JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 28/99

COR. THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE WALKER, J.A.
THE HON. MR. JUSTICE PANTON, J.A.

REGINA VS. IAN BLAKE

Terrence Williams for the Appellant

Evan Brown for the Crown

23rd, 24th November, 1999 and 16th March ,2000

WALKER, J.A.

On February 4, 1999 at a trial held in the St. Catherine Circuit Court the appellant was convicted for rape and on February 8, 1999 he was sentenced to 10 years imprisonment at hard labour.

The case for the prosecution revealed that at about 7:15 a.m. on a Saturday in April, 1998 while on her way to work the complainant observed a motor car being driven by the appellant in the vicinity of a taxi stand. She had never seen the appellant or his car before that day. The appellant pointed in the direction of Spanish Town and as that was her intended destination the complainant entered the car in which there were two other passengers already seated. Subsequently, these passengers were let out of the car after which, on the invitation of the appellant, the complainant, who had up to then been sitting in

the rear of the car, proceeded to occupy the front seat beside the driver. So positioned in the car, the appellant and the complainant drove together towards Spanish Town. On the way the appellant became personal, seeking to engage the complainant in conversation on matters of a sexual nature. Eventually the appellant drove the car off the main roadway and on to a side road, a manoeuvre which prompted the complainant to enquire of him where he was going. To this enquiry, the appellant made no reply except to say that he was going to take what he wanted. Then he commenced to treat the complainant who was then in tears in a rough manner, in the process telling her to shut up. Finally, the appellant stopped the car at a gate and locked the doors of the vehicle. Then the appellant threatened the complainant by saying: "You goin' give me what I want or else I am going inside the building and get some of my friends and all of them would take what they want". Or, he enquired, was she going to give him alone. The appellant ordered the complainant to remove her panties and when she refused to do so he became angry and threatened further action by saying, "I am going count from one to five, if you don't pull off the panty by the time I finish count from one to five." The count having been completed and not having achieved the desired result the appellant next reached for a large screwdriver which had been lying on the floor of the car. The complainant's reaction was to plead "Please don't take up the screwdriver." Thereafter the appellant collapsed the complainant's seat and had sexual intercourse with her as she lay on her back. During the act which lasted for

some fifteen minutes the complainant cried which evoked the response from the appellant "Shut up, don't bother cry because nobody can hear you." Following the sexual act the appellant continued to drive fear into the complainant by warning her that if she went to the police it would not be nice. He said he would find her as he knew where she lived. He added that if he didn't catch her personally he would catch someone close to her. The appellant had previously rummaged through the complainant's purse and had found photographs of her and her diary in which her home address was recorded.

In his defence the appellant gave evidence of consensual sexual intercourse in his car between himself and the complainant whom he said he had known for two weeks prior to the day in question. It was the complainant, he said, who voluntarily gave him her photograph and telephone number. After the sexual act she gratefully accepted $500 which he offered to her. He did not threaten the complainant at any time, nor did she cry. She voluntarily undressed herself and indulged in foreplay with him before the sexual act. Afterwards when asked if she had enjoyed the experience she said, "It could be better, but it can pass". Eventually, they parted company on his promise to settle with her by giving her a further $500 on the following Monday.

Several grounds were argued in support of this application which for reasons as we shall shortly explain has been treated as an appeal. The first ground was inspired by the majority decision of the House of Lords in ***D.P.P v Morgan*** (1975) 2A11 E.R. 347. It is framed as follows:

> "The learned trial judge misstated the ***mens rea*** required for the offence of rape".

This ground raises the question of law whether the judge was right in directing the jury on the mental element of the crime of rape. If the judge's direction was wrong in law, the further question arises whether the case is one in which the conviction should stand notwithstanding the misdirection by application of the proviso to section 14(1) of the Judicature (Appellate Jurisdiction) Act.

In ***Morgan*** (supra) which must be regarded as the locus classicus on the subject matter of the ***mens rea*** in cases of rape, the majority of their Lordships' Board held that a defendant who had had sexual intercourse with a woman without her consent, genuinely believing nevertheless that she did consent, was not to be convicted of rape, even though the jury were satisfied that he had no reasonable grounds for so believing. This is a principle of law that has been followed consistently and applied by this court in a long line of cases. In examining the direction of the trial judge in ***Morgan*** Lord Fraser of Tullybelton, who was one of the majority of the court, had this to say (at pp. 236-237):

> "In the present case, the learned judge's direction to the jury about the mental element in the crime fell into two parts. The first part was exactly in accordance with the cases to which I have referred. I need not quote the direction again in full but I would particularly refer to one sentence where the learned judge emphasized that the prosecution must prove 'not merely that [the defendant] intended to have intercourse with [the woman] but that he intended to have intercourse without her consent'."

> If the effect of the evidence as a whole is that the defendant believed, or may have believed, that the woman was consenting, then the Crown has not discharged the onus of proving commission of the offence as fully defined and, as it seems to me, no question can arise as to whether the belief was reasonable or not. Of course the reasonableness or otherwise of the belief will be important as evidence tending to show whether it was really held by the defendant, but that is all".

In the result a majority of their Lordships' Board held that there had been a misdirection as indicated in the judge's summing-up.

In the instant case the critical issue for the jury was one of consent ***vel non***. On the facts of the case, a direction from the trial judge on the mental element of rape was required. Such a direction was forthcoming. It followed ***ipsissima verba*** the flawed direction of the trial judge in ***Morgan*** and read as follows:

> "The Prosecution has to prove further, that the accused intended to have sexual intercourse with her, without her consent. Not merely that he intended to have sexual intercourse with her, but he intended to have sexual intercourse without her consent, or recklessly not caring whether she consented or not. So, this again is what the Prosecution is saying, that he intended to have sexual intercourse with her whether she consented, or not caring if she consented at all. Therefore, if the accused believed or may have believed that the complainant consented to him having sexual intercourse with her, then he would not be guilty of the offence of rape. But, such a belief must be honestly held by the accused in the first place. He must believe. Secondly, his belief must be a reasonable belief and such a belief as a reasonable man would entertain if he applied his

> need (sic) and talked (sic) about the matter. It is not enough for the accused to say or rely upon a belief, even though he honestly held it, if it was fanciful, contrary to every indication which would be given, which would carry some weight with a reasonable man and of course, that the woman would consent at some time in the future, but, at the time of intercourse, when it began, she was consenting to it."

Now agreeing, as we do, with Lord Fraser's analysis of the trial judge's direction in ***Morgan*** we are bound to conclude that there was a misdirection in the present case. The true test of the ***mens rea*** in the crime of rape is a subjective one. The fact to be refuted by the prosecution is honesty, and not honesty plus reasonableness. The element of reasonableness is relevant only as evidence tending to demonstrate whether the defendant in fact held an honest belief that the woman was consenting to sexual intercourse. It goes no further than that. Accordingly, trial judges should avoid the use of the term "reasonable man" in this context as, if used injudiciously, it may serve to confuse the minds of jurors as to the proper test to be applied in determining the state of mind of a defendant.

The question now arises whether this is a suitable case for the application of the proviso. As has been demonstrated by the evidence hereinbefore described, the stories of the complainant and appellant were diametrically opposed to each other. By their verdict the jury clearly accepted the complainant's story and roundly rejected that of the appellant. In the circumstances we feel sure that had the jury been properly directed on the matter

of honest belief they would inevitably have come to the same conclusion that they did. We are convinced that no miscarriage of justice has, or conceivably could have, occurred on account of the judge's error. Accordingly, we would unhesitatingly apply the proviso. With regard to this ground of appeal, we would make one final comment. We do so in deference to Mr. Williams who submitted that in the light of ***Morgan*** (supra) two recent decisions of this court were wrong and ought not to be followed. These cases, upon which Mr. Brown for the prosecution placed great reliance, are ***R v Aggrey Coombs*** (unreported) SCCA No. 9/1994 delivered March 20, 1995 and ***R v Clement Jones*** (unreported) SCCA No. 5/1997 delivered April 27, 1998. Each of these cases was a case of rape in which a direction identical to the flawed direction in the present case was given by the trial judge. In each case the direction was impugned but was not expressly found to be exceptionable by this court. We, therefore, turn to look at these cases. In ***Coombs*** the ***ratio decidendi*** appears to us to be contained in the following words of Wolfe, J.A. (as he then was) who delivered the unanimous judgment of the court:

> "This clearly was not an honest belief situation, consequently no direction on honest belief was required. While it is incumbent on a trial judge to leave for the consideration of the jury every defence which properly arises on the evidence, there is no obligation on a trial judge to leave to the jury fanciful defences for which there is no evidential support, and trial judges should not indulge in this kind of patronage.

> The question of honest belief in a case of rape only arises where the man misreads or misunderstands the signals emanating from the woman. What the defence of honest belief amounts to is really this: I had sexual intercourse but I did so under the mistaken belief that she was consenting. That plainly was not what the applicant put forward as his defence."

In ***Jones*** the ***ratio decidendi*** was the same, namely that the case was not one in which a direction on honest belief was called for on the facts. There in addressing the impugned direction Bingham J.A who delivered the judgment of the court said:

> "In light of the defence put forward by the appellant there was no room for any direction based on honest belief...we are of the firm view that on the evidence adduced in this case such directions as to honest belief on the issue of consent as complained of were totally unnecessary and can, therefore, be regarded as otiose."

Earlier in commenting on the same direction Bingham J.A. had said:

> "In so directing the jury, it is clear that on the issue of consent, were the question of the appellant's belief to be material then on the face of it the learned trial judge would have erred in applying the objective standard rather than the subjective one called for by the House of Lords in ***D.P.P v Morgan*** [1975] 2 A11 E.R. 347"

thereby conceding that in circumstances where a defendant's belief was in issue the court would construe such a direction to be prima facie defective.

Both ***Coombs*** and ***Jones*** may, we think, be distinguished from the present case on the basis that whereas those were cases which, on the facts, did not

require a specific direction on honest belief the present case is one in which such a direction was necessary. It is to be noted that in both ***Coombs and Jones*** the court expressly stated that had the judge's directions been found to be defective, the court would not have hesitated to apply the proviso on the facts. It is in this light that the decisions in ***Coombs*** and ***Jones*** ought to be viewed and understood. ***Obiter dicta*** pronounced in both cases should be recognised for what they are and not confused with the ***ratio decidendi*** of the cases.

We turn now to consider the second ground of this appeal which reads as follows:

> "The learned trial judge misdirected the jury that corroboration was particularly important when the question of sexual intercourse was called into question.
>
> The learned trial judge directed the jury that corroboration may be a matter for the defendant's case."

The direction complained of was given in the following terms:

> "Recognising this, the law says that when you consider cases of rape and when the evidence of the complainant is not corroborated;...
>
> I mean, I must tell you that in this case there is no corroboration. Now, as told you earlier you will have to use your common sense in determining these matters. Now, when persons go to rape or when a man is going to rape a woman, he is not going to call down crowd and say, 'You look. Come, want you as evidence. I am going to rape that woman.' You want corroboration, somebody else to say, 'Yes'. I know she consented; heard her say, 'Yes'. Doesn't go like that".

There is no gainsaying the fact that the language of the trial judge as recorded above was loose and inelegant. Also, we think that the unlikely scenario which he sketched was singularly unhelpful to the jury. However that may be, to our way of thinking what is important is that the judge did define corroboration in an acceptable manner and, even more importantly, did correctly direct the jury that there was no corroboration in the case. In the circumstances we found no merit in this ground.

The third ground of this appeal complained that the learned trial judge misdirected the jury as to the way they ought to regard inconsistencies in the complainant's evidence by failing to tell them that a material irregularity could result in a total disregard of her evidence. The specific passage of the summing-up against which exception was taken reads as follows:

> "They might be slight or serious, material or immaterial. If slight, you may probably think they do not affect the credibility of the witness on a particular point. On the other hand, you may think that because of them, it would not be safe to believe the witness on that point at all."

Mr. Williams argued that these directions were incomplete in that they did not alert the jury to the fact that it was open to them to disbelieve a witness entirely. We do not agree with this criticism. In our opinion such a direction as was given meant, by necessary implication, that the jury were being told that it was open to them to disbelieve a witness on all points which, in the event, would amount to a total rejection of that witness. We should be loath to underestimate

the intelligence of the jury and do not think they could have failed to understand that. In our view this ground was without merit.

The final ground of this appeal reads as follows:

> "The summation was imbalanced as it ridicules points favourable to the defence and unfairly treated points favourable to the crown".

On this ground complaint was taken against two comments of the learned trial judge. At one stage of his summation he said:

> "Now, you know, people use their vehicles as taxis everyday. So, you are to use your own common sense in evaluating this, because he is saying he wasn't operating a taxi, but she is saying she was taking him as a taxi".

Later on he said:

> "So if there was consensual sex, then the reasonable thing would be for her to have gone to her house rather than in the bushes".

This ground was not seriously argued by Mr. Williams, and understandably so. These were fairly innocuous comments of the trial judge who had been careful to direct the jury earlier in the summation in terms that:

> "You are at liberty to discard any comments I might make on the evidence. If I make any comments or express any view in which you are in agreement, you may accept it. If you don't agree with what I have said in regard to the evidence, you may discard them and substitute your own view. You are the sole judges of the facts, and the same rule applies to the comments made by Crown Counsel or Defence Counsel."

We found no merit in this ground.

For these reasons we grant this application for leave to appeal and treat the hearing of the application as the hearing of the appeal. Having applied the proviso as stated earlier in this judgment we dismiss this appeal and affirm the conviction and sentence of the appellant. Sentence is to commence on May 8, 1999.