## REPUBLIC OF TRINIDAD AND TOBAGO

**IN THE COURT OF APPEAL**

**Cr. App. No. 22 of 2001**

**BETWEEN**

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| **LENNOX MILLETTE** | **APPLICANT/APPELLANT** |

**AND**

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| **THE STATE** | **RESPONDENT** |

**PANEL**

**L. Jones, J.A.**
**A. Lucky, J.A.**
**S. John, J.A.**

**APPEARANCES**

**Ms. Sophia Chote for the Appellant**
**Mr. Devan Rampersad for the Respondent**

**DATE DELIVERED:** **10th October, 2002**

**JUDGMENT**

***Delivered by Stanley John, J.A.***

The appellant was, on the 12th May, 2001 convicted of rape and serious indecency and sentenced to two concurrent terms of fifteen years and five years, respectively. He appealed against both the convictions and sentences.

On the 18th day of July, 2002, we dismissed the appeal and confirmed the convictions but varied the sentence. We said that we would give our reasons at a later date. We now do so.

The following is an outline of the prosecution's case which rested primarily on the evidence of the virtual complainant and her male companion. At about 8:00p.m. on 18th May, 1995 they were in a lonely area in the Queen's Park Savannah when they were accosted by the appellant who pretended to be a member of the Trinidad and Tobago Coast Guard on a special assignment to patrol the area. He searched their bags then took them to the sand track where the lighting was much better and performed an act of serious indecency upon the virtual complainant. He then dragged her to another area of the savannah, namely the Botanical Gardens where he had sexual intercourse with her without her consent.

Police Officers on mobile patrol received a wireless report relative to the incident and at about 11:30p.m. Constable David arrested the appellant after a short chase on Independence Square, Port of Spain. He cautioned the appellant who remained silent. Constable David observed what appeared to be scratches on the palms of the appellant's both hands and upon enquiring of him how he received them the appellant said that earlier that night he was involved in an altercation with a rastaman at the Queen's Park Savannah.

Later that night Police Corporal Millette took possession of the appellant's underwear and submitted same for analysis. The Certificate of Analysis revealed the presence of human spermatozoa.

On 2lst May the appellant was placed on an identification parade where he was pointed out both by the virtual complainant and her male companion

The defence raised the issue of alibi. The appellant did not give any evidence but called three witnesses one of whom was his mother who testified in support of the alibi raised. The appellant's brother, Ivan Christmas testified that he witnessed the identification parade and observed that the appellant was the only person on the parade who had a plaster on his hand.

The grounds of appeal filed were as follows:-

*(a)* ***The learned trial Judge erred in law by failing to place the Appellant's defence fairly and adequately before the jury.***

*(b)* ***The learned trial Judge erred in law by failing to give the jury adequate directions in law as to how they should approach the oral statement of the Appellant.***

*(c)* ***The learned trial Judge erroneously directed the jury to draw conclusions from certain aspects of the evidence led by the prosecution which were adverse to the Appellant and which ought not to have been used against him in the manner proposed.***

*(d)* ***The learned trial Judge erred in law by imposing a sentence which was unduly severe having regard to the circumstances of the case.***

With regard to the first ground, it was argued that there were several instances where, in the summation, the trial Judge did not deal fairly with the evidence of the defence. Ms. Chote referred to the evidence of Ivan Christmas who had given evidence on behalf of

the accused and who had witnessed the identification parade. According to this witness the appellant was the only person on the parade with a plaster on his hand and additionally he was shorter than all the other persons on the parade. It was argued that the effect of such evidence was that the accused stood out on the parade and accordingly it rendered the parade unfair. However, both the virtual complainant and her male companion testified that they had no recollection of the appellant having any plaster on his hand. Under cross-examination the male companion said that the other persons on the parade were an inch or two taller that the appellant.

Attorney further complained that the trial Judge's approach to the identification parade was incorrect. She said the trial judge fell into error when he said to the jury in reference to the identification parade. ***"If you find that the accused stood out and it was easier to identify him, then you may not wish, members of the jury, to put too much emphasis, too much weight on that parade***." The parade, she argued, was either fair or not fair and if doubts existed in the jury's mind about the fairness of the parade they ought to have been directed that the evidence of the parade should be disregarded completely.

There was also complaint about the judge's treatment of certain aspects of the identification parade evidence attempting to demonstrate that he did not adequately address the weaknesses in the evidence. Attorney further argued that it was incumbent on the trial judge in this case not only to direct the jury that there was no onus on the accused to establish the alibi but he ought to have further directed them that even if they disbelieved the appellant they should not convict him because he may have lied.

As we pointed out to Attorney for the appellant this was not a case in which the appellant was alleged to have had a plaster on his hand on the night of the incident. If such were the case there would have been some merit in the argument advanced but the only evidence of the plaster came from Ivan Christmas. There was no evidence of the size of the plaster so as to raise any question of its undoubted visibility. As indicated earlier both the virtual complainant and her male companion said they had no recollection of it. In fact both witnesses said that they identified the appellant by his face.

In the circumstances, there was no necessity for the trial judge to give any special directions on that issue. We were quite satisfied that the trial judge's direction to the jury on how they should approach the identification parade was fair and balanced and could not be faulted. Accordingly, we found no merit on that ground.

With respect to the complaint that the trial judge gave a partial alibi direction this is what the trial judge said after explaining what alibi meant:

> ***"Now, I want you to be careful about this. You must remember, that there is no burden on the accused to prove anything to you, he does not have to prove an alibi to you. Once the issue of alibi arises in the evidence, members of the jury, then it is for the State to leave you at the end of the day that you feel sure that the accused was at the scene of the offence committing the offence. In other words, he was not somewhere else at the material time. At the end of the day, as I said, the State must leave you sure of that.***
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> ***Now, the State may do that, members of the jury, either by leading evidence to rebut the alibi or by relying on evidence that they have already led. If you accept the evidence of Ms. David and you are sure that the accused was in the savannah and the botanical gardens at the material time, they the State, members of the jury, would have fulfilled that burden of proving that the accused was at the scene at the material time. In other words, the burden of disproving the alibi.***
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> ***Now, there is another matter which I will touch on again a little later. If you disbelieve the alibi, members of the jury, if you do not believe the evidence of Mrs. Millette that the accused was at home that night, and it was the night of the 18th of May, 1995, around 9:00p.m., that is no reason, I must warn you, to convict the accused of the offence and it is***

> ***simply because accused persons sometimes make up alibis to bolster their defence even though they are entirely innocent. So you must be careful about that."***

Now, there is no rule of law or practice that a trial judge must give a ***Lucas*** direction in every case where the issue of alibi is raised. In ***Burge and Pegg [1996] Cr. App. R***. the Court of Appeal held that:

> ***"A Lucas direction [(1981) 73 Cr. App. R 159] is not required in every case where a defendant gives evidence, even if he gives evidence on a number of matters, and the jury may conclude in relation to some matters at least that he has been telling lies. The warning is only required if there is a danger that they may regard that conclusion as probative of his guilt of the offence which they are considering. How far a direction is necessary will depend upon the circumstances."***

The next ground of appeal was that the trial judge did not properly assist the jury on how they should approach the oral statement the appellant allegedly gave to Constable David.

Relying upon ***Belcon v R (1963) 5 WIR 526*** it was argued that where the state relies upon an oral admission the jury ought to be given such directions that would make them alive to the caution with which they ought to approach such evidence.

In that case complaint was made that the trial judge ought to have warned the jury, but did not, that the evidence of alleged confessions by the accused should be received with caution.

It was also contended there that the jury ought to have been also warned that such statements are liable to be unintentionally misrepresented by the witness and therefore they should be cautious in acting on them.

We agree that in some cases juries need to be warned to be cautious when acting upon alleged oral confessions; but in the instant case the appellant was not confessing to the alleged crime. He was merely explaining how and where he sustained the injuries.

In ***Belcon (supra) Wooding C.J.*** in delivering the judgment of the court said at page 531(f):

> ***We doubt that either of the two statements fall strictly to be regarded as confessions but we are prepared to deal with them as if they do. In our judgment, if and when objection is taken to the admissibility of any such statements, the authorities do not go beyond requiring the judge, notwithstanding his ruling that they are admissible, to direct the jury that it is for them to determine what weight and value they should give to them after hearing evidence of the circumstances in which they were made. But when no objection has been or can be taken to their admissibility and evidence of them has been tendered and received, the test to be applied is the same as with regard to any other question of fact: that is to say, before the jury can act upon them, they must feel sure that the statements were made as alleged.:"***

We were satisfied that in the final analysis the trial judge made it clear to the jury that it was an issue of fact for them to decide and therefore, no injustice was caused to the appellant. Accordingly, that ground also failed.

Another ground of appeal was the trial judge's treatment of the presence of spermatozoa in the underwear of the appellant. During the course of the investigations the police seized and submitted for analysis a pair of underpants which the appellant was wearing that evening. Upon analysis human spermatozoa was found on it.

The complaint was that the trial judge's directions on that issue were confusing, as the jury may have formed the erroneous view that the presence of human spermatozoa in the underpants was evidence of corroboration.

In his directions to the jury the trial judge in very clear and unambiguous terms explained what was corroboration and made it quite clear to them that there was no evidence capable of corroborating the testimony of the victim.

This is what he said:-

> ***"Now, I have reviewed the evidence in the case and I have found that there is no evidence in this case which is capable, in law, of independently confirming the evidence of Ms. David as the law defines corroboration. However, this does not mean, members of the jury, that you cannot convict the accused of the offence of rape. If you accept the evidence of Ms. David and you are sure of her evidence, you may convict the accused of the offence of rape provided that you bear in mind the danger of convicting in the absence of corroborating evidence."***

It must be borne in mind that where in the summation the trial judge referred to other bits of evidence which might give support to the testimony of the virtual complaint he prefaced his remarks by saying, ***"If you accept that evidence of Ms. David, then it is open to you to find that the accused did have sexual intercourse with her."***

We would merely wish to add what was said by this court in ***State v Fuller 1995 52 WIR 424:***

> ***"What they (the jury) require from the judge in the final round is his assistance in identifying, applying and assessing the evidence in relation to each direction of law which the trial judge is required to give them and also to the issues that arise for their determination. How that is***

> ***done is best left to the discretion of each individual judge but howsoever it is done, what is required is that the jury must be given in clear language the assistance that they need to enable them properly to discharge their function."***

We were satisfied that the jury got the necessary assistance in that issue and that ground also failed.

The final ground of appeal was against the severity of the sentences. Attorney argued that the trial judge failed, to take into consideration the period the appellant spent in custody pending trial. In addition, she invited the court to consider section 49 of the Supreme Court Judicature Act, Chapter 4:20.

Counsel relied on the decision of the Privy Council in ***Leslie Tewari v the State*** which was delivered on the 29th May, 2002 as Privy Council Appeal No. 76 of 2001.

In that case, one of the grounds of appeal was against the sentence. The Court of Appeal found that in combination the sentences were inordinately long and ordered that they should run concurrently. Before the Board, it was submitted that the time spent in custody awaiting trial ought to have been taken into consideration by the Court of Appeal.

Under section 49(1) of the Supreme Court of Judicature Act, the time spent in custody pending the determination of an appeal does not count as part of the term of imprisonment under the sentence. However, the Court of Appeal has a discretionary power to direct to the contrary.

The operation of section 49(1) was considered by this court in ***Jagessar vs the State (No. 2) (1990) 41 W.I.R. 373*** where the court said that it was only in exceptional cases that it would exercise the discretion given to it by section 49(1).

We have deliberately refrained from going into that aspect of the case in any detail in view of the fact that Tewari's case has been remitted by the Privy Council for further consideration by this court.

In our view, there was nothing exceptional in this case to warrant the exercise of our discretion.

Having regard to the nature of the offence and the circumstances surrounding the commission of the offence, we did not consider the sentences were unduly severe. However, in the exercise of our discretion we ordered that the sentences begin from the date of the conviction.

Stanley John
Justice of Appeal