[2019] JMCA Crim 43

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 18/2017

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MISS JUSTICE P WILLIAMS JA
THE HON MISS JUSTICE SIMMONS JA (AG)

LOVEROY HENRY v R

Delano Harrison QC and Hugh Thompson instructed by Gifford, Thompson and Shields for the applicant

Miss Paula Llewellyn QC, Director of Public Prosecutions, and Kemoy McEkron for the Crown

15 October and 20 December 2019

SIMMONS JA (AG)

[1] On 15 October 2019, the court had the benefit of hearing submissions from counsel. At the conclusion of the hearing, this court made the following orders:

1) The application for leave to appeal is granted.

2) The hearing of the application is treated as the hearing of the appeal.

3) The appeal is allowed.

4) Convictions quashed and sentences set aside.

5) Judgment and verdict of acquittal entered.

[2] It was indicated to the parties that the reasons would be provided and this judgment is a fulfilment of that promise.

Background

[3] On 19 January 2017, after a trial before a judge and jury, in the Circuit Court for the parish of Saint Catherine, the applicant, Mr Loveroy Henry, was found guilty, on an indictment charging him with the offences of rape and forcible abduction. On 27 January 2017 he was sentenced to 18 years' imprisonment at hard labour for the offence of rape and seven years' imprisonment at hard labour for the offence of forcible abduction, to run concurrently. Both sentences were ordered to be reduced by three months to reflect the time that the applicant had spent in custody before the trial.

[4] The defence was consent and as such, the main issue was that of credibility. The prosecution relied on three witnesses, those being; the complainant, her mother and the officer who conducted the identification parade. The statements of the latter two witnesses were agreed between counsel and read into the record without the need for them to be called. The applicant gave an unsworn statement from the dock and called one character witness.

The application for leave to appeal

[5] The applicant filed an application (dated 8 February 2017) to this court for leave to appeal conviction and sentence, on the ground of "unfair trial" with the promise of "Further Grounds to be filed by [his] attorney".

[6] The application which was considered by a single judge of appeal on 26 June 2018 was refused on the basis that the main issue of credibility, as well as the inconsistences and discrepancies in the evidence, were adequately dealt with by the

learned trial judge. The sentences which were imposed by the court were found to be within the usual range of sentences imposed for these offences committed in similar circumstances.

[7] The applicant has sought to renew his application before this court, as is his right.

The case for the Crown

[8] On the evening of 7 September 2013, the complainant was at a bus stop in Brown's Hall in the parish of Saint Catherine. The applicant, a taxi operator, who also lived in the same community as the complainant and was known to her for some time prior to this date, came along and offered her a ride home. She accepted the offer and got into the vehicle. No one else was in the vehicle.

[9] During the course of the journey, the applicant deviated from the route. The evidence is that he used that opportunity to touch the complainant inappropriately. She said that he said it was "a long time him a beg me a fuck and me a goh on like mi naah fuck. A hold man fi hold you down and tek it". She said that she did not respond because she was nervous and did not know what to say.

[10] When they were almost in Woodhall district in the same parish, the applicant told the complainant that he was going to collect something from his friend Chi Chi and she said it was okay. He left her in the vehicle. When he returned he drove in the opposite direction from her home. He later stopped in a lane, pulled back her seat and repeated the words above. She started to cry and told him that she wanted to go home. He

started the vehicle and drove into bushes where there were no streetlights. He asked her for sex and she told him "no". She continued to cry and told him she wanted to go home.

[11] The vehicle stopped and he ordered her to exit the vehicle. She complied and he then told her to get into the back seat. She complied. He told her to remove her panties and she did not. He then tried to remove them unsuccessfully. He again told her to remove them. She complied, she said, because she was afraid and did not know what else to do. He then had sexual intercourse with her without her consent. She continued to cry and he told her to stop making noise. She did not.

[12] He had sexual intercourse with her again, without consent. During the act she asked him what if she got pregnant. He then put on a condom and continued. She continued crying and told him that she wanted to go home. He complied. When she reached home she alighted from the vehicle and told her mother that the applicant had raped her. Her mother started to curse him saying, "boy you rape mi daughter". In his denial he said, "a lie di gyal a tell". He then drove off.

The case for the applicant

[13] The applicant gave an unsworn statement from the dock in which his defence of honest belief of the consent of the complainant was raised. He denied raping the complainant and stated that they had spoken about sex on the way from Brown's Hall to Chi Chi's house and had sexual intercourse after they left there. He also stated that they stopped at Tunga's house before he took the complainant to her home.

[14] A witness was also called who gave evidence of his good character.

The grounds of appeal

[15] As mentioned previously, in the notice of appeal (dated 8 February 2017) the original ground of appeal was "unfair trial". There was also an indication that further grounds would be filed. Subsequently, two supplementary grounds of appeal were filed 26 June 2019 and an amended ground of appeal was filed 9 July 2019. At the hearing of the appeal, permission was sought by learned Queen's Counsel to argue supplementary ground 1A and amended supplementary ground 1, which read as follows:

> Supplementary ground 1A
>
> "The learned trial judge omitted to direct the jury that, if the applicant's defence (urged in his unsworn statement) left them in doubt whether he honestly believed in the complainant's consent to sexual intercourse with him, they were obliged to acquit him. That non-direction constituted a serious misdirection, fatal, it is submitted, to the applicant's conviction."
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> Amended supplementary ground 1
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> "In her summing-up, by inconsistent directions on the issue, the learned trial judge, failed to adequately direct the jury as to the proper approach to the applicant's defence of honest belief in the complainant's consent. The applicant's conviction accordingly constituted a substantial miscarriage of justice."

[16] Permission was granted for these grounds to be pursued.

Submissions on behalf of the applicant

Supplementary ground 1A – The learned trial judge omitted to direct the jury that, if the applicant's defence (urged in his unsworn statement) left them in doubt whether he honestly believed in the complainant's consent to sexual intercourse with him, they were obliged to acquit him.

[17] Queen's Counsel, Mr Harrison, referred the court to the following portion of the learned judge's direction to the jury in relation to the applicant's unsworn statement, at page 98 of the transcript (lines 6 – 14):

> "Now, Mr. Foreman and members of the jury, that was his statement to you. You will have to decide whether you believe him. But even if you don't believe him as I said, you have to – even if you believe that he is lying, you have to go back to the Prosecution's case and see whether they have convinced you by the evidence to make you feel sure that one or either of these, one or both of these offences took place."

[18] It was submitted that the cited portion of the direction, which concerned the applicant's defence, was far from helpful as guidance to the jury. Mr Harrison took issue with the learned judge's direction that the jury should instead "go back to the Prosecution's case" if they did not accept his evidence.

[19] Queen's Counsel, in his oral submissions, argued that the correct approach would have been to direct the jury that, where they do not believe the accused, they should consider all the evidence in the case. In addition, it was submitted that the learned trial judge should have also directed the jury that if the effect of the evidence as a whole is that the applicant believed or may have believed that the complainant was consenting, then the Crown would have failed to discharge the onus of proving the commission of the offence.

[20] It was contended that the appropriate guidance may have been gained from the dictum of Lord Fraser of Tullybelton in **Director of Public Prosecutions v Morgan** [1976] AC 182, a House of Lords decision which was followed by this court in **Denjah Blake v R** [2014] JMCA Crim 19, at paragraph [9].

[21] In the circumstances, it was contended that the learned judge's direction constituted a non-direction, itself constituting a misdirection sufficient to warrant interference with the verdict.

Amended supplementary ground 1 – The learned trial judge failed to adequately direct the jury as to the proper approach to the applicant's defence of honest belief

[22] Mr Harrison submitted that quite early in the learned trial judge's summing-up, she brought home to the jury in the clearest terms that the issue of the complainant's consent "to the sex" was the crucial issue in the present case. Treating in extenso with the offence of rape, the learned trial judge concluded with these words, at page 47 of the transcript (lines 2-7):

> "Mr. Foreman and your members, if Mr. Henry, the accused man, honestly believed that the complainant was consenting, whether or not that belief was based on reasonable grounds, he cannot be found guilty of the offence"

[23] It was submitted that the cited direction was, on the face of it, correct as it was based on the subjective test of the actual belief of the applicant himself, even though he may have been mistaken. However, Mr Harrison also submitted, the learned trial judge failed to apply the law, so correctly stated, to the facts in the case by identifying

for the jury, those aspects of the evidence which may have given rise to the applicant's honest belief in the complainant's consent at the material time.

[24] Queen's Counsel posited that the following ought to have been identified by the learned judge, (1) that no alarm of any form was raised, and (2) the complainant had been left alone in the applicant's van while he went into his friend Chi-Chi's home; this particularly, just after he had, according to the complainant, "touched off" (fondled) her breast while vulgarly suggesting sexual activity between them. In this regard, it should be noted that when the applicant advised the complainant of his need to stop at Chi-Chi's, the complainant agreed without hesitation as she said "okay".

[25] It was further submitted that the trial judge failed to assist the jury by identifying for them any evidence which may have amounted to "mixed signals" grounding the applicant's belief that the complainant was consenting. This Queen's Counsel said, was aggravated by a direction inviting the jury to ask themselves whether the applicant's use of some force to have his way with the complainant (according to the prosecution) "would be consistent with a reasonable belief that [the complainant] was consenting, or she had given her consent, bearing in mind that I told you what the law says in relation to consent" (at pages 74 to 75 of the transcript (line 25 and lines 1 -3)).

[26] It was submitted that to invite the jury to approach the applicant's defence from the perspective of a reasonable belief in the complainant's consent, which is an objective test, constitutes a grave misdirection. He stated that the issue is so critical

that every aspect of the learned trial judge's direction regarding the nature and quality of the defence must be balanced, equitable and fair.

[27] It was submitted that the misdirection referred to at paragraph [22] above, was never corrected and the inconsistency between the latter incorrect direction vis-à-vis the previous correct direction may have confused the jury. This he said, would have impacted on their duty to apply a careful, fair and balanced approach to the applicant's defence. He described the judge's directions as "cavalier".

[28] In the result, it was submitted, the applicant was deprived of the substance of a fair trial. . Accordingly, the applicant's convictions ought to be quashed, sentences set aside and judgment and verdict of acquittal entered.

Submissions on behalf of the Crown

Supplementary ground 1A – The learned trial judge omitted to direct the jury that, if the applicant's defence (urged in his unsworn statement) left them in doubt whether he honestly believed in the complainant's consent to sexual intercourse with him, they were obliged to acquit him

Amended supplementary ground 1 – The learned trial judge failed to adequately direct the jury as to the proper approach to the applicant's defence of honest belief

[29] Crown Counsel, Mr McEkron, essentially argued both grounds together. He stated that his understanding of the grounds was as follows: "The learned trial judge's direction regarding the mental element for the offence of rape was inadequate, in that, she failed to assist the jury in identifying the evidence which gave rise to any honest belief on the part of the applicant that the complainant was consenting to sexual intercourse."

[30] Reference was made to specific portions of the learned judge's summation which Crown Counsel submitted were important in assessing the adequacy of the learned trial judge's directions to the jury. He pointed out that at pages 46 and 47 of the transcript (lines 18-25 and lines 1-7, respectively) the learned trial judge made reference to the well-known and oft cited passage from **Director of Public Prosecutions v Morgan** regarding the necessary requirement for the *mens rea* for the offence of rape. The judge stated:

> "The Prosecution is saying in those circumstances there was no consent and that Mr. Henry knew that she was not consenting or did not care whether she did. What the law says is that, if there was any fear of physical assault or any threat of physical assault or any physical assault, there would have been no consent. So if you find that any of these existed, you would want to think whether, in fact, there was any consent. Mr. Foreman and your members, if Mr. Henry, the accused man, honestly believed that the complainant was consenting, whether or not that belief was based on reasonable grounds, he cannot be found guilty of the offence."

[31] In response to the applicant's contention that the learned judge ought to have assisted the jury by identifying such evidence as may have given rise to the applicant's honest belief that the complainant was consenting at the material time, Crown Counsel submitted that the totality of the learned trial judge's summation must be considered. It was submitted that the learned trial judge explained to the jury in great detail, at pages 72 and 83[1] of the transcript (lines 3-25 and line 4, respectively), the evidence that was led in the case, including the suggestions put to the witnesses by defence counsel. These included the same inferences now being contended on appeal. By way of

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[1] It appears that this was intended to be a reference to page 73

example the court was directed to page 79 (lines 1-6) where the learned judge reminded the jury of defence counsel's suggestion to the complainant that "there was consent because she remained in the van when [the applicant] had stopped at "Chi-Chi", she remained in the van because there was some agreement…".

[32] Crown Counsel responded to the applicant's challenge to the judge's direction where she invited the jury to apply an objective test in assessing the defence by her use of the phrase "reasonable belief" by first referring to pages 74 to 75 (lines 13-25, and lines 1-3) of the transcript, where the learned judge instructed the jury as follows:

> "Mr Foreman and members of the jury, if you believe Peta Gaye that she told the truth, you must ask yourself whether the accused conducted himself in a manner such that you could believe he thought Peta Gaye had consented or was consenting. If you believe her as well and believe she spoke the truth that he pushed her, or he braced her against the seat when she did not comply with his direction, or instruction, or order, however you see it, if you see it any of those ways, you should ask yourself whether such conduct would be consistent with a **reasonable belief** that she was consenting or she had given her consent, bearing in mind that I told you what the law says in relation to consent." (Emphasis supplied)

[33] Crown Counsel acknowledged that the correct test, from **DPP v Morgan**, is that if the defendant believes that the complainant has consented, whether or not that belief is based on reasonable grounds, he cannot be found guilty of rape. Mr McEkron appropriately conceded that while the direction was correctly given by the learned judge at pages 46 and 47 of the transcript (lines 18-25 and lines 1-7, respectively), set out at paragraph [30] above, she went on to misuse the phrase "reasonable belief" at pages 74 to 75 (lines 13-25, and lines 1-3), set out at paragraph [32] above. In oral

submissions, Crown Counsel further conceded that this use of "reasonable belief" took away from what the learned judge appeared to have intended to say and that a further explanation or clarification would have been necessary.

[34] It was further submitted that, having regard to the evidence of the "acquaintance" between the complainant and the applicant, there needed to have been no ambiguity in the minds of the jury in assessing the applicant's honest belief as to whether or not the complainant was consenting.

[35] Crown Counsel also conceded that instead of telling the jury to return to the Crown's case the learned judge ought to have directed them to consider the whole of the evidence.

[36] Reference was made to the cases of **Denjah Blake v R** and **R v Chester Gayle** (1978) 25 JLR 317, which although distinguishable on some points, supported the point that the direction to the jury ought to have been clear. It was observed that there may be some incompatibility with the decision from the case of **Marlon Roberts v The State** (unreported), Court of Appeal, Trinidad and Tobago, Criminal Appeal No. 19/2007, judgment delivered 29 July 2008, which is cited in the Supreme Court of Judicature Criminal Bench Book (the Bench Book). In **Marlon Roberts**, the directions given by the trial judge were in Crown Counsel's estimation far more egregious than in the case at bar. However, on appeal it was held that there was no miscarriage of justice.

[37] As far as the effect of the judge's direction is concerned, Crown Counsel submitted that the case at bar was not a suitable one for a retrial. This was so because the complainant in this case was a young girl at the time of the commission of the offence in 2013 and at the time of the trial in 2017 she had already maintained that there were aspects of her evidence which she could not recall. This among other factors therefore would hamper the interests of justice being served if a retrial were to be ordered.

Discussion and analysis

[38] As would be observed from the orders, set out a paragraph [1], this court was of the view that there was merit in the submissions of Queen's Counsel. Although Mr Harrison's submissions were characterised by precision and economy, this court will further summarise his arguments as follows. The learned judge's directions to the jury were ineffectual/unsatisfactory insofar that:

(1) she failed to avert to the circumstances which might have caused the applicant to believe that the complainant was consenting to sexual intercourse;

(2) she undermined her initial correct direction in relation to the *mens rea* for rape, namely that the jury should apply a subjective test by considering the applicant's honest belief that the complainant consented regardless of whether the belief was based on reasonable grounds, by going on to

suggest that an objective test should be applied, that is, directing the jury to consider whether the applicant's conduct would be consistent with a reasonable belief that she was consenting; and

(3) she incorrectly told the jury to resolve their doubts as to whether the applicant was telling the truth by returning to the Crown's case, as opposed to considering the evidence in its entirety.

(1) Failure to advert to the circumstances which might have caused the applicant to believe the complainant was consenting

[39] It is observed that the summation of the learned judge was generally balanced. Where the issue of consent is concerned, she invited the jury to consider the actions of the complainant as well as what she said in order to decide whether, if believed, they would amount to an agreement to have sexual intercourse with the applicant. She undertook an extensive review of the evidence and highlighted the inconsistencies. In particular, the judge recounted the suggestions that had been put to the complainant, at page 78 to 79 of the transcript. She also reminded the jury that the complainant got into the applicant's van knowing he had a sexual interest in her, that she did not answer her mother's call because she did not want to tell her where she was and that she remained in the van when the applicant stopped at Chi Chi's because there was some agreement. She also reminded the jury of the complainant's responses to these

suggestions and ultimately instructed them that these were matters for them to decide whether they accepted her explanations.

[40] The learned judge ended that aspect of her summation by leaving it to the jury to decide whether the complainant's conduct was the conduct of someone who was consenting.

[41] In **R v Chester Gayle**, to which we were referred by Crown Counsel, in allowing the appeal it was held that "in directing the jury on the issue of consent the trial judge had a duty to assist the jury by pointing out that on the Crown's case there were possible inferences from which it could be found that the accused believed that the complainant had consented as it was only by directing the jury along those lines that the trial judge could have alerted the jury as to whether or not the Crown had discharged the burden of proving the absence of such belief." Downer JA made the observation that even though the learned judge's general directions early in his summing up were impeccable, they "were not co-related to the evidence raising the issue of honest belief that must be negatived by the prosecution". [2]

[42] The learned judge cannot be faulted in this regard. There was no failure to advert to the circumstances which might have caused the applicant to believe that the complainant was consenting.

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[2] Page 320

(2) The learned judge undermined her initially correct direction in relation to the honest belief by going on to suggest that an objective test should be applied

[43] Section 3(1) of the Sexual Offences Act which provides:

> "A man commits the offence of rape if he has sexual intercourse with a woman --
>
> (a) without the woman's consent; and
>
> (b) **knowing** that the woman does not consent to sexual intercourse or recklessly not caring whether the woman consents or not." (Emphasis added)

[44] Although consent is not defined by the said Act, section 3(2) is instructive:

> "For the purposes of subsection (1), consent shall not be treated as existing where the apparent agreement to sexual intercourse is –
>
> (a) extorted by physical assault or threats or fear of physical assault to the complainant or to a third person; or
>
> (b) obtained by false and fraudulent representation as to the nature of the act or the identity of the offender."

[45] We agree that the portion of her summation set out at paragraph [30] is unexceptionable, as Queen's Counsel submitted. It accords with the principle recognised by Morrison JA (as he then was), at paragraph [9] of **Denjah Blake v R**, from **DPP v Morgan**, that "if a defendant accused of rape believes that the complainant has consented, whether or not that belief is based on reasonable grounds, he cannot be found guilty of rape."

[46] Though quite well-known, it is perhaps useful to recount the details of **DPP v Morgan**, the facts of which were described as "somewhat bizarre". One of appellants, M, invited the three other appellants, who were strangers to him, to come to his house

and have sexual intercourse with his wife. M assured them that his wife would be willing but would probably simulate reluctance for her own pleasure. The appellants agreed and M drove them all to his house. They found Mrs M asleep, awakened her and forcibly took her into another bedroom. Each of appellants had intercourse with Mrs M whilst the others restrained her. Immediately after, Mrs M left the house and went to a nearby hospital. She alleged that she had been raped and that she had done all she could to resist. The three appellants other than M were charged with rape and all four with aiding and abetting the rapes by the others. The statements made by appellants to the police corroborated Mrs M's story, but at the trial the appellants changed their statements and claimed that Mrs M had been a willing party throughout. The judge directed the jury that the prosecution had to prove that appellants had intended to have intercourse with Mrs M without her consent and that if appellants had believed that she was a willing party they could not be found guilty provided that their belief was a reasonable one. All four appellants were convicted and appealed.

[47] By a four to one majority, the House of Lords held, (1) the crime of rape consisted in having sexual intercourse with a woman with intent to do so without her consent or with indifference as to whether or not she consented. It could not be committed if that essential *mens rea* was absent. Accordingly, if an accused in fact believed that the woman had consented, whether or not that belief was based on reasonable grounds, he could not be found guilty of rape; (2) in the light of all evidence, however, no reasonable jury could have failed to convict appellants even if the jury had been properly directed. Accordingly, despite the misdirection, there had

been no miscarriage of justice in respect of any of appellants and their appeals were dismissed.

[48] In the case at bar it was common ground that learned judge made an error in her use of the phrase "reasonable belief" when directing the jury in relation to consent. We entirely agree that she erred in giving the subsequent direction, which is set out more fulsomely at paragraph [32]. For present purposes it is useful to set out the portion, which contains the misdirection:

> "…you should ask yourself whether such conduct would be consistent with a reasonable belief that she was consenting or she had given her consent, bearing in mind that I told you what the law says in relation to consent."

[49] We agree with the submission of Queen's Counsel that guidance may be found from the dictum of Lord Fraser wherein he opined, at page 237 of **DPP v Morgan**, as follows:

> "…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." (Emphasis added)

[50] For good measure, it is useful to have regard to the dictum of Lord Hailsham of St. Marylebone at page 215:

> "I am content to rest my view of the instant case on the crime of rape by saying that it is my opinion that the prohibited act is and always has been intercourse without consent of the victim and the

> mental element is and always has been the intention to commit that act, or the equivalent intention of having intercourse willy-nilly not caring whether the victim consents or no. A failure to prove this involves an acquittal because the intent, an essential ingredient, is lacking. **It matters not why it is lacking only it is not there, and in particular it matters not that the intention is lacking only because of a belief not based on reasonable grounds**." (Emphasis added)

[51] The jury ought to have been instructed that if the applicant, when he had sexual intercourse with the complainant, genuinely believed that she was consenting, he was not to be found guilty of rape, even if they were of the view that he had no reasonable grounds for his belief. The test is one of honest belief, and as such, Queen's Counsel was quite correct when he submitted that it was the applicant's subjective belief that the jury ought to have been directed to consider.

[52] However, the timing of the misdirection cannot be overlooked as it occurred closer to the end of her summation. There was, therefore, a real likelihood that it would have left a lasting impression on the juror's minds when they retired to consider the case. In the circumstances, we formed the view that this constituted a miscarriage of justice and as such we allowed the application.

(3) <u>The learned judge erred in directing the jury to resolve their doubts as to whether the applicant was telling the truth by returning to the Crown's case</u>

[53] Queen's Counsel recounted his own experience that the customary direction to the jury is along the following lines, "If you believe the accused, acquit him. If you are not sure, acquit him. Even if you believe he is lying and do not believe a word he says, you do not for that reason convict him. You must consider all the evidence in the case".

[54] We found his submission in this regard to have merit. After all, it is the "effect of the evidence as whole" (per Lord Fraser) that the jury must consider when determining whether the accused believed the complainant consented. The applicant was entitled to have the whole evidence considered by the jury, including all aspects of his defence and they should have been so directed. Put another way by Lord Goddard CJ in **Rex v. Steane** [1947] K.B. 997, at page 1004:

> "… **if on the totality of the evidence** there is room for more than one view as to the intent of the prisoner, the jury should be directed that it is for the prosecution to prove the intent to the jury's satisfaction, and if, on a **review of the whole evidence**, they either think that the intent did not exist or they are left in doubt as to the intent, the prisoner is entitled to be acquitted." (Emphasis added)

[55] As mentioned above, Crown Counsel appropriately conceded that the learned ought to have directed the jury that if they did not believe the evidence of the applicant they were to consider all of the evidence in the case in order to arrive at their verdict.

Should there be a retrial?

[56] Where a conviction has been quashed this court is empowered by the Judicature (Appellate Jurisdiction) Act to order a retrial. Section 14(2) states:

> "Subject to the provisions of this Act the Court shall, if they allow an appeal against conviction, quash the conviction, and direct a judgment and verdict of acquittal to be entered, or, if the interests of justice so require, order a new trial at such time and place as the Court may think fit."

[57] In order to determine whether a retrial is in the interests of justice, this court is required to consider the circumstances of the case. As was stated by Lord Diplock who delivered the decision of the Board in **Dennis Reid v The Queen** (1978) 16 JLR 246:

> "…any consideration of what the interests of justice require in a particular case may call for a balancing of a whole variety of factors, some of which will weigh in favour of a new trial and some against, and not all of which are necessarily confined to the interests of the individual accused and the prosecution in the particular case. The weight to be given to those various factors may differ from case to case…"[3]

[58] Those factors which were set out by the Board were reproduced in the judgment of Brooks JA in **Shirley Ruddock v R** [2017] JMCA Crim 6. They are as follows:

> "(ii) The interest of justice that is served by the power to order a new trial is the interest of the public that those persons who are guilty of serious crimes should be brought to justice and not escape it merely because of some technical blunder by the judge in the conduct of the trial or in his summing up to the jury.
>
> (iii) It is not in the interest of justice that the prosecution should be given another chance to cure evidential deficiencies in its case.
>
> (iv) Where the evidence against the accused was so strong that any reasonable jury if properly directed would have convicted the accused, prima facie the more appropriate course is to apply the proviso and dismiss the appeal.
>
> (v) Among the factors to be considered in determining whether or not to order a new trial are: the seriousness and prevalence of the offence; (b) the expense and length of time involved in a fresh hearing; (c) the ordeal suffered by an accused person on trial; (d) the length of time that will have elapsed between the offence and the new trial; (e) the fact, if it is so, that evidence which tended to support the defence on the first trial would be available at the new

[3] Pages 247-248

> trial; (f) the strength of the case presented by the prosecution, but this list is not exhaustive." [4]

[59] Notwithstanding that the error was on the part of the judge, we also had regard to the very proper submission of Crown Counsel that the case was not one that was suitable for retrial, given the complainant's difficulty in recollection at the time of the trial and the length of time that has since passed. Accordingly, in the interests of justice we did not think it appropriate to make such an order.

The Bench Book

[60] Finally, we would make a comment about the case of **Marlon Roberts** which Crown Counsel pointed out is referred to in the Bench Book, under the heading of "Consent and Reasonable Belief in Consent." Reference was made to that case in the context of the complaint that the learned trial judge failed to assist the jury by identifying evidence which may have supported the appellant's defence of honest belief.

[61] It is perhaps best to set out the paragraph since it was the court's reference to a passage from Archbold Criminal Pleading, Evidence and Practice that was commended as a useful guide to judges.

> "In *Marlon Roberts v The State* the appellant challenged the adequacy of the trial judge's directions on the requisite mens rea for the offence of rape. The Court considered *Archbold* (2000) [17-58] as providing a useful guide on the direction that a trial judge should give a jury concerning the issue of consent:
>
> [I]n summing-up a case for rape which involves the issue of consent, the judge should, in dealing with the state of mind of the

[4] Paragraph [17]

> defendant, direct the jury that before they can convict, the Crown must have proved either that he knew the woman did not consent to sexual intercourse, or that he was reckless as to whether she consented. If the jury is sure he knew she did not consent, they will find him guilty of rape knowing there to be no consent. If they are not sure about that, they will go on to consider reckless rape."

[62] We do not find this in any way to be misleading, particularly since the passage from Archbold aligns with section 3(1) of the Sexual Offences Act (set out at paragraph [43]) above) which provides the mental element (*mens rea*) for the offence of rape. This is quite similar in wording to section 4(1) of the Sexual Offences Act, 1986 which was considered by the Court of Appeal of Trinidad and Tobago in **Marlon Roberts**. The court was satisfied that the summing-up of the trial judge on the issue of consent reflected with sufficient clarity what was encapsulated in their Sexual Offences Act and that the jury was adequately instructed to consider whether the appellant had the requisite mental element for the offence of rape.

[63] There were a number of other grounds advanced before the court in **Marlon Roberts,** which were ultimately resolved by dismissing the appeal as it was determined there was no miscarriage of justice. These "egregious" directions, as described by Crown Counsel, included *inter alia* (i) a wrongful direction on the burden and standard of proof, which the court acknowledged was a misdirection but deemed it "no more than the slip of the tongue"; and (ii) a direction that intimated that the accused, if innocent, may have prepared for trial by calling witnesses who could speak to his innocence – essentially placing an evidential burden on the accused. The court was satisfied that the jury would have understood the judge's remarks in light of the context

that they could only deal with the evidence given in court and had to disregard "what coulda or woulda" and that no evidential burden was being placed on the appellant. Accordingly, the court held that he suffered no prejudice.

[64] In relation to how the court dealt with these "egregious" directions, we would observe that some cautionary treatment may be appropriate and, in any event, the case of **Marlon Roberts** is merely a persuasive authority.

[65] The passage referred to in the Bench Book does not address the issue of honest belief. That issue is dealt with on page 321 under the heading, "Belief in Consent". It reads:

> "The next question is whether the accused honestly believed that the complainant was consenting. If you are sure that the accused knew either that (i) the complainant was in no condition to make a choice one way or the other or (ii) the complainant had made no choice to agree to sexual intercourse, then you will be sure that the accused did not honestly believe that the complainant was consenting. If that is your conclusion, your verdict would be guilty.
>
> If, on the other hand, you conclude that the accused did believe, or may have believed, that the complainant was consenting, you need to consider the final question which is whether his belief was reasonable in the circumstances."

[66] We have a concern regarding the above direction and the heading of chapter 20-4, which reads "Consent and Reasonable Belief in Consent'. Judges are reminded that the direction in relation to honest belief is based on a subjective test. That is, the accused man's genuine belief that the complainant was consenting.

Conclusion

[67] It is clear that the learned trial judge in addressing the issue of honest belief misdirected the jury and that consequently there was a miscarriage of justice. It is for this reason that we decided to allow the appeal and made the orders set out at paragraph [1], above.