each element of the offence of rape, the respondent submitted that this rule did not apply in the case of circumstantial evidence suggestive of an unnatural passion for a child. According to the respondent, the admissions were, therefore, potentially corroborative of the complainant's testimony, notwithstanding that this evidence did not directly confirm the complainant's assertion that she did not consent to the intercourse the subject of the rape charge.

As Gibbs J. explained in Kelleher v. The Queen (1974) 131 C.L.R. 534 at 553, it is established that in cases of rape and other sexual offences in which corroboration is not required as a matter of law, there is a common law rule of practice which requires that the trial judge warn the jury that it is dangerous to convict on the uncorroborated testimony of the complainant alone. This rule of practice has been abrogated by legislation in New South Wales, Victoria, South Australia, Western Australia, Tasmania and the Australian Capital Territory, but continues to apply in Queensland.

The classic statement of what constitutes corroborative evidence is that of Lord Reading C.J. in R.v. Baskerville [1916] 2 K.B. 658 at 667:

> "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."

In the appellant's submission, there is in addition a special rule in rape cases that each element of the offence must be specifically corroborated; that is, that in addition to the requirement that the corroborative evidence implicate the accused, there must be independent evidence capable of corroborating the complainant as to both the fact of penetration and the absence of consent. This "rule" apparently has as its source two decisions of the Privy Council, Chiu Nang Hong v. Public Prosecutor [1964] 1 W.L.R. 1279 and James v. R. (1970) 55 Cr.App.R. 299, the authority of which, according to the appellant, has been accepted in Queensland.

It is helpful to examine the Privy Council decisions in some detail. In Chiu Nang Hong, the complainant testified that the accused, with whom she was acquainted, had tricked her into entering a house, pushed her into a bedroom, placed a chair against the door, threatened her with violence and raped her. The accused admitted that intercourse had taken place, but said that the complainant had been a willing partner. There was, on the Public Prosecutor's admission, no independent evidence which supported the complainant's allegation of non-consent. In this context, the Privy Council decided that the trial judge, who sat without a jury, had erred in concluding that "in all material circumstances [the complainant's] evidence was corroborated by

the facts". Rather, their Lordships said (at 1284-5):

"The crucial question was whether the complainant consented, and the risk of convicting on her own evidence alone was clear. Some corroborative evidence was most desirable, that is to say, some evidence coming from a source independent of her, which tended to show that she did not consent of her own free will.

... the circumstances did not afford corroboration of the complainant's allegation of no consent."

The issues raised in James were somewhat different. There, the complainant alleged that she had been raped in her bedroom at knife-point by the accused. The accused's defence was one of mistaken identity, the complainant having, on her own account, caught only a quick glimpse of her attacker's face. The only independent evidence supporting the complainant's testimony was medical evidence confirming that the complainant had recently had intercourse on the bed in her bedroom. The Privy Council allowed the accused's appeal against conviction on the basis that the trial judge had erred in failing to warn the jury that there was no evidence corroborating the complainant's account that she was raped. Their Lordships said (at 302-4):

"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....

Independent evidence that intercourse had taken place is not evidence confirming in some material particular either that the crime of rape had been committed or, if it had been, that it had been committed by the

> accused. It does not show that the intercourse took place without consent or that the accused was a party to it. There was in this case no evidence capable of amounting to corroboration of Miss Hall's evidence that she had been raped, and raped by the accused. The judge should have told the jury that.
> ... he failed to direct the jury as to the need for corroboration on both these questions."

In my opinion, these cases are authority at most for the propositions that, first, there must be corroborative evidence which implicates the accused in the commission of the crime and secondly, that where penetration by the accused has been admitted by him, there must be corroboration of non-consent. In Chiu, the accused admitted penetration, and the case was therefore conducted on the basis that the only issue was whether there had been consent. The case is therefore not authority for the proposition that, where both penetration and consent remain in issue, independent evidence confirming both the fact of penetration and non-consent must exist before there can be corroboration. Similarly, although the quoted statements in James suggest that where both penetration and non-consent remain in issue, there must be corroboration of both these elements, the decision can be explained on the more limited basis that, in that case, no evidence other than that of the complainant implicated the accused in the alleged crime. To the extent that the comments quoted go beyond this, they should be regarded as obiter dicta.

However, it seems that, in Queensland, the so-called rule has been recognised in the wide form in which it was actually

expressed in James: see R. v. Roberts and Others (Unreported, Queensland Court of Criminal Appeal, 4 December 1975) at p.5 per D.M. Campbell J.; R. v. Berrill [1982] Qd.R. 508 at 522 per McPherson J.; R. v. Stratford and McDonald [1985] 1 Qd.R. 361 at 366 per Macrossan J.; R. v. Kerim [1988] 1 Qd.R. 426 at 432 per Andrews C.J. and at 454, 456-7 per McPherson J.; R. v. Sherrie (Unreported, Queensland Court of Criminal Appeal, 13 March 1990) at p.3 per de Jersey J. Contrast R. v. Berrill [1982] Qd.R. 508 at 509-10 per Andrews S.P.J. and at 518-9 per Kelly J. (referring to the "rule" in terms no wider than the actual decision in Chiu; penetration was formally admitted in that case); R. v. Sherrie per Macrossan C.J. (penetration was formally admitted in that case and the decision is therefore explicable on the same basis as Chiu); R. v. Freeman [1980] V.R. 1 at 11 (where the "rule" was expressed in the narrow form of Chiu). Consequently the application of the so-called rule in James appears to have produced the result that the complainant's account can be said to be corroborated only where the various pieces of corroborative evidence, when viewed together, tend to confirm her account in respect of both the fact of intercourse with the accused and non-consent.

I do not accept the respondent's submission that independent evidence of "guilty passion" forms an exception to the so-called rule in James. In making this submission, the respondent relied upon the recent Queensland authorities of McK [1986] 1 Qd.R. 476, R. v. Williams [1987] 2 Qd.R. 777, R.v. T.J.W.; ex parte Attorney-General [1988] 2 Qd.R. 456 and R. v. Sakail [1993] 1

Qd.R. 312. However, in my opinion, these decisions only establish the following propositions: first, that where there is relevant and sufficiently probative evidence of other acts of indecent dealing by the accused towards the complainant, this evidence may be admissible on a charge of indecent dealing, rape or a similar offence by the accused against that complainant; secondly, that evidence of this kind may provide independent confirmation of the fact of the indecent dealing or penetration the subject of the charge; thirdly, that where this evidence demonstrates that the other dealings were non-consensual, it may also confirm that the act the subject of the charge was non-consensual (and therefore provide corroboration of both the physical act and the absence of consent); and fourthly, that these propositions apply equally where the complainant is an adult as where she or he is a child.

These decisions do not support the respondent's submission that, on a rape charge involving a child, where the independent evidence of other indecent dealings tends to confirm only that penetration has occurred, independent evidence confirming the complainant's statement that she did not consent is not required. In my opinion, there is no reason, as a matter of either authority or logic, to depart from the so-called rule in James (if it exists) simply because there is evidence of "guilty passion" and the complainant is a child. The real question appears to me to be whether the rule can be supported at all.

The so-called rule has been the subject of both tacit and express criticism: Kelleher v. The Queen at 543 (per Barwick

C.J.); Freeman at 11; Berrill at 422 (per McPherson J.); McK at 480 (per Thomas J.); Kerim at 454 (per McPherson J.). One objection which has been raised to its operation is that an accused person can, by strategic admissions, narrow the scope of what can be relied upon as corroborative evidence: see, for example, A.B. Clarke, "Corroboration in Sexual Cases" [1980] Crim.L.R. 362 at 364. However, this objection appears to me to be misguided. First, it is hardly to an accused's advantage to admit an element of the charge against him. Secondly, the objection ignores the fact that the rule requires that even if the accused does not admit an element of the offence, the trial judge must still warn the jury that the complainant's account is uncorroborated if independent evidence cannot be found to confirm each element of the offence. For example, independent evidence of non-consent would be required whether or not the accused has admitted penetration.

However, there appears to me to be a more cogent criticism which can be made of the so-called rule in James. The rule is inflexible and arbitrary in its insistence that independent evidence which confirms the complainant's account with respect to one element of the offence (for example, penetration), but which is not directly relevant to another disputed element (for example, non-consent), can never corroborate the complainant's account generally. This ignores what I consider to be the real possibility that, for example, the independent evidence confirming penetration could in an appropriate case, when viewed in the context of the evidence as a whole (but independently of

the complainant's testimony), sufficiently confirm the complainant's account generally as to alleviate to a significant extent the danger that her story is a fabrication. It seems to me artificial and unduly restrictive to maintain that in all cases a jury should view each part of the complainant's testimony which is relevant to a separate element of the offence independently and with equal suspicion, so that the established truth of any one such part can never, by association, increase the likelihood of another part of her account being accurate.

This is not to say that any evidence tending to confirm the complainant's account with respect to one element of the offence will suffice in all cases to corroborate her story generally. The question must always be whether or not, in the context of the particular case, the evidence reduces the danger that the complainant's allegation is fabricated. Where, for example, the accused has always maintained that intercourse took place with the complainant's consent and has sought to explain events on that basis, his admission of penetration will, in the absence of other independent evidence directly relevant to and confirming non-consent, usually be so equivocal that it cannot corroborate the complainant's testimony. This is because, in the context of such a case, this admission will be no more consistent with the truth of the complainant's testimony than with its falsity. In other words, it will be intractably neutral, the real issue being at all times whether or not the complainant consented.

However, the circumstances of the present case are materially

different from the above example. Here, the appellant at all times denied that intercourse occurred, while maintaining that if it did occur, it was consensual. Further, the suggestion that she consented to intercourse was never put directly to the complainant in cross-examination. In my view, this case was one where the learned trial judge was entitled to think it possible that a reasonable jury, having accepted the evidence of the appellant's admissions of intercourse, and having consequently drawn the inference that intercourse occurred, could regard that fact as increasing the probability that the complainant's entire testimony was truthful.

In my opinion the flexibility inherent in this approach is consistent with the leading pronouncements on the law in this area. As McPherson J. explained in Berrill (at 522) and in Kerim (at 454), the restrictive approach of the Privy Council in James derives no support from the decision in Baskerville. Further, the House of Lords has emphasised that "corroboration" is not a term of art, but is to be understood as requiring no more than independent "confirmation": Director of Public Prosecutions v. Hester [1973] A.C. 296 at 325, 330; Director of Public Prosecutions v. Kilbourne [1973] A.C. 729 at 740-1, 750, 758. And in Kelleher, the High Court said that in determining the sufficiency of a trial judge's direction on corroboration, it is necessary to bear in mind the danger which requires that the warning be given: the ease with which the charge is made and the difficulty which may attend its rebuttal: at 543, 560. In keeping with this approach, it appears to me that where the

circumstances of the case are such that, as here, confirmation of part of the complainant's testimony relating to one element of the offence may be seen as also increasing the likelihood that the other parts of her testimony are true, that danger is reduced and the evidence providing that confirmation is potentially corroborative.

For these reasons, I do not believe that the learned trial judge erred in directing the jury that the evidence of the accused's admissions of intercourse were capable of being corroborative of the complainant's account.

The appellant's first submission with respect to the evidence of flight was that it could not be corroborative because it was intractably neutral in the sense that it was too equivocal to reveal a consciousness of guilt. Alternatively, the appellant submitted that the learned trial judge had failed adequately to direct the jury as to the circumstances in which it could regard the evidence of flight as indicating a consciousness of guilt. As Connolly J. explained in R. v. Melrose [1989] 1 Qd.R. 572 at 574, where evidence of flight is admitted as being capable of showing consciousness of guilt, the jury should be warned that they must not assume that the accused's conduct is conclusive of his guilt. In the present case, the learned trial judge directed the jury concerning the evidence of flight in the following terms:

"You see, sometimes flight - running away from a police officer - may be an indication of guilt. You may think normally people don't run away from police

> officers if they have done nothing wrong. Of course, it doesn't necessarily follow that that is an indication of a consciousness of guilt, but as you will appreciate, flight, very often, is an indication by the person fleeing of some consciousness of guilt. So really when you are considering that evidence, if you come to the conclusion that the accused is seeking to avoid the police officers, in effect running away from them, that this is as a result of some consciousness of guilt in relation to these offences, well you may regard that as some corroboration or evidence which is capable of corroborating the complainant's evidence as to what she says happened. (R156)
>
> .... The Crown referred to the evidence of flight. Well, I have mentioned that to you. As I have said, that is evidence capable of corroborating the complainant's evidence, depending on what attitude you take towards that evidence. If you think it's indicative of a consciousness of guilt then you may have regard to it. If you think there may be some other explanation for that flight, obviously based on evidence you have heard, well you would disregard it. (R166)
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> .... Evidence of flight ... is evidence which is capable of corroborating all or any of the charges before you. I would also repeat that that evidence of flight is only to be regarded by you if you are satisfied that that flight or that the accused fled as a result of some consciousness of guilt. If there is any other explanation for it, other than a consciousness of guilt, well of course you would disregard it. (at R186-7)"

According to the appellant, this direction was not sufficient because the trial judge failed expressly to warn the jury that the appellant's flight did not necessarily indicate a consciousness on his part of having raped or had intercourse with the complainant. I did not understand the appellant to dispute that the jury were entitled to infer from the evidence of flight that the appellant was conscious of having indecently

dealt with the complainant, nor could this have been disputed. And the trial judge's direction was, in my view, adequate to inform the jury of the caution they should exercise in drawing such an inference. Further, had the jury drawn such an inference it would, on the authority of McK, Williams, T.J.W. and Sakail (as explained above), have been permissible for them to use that inference as support for the further inference that the appellant had had intercourse with the complainant. In this sense, therefore, the evidence of the appellant's flight was directly comparable to the evidence of the appellant's admissions of intercourse. And like such admissions, this evidence was, for the reasons given above, in the context of this case capable of corroborating the complainant's testimony on the charge of rape.

However, I would agree with the appellant's submission that, at the very least, the learned trial judge should have drawn the jury's attention to the special difficulty of inferring from the appellant's flight a consciousness of anything more than indecent dealing. Indeed, it was probably appropriate to tell the jury that they could not safely infer from the flight alone that the appellant was conscious of having raped the complainant. In my opinion, the learned trial judge's failure to do so constituted a misdirection.

Nevertheless, I do not believe that this failure can be said to have produced a substantial miscarriage of justice. The risk created by the misdirection lay in the fact that the jury would

regard the flight as revealing a consciousness of guilt of rape and regard this alone as being corroborative of the complainant's testimony. This does not appear to me to be a real possibility. The appellant's admissions of intercourse constituted very strong evidence which it was highly unlikely that the jury could have rejected. This evidence, if accepted, would virtually have independently proved the fact of intercourse, and could be regarded as corroborating the complainant's entire account.

Further, there existed, in my opinion, additional material, not referred to by the learned trial judge in this context, which was capable of being viewed as corroborating the complainant's account. First, in the event that the jury found the second and fourth charges (of indecent dealing) proven, they would have been entitled, on the authority of McK, Williams and Sakail, to regard this as supportive of the complainant's allegation that intercourse had occurred, and therefore as corroborative of her testimony generally. Secondly, the complainant's age at the time of the alleged rape (12 or 13 years), the fact that it was the first occasion of any alleged intercourse, and the fact that the appellant was her step-father, could have been regarded by a reasonable jury as supporting an inference that any intercourse which took place was not consensual, and therefore, in combination with the evidence of the admissions of intercourse and the proven indecent dealings, as corroborative of the complainant's account. Indeed, when these latter facts are considered in light of the failure to put to the complainant at

the trial the suggestion that she consented to intercourse, it seems that the jury had before it a very strong body of evidence independently confirming that the complainant did not consent. In failing to point out to the jury that the above matters were also potentially corroborative of the complainant's testimony, the learned trial judge's direction was in fact too favourable to the appellant. In my opinion, these factors indicate that a new trial is not warranted in this case.

For these reasons, this ground of appeal must also fail.

(3) The Unsafe and Unsatisfactory Ground

The appellant's final ground of appeal against conviction was that the verdict of the jury on the rape charge was unsafe and unsatisfactory because there was an unacceptably high risk of fabrication by the complainant. In my opinion there is no substance in the allegation. The jury was fully apprised by defence counsel of the alleged motives which the complainant had for fabricating the allegations; there was ample evidence capable of corroborating her account; and her statement that she did not actively resist the appellant because she was frightened of him was, in the light of the other evidence in the case, perfectly credible. For these reasons, I am of the opinion that the appeal against conviction must be dismissed.

The Appeal Against Sentence

The notice of appeal also contains an application for leave to appeal against sentence. In oral argument, the appellant's

counsel quite rightly conceded that there was little merit in such an application. The appellant took advantage of his position of trust as the complainant's step-father, using threats in order to secure her submission, at a time when she was only 12 or 13 years of age. Moreover, this offence was part of a course of conduct towards the complainant which had extended over several years. The sentence of eight years is therefore not manifestly excessive.

Orders

The appeal against conviction should be dismissed and the application for leave to appeal against sentence refused.

JUDGMENT - G.N. WILLIAMS J

Judgment delivered 14/02/1994

The facts relevant to this appeal are fully set out in the reasons for judgment of Davies JA which I have had the advantage of reading.

The matters of substance argued on the hearing related primarily to the direction given in his summing up by the learned trial Judge on the issue of corroboration. It was submitted on behalf of the appellant that the rule of practice requiring a warning that it is dangerous to convict on the uncorroborated testimony of the complainant alone necessitated there being evidence not only corroborative of the girl's evidence generally but also corroborative of each of the specific elements of penetration and lack of consent. The argument here was that the evidence referred to by the learned trial Judge as being capable of constituting corroboration did not specifically corroborate the element of want of consent.

In my view the issues whether or not evidence is capable of constituting corroboration and whether or not such evidence may be sufficient to satisfy the test derived from R. v. Baskerville [1916] 2 K.B. 658 at 667, are questions of mixed law and fact to be resolved in the particular circumstances of each case. In answering these questions one looks not only at the precise evidence said to constitute corroboration, but also at all the evidence admitted on the trial and the conduct of the defence. A consideration of all of those matters may result in

a conclusion that for there to be corroboration of the complainant's evidence in the subject case, there should be evidence confirming her allegation of lack of consent. But that does not mean that in every rape case there must be evidence specifically corroborating lack of consent before in the particular circumstances one can conclude that the Baskerville test has been satisfied. Those conclusions are, in my view, supported by a reading of all the cases cited in the reasons for judgment of Davies JA.

Given all the evidence here and the conduct of the defence at the trial (all of which are fully canvassed in the reasons of Davies JA) I have come to the conclusion that the learned trial Judge did not err in his general directions to the jury on the issue of corroboration.

It remains to consider his direction on the question whether or not the evidence of flight (again particularised in the reasons for judgment of Davies JA) could amount to corroboration of the charge of rape. Authority establishes that flight may be corroborative of a complainant's evidence, but there will always be a problem where the flight does not necessarily indicate a consciousness of having committed the particular offence charged. Here the argument was that the jury could well infer from the evidence of flight that the appellant was conscious of having indecently dealt with the complainant, but not of the fact that he had committed the offence of rape. Whether or not in a particular case the evidence of flight would tend to confirm the evidence of the commission of the office

charged can only be answered after considering all the evidence and the conduct of the defence at the trial.

I am of the view that given all the evidence and the conduct of the defence in this case there was no error on the part of the learned trial Judge in his summing up on this point. I am comforted by the fact that should I be wrong in such a conclusion then the failure of the learned trial Judge to advert to the distinction between the offences could not have produced a substantial miscarriage of justice. That is particularly so in the light of the appellant's repeated out of court admissions, substantially contemporaneous with the events, of intercourse with his young step-daughter.

I agree with all that has been said by Davies JA with respect to the question of fresh evidence, and the contention that the jury verdict was generally unsafe and unsatisfactory. I also agree with his reasons for concluding that the sentences imposed were not manifestly excessive.

The appeal against conviction should be dismissed and leave to appeal against sentence refused.