JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 5/97

BEFORE: THE HON. MR. JUSTICE RATTRAY, P.
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE BINGHAM, J.A.

REGINA vs. CLEMENT JONES

Lord Anthony Gifford, Q.C. and Hugh Wilson for the appellant

David Fraser for the Crown

December 2, 3, 1997 and April 27, 1998

BINGHAM, J.A.:

The appellant, a soldier in the Jamaica Defence Force, was tried and convicted in the Home Circuit Court on the 15th January, 1997, of rape and was sentenced to five years imprisonment at hard labour. He appealed against his conviction and sentence by leave of the single judge. We subsequently heard arguments from counsel at the end of which we reserved our judgment. This judgment now follows.

The facts, briefly summarised, were as follows: The complainant, W.M., and the appellant were members of the same church. As a driver in the Jamaica Defence Force the appellant was accustomed to taking the complainant to church on Fridays.

On Friday 8th September, 1995, the appellant went to the complainant's work place around 4:00 p.m. He told her that he wanted to speak to her and

invited her to sit in the vehicle. He then told her that he wanted them to have an intimate relationship. She declined his offer telling him why such a relationship was not possible. The appellant reacted by driving off the vehicle with the complainant. He told her that he was going to Port Royal to collect something for his boss. He promised to drop her off at church on the return journey.

When the vehicle got to a short distance from Morgan's Harbour Hotel, however, the appellant turned to the right of the road and into a swampy, bushy area. This manoeuvre caused the complainant to enquire from him as to "wha you a do, whey you a turn up here so fah." His response was to demonstrate his annoyance at her rejection of his advances by coming out of the vehicle, slamming the driver's door and exclaiming, "Jesus, Jesus, a love this gal and all she have to do is love me back and she don't want to."

The appellant then re-entered the vehicle and held unto the front of the complainant's dress and renewed his sexual advances. She responded by telling him, "Don't let the devil fool you"; repeating this warning to the appellant several times during her ordeal. The appellant then proceeded to slap and punch the complainant several times while threatening to kill her. He then forcibly removed her panties and attempted to have sexual intercourse with her without much success. This resulted in his sexual appetite becoming even more aroused. He went into the glove compartment of the vehicle and took out a knife which he held at the complainant's throat. He ordered her to remove her dress. She did so following which he proceeded to force her feet apart and to have sexual intercourse with her.

After he was finished, he took up the knife, threatening the complainant that it was "time fi yuh dead now." Her response was to plead with him that, "Clement

you doh enough to mi already, don't kill mi." These words seemed to have had its desired effect on the appellant as he dropped the knife telling the complainant, "W., a yuh mek mi doh this to yuh, yuh know, because mi love you and all you have to do is love mi back." He also expressed the desire that, "Now this happen, mi wi love him and married to him."

Following this the complainant made several attempts to re-clothe herself and to leave the car. She was prevented from doing so by the appellant who threatened her on each occasion. They remained at the scene until nightfall before he finally left around 7:30 p.m. He drove her to the church, stopping shortly on the way to buy drinks which he offered her. She reluctantly took it from him.

At the church the complainant spoke to a sister who then spoke to her boyfriend to whom she is now married. She in her distressed state told him what had happened. He escorted her to Up Park Camp where both the appellant and himself were stationed. The complainant made a report and from there she was taken to the Cross Roads Police Station where she also made a report. The following morning she went to the Rape Centre where she was examined by a doctor.

The medical evidence from Dr. Herbert Elliott described the condition of the complainant and the injuries which he observed to the inner portion of both thighs and her private parts. This led him to canvass the opinion that the injuries he saw were not consistent with voluntary sexual intercourse.

The appellant's account, on the other hand, was that the complainant and himself were, over a period of some three months, intimate friends indulging in regular acts of sexual intercourse secretly at her home whenever the lady with whom she shared residence was absent. They also on one previous occasion had

sexual intercourse at the same location where the incident took place on the day in question. On that occasion the act of sexual intercourse took place by arrangement. It was the complainant who suggested that they drive to Port Royal before going to church that Friday. On this score, this would have amounted to a clear case of consensual sexual intercourse between these two persons.

Given these two diametrically opposite accounts, the matter resolved itself down to a credibility issue as to which of the two accounts, viz., that of the complainant or the appellant was to be believed. From the account of the complainant this amounted to a case of a forceful sexual assault on her at knife point which, if accepted by a reasonable jury, clearly supported the verdict arrived at.

On the basis of her account, the appellant could not have understood her reaction to his advances in any other manner than that she was not consenting to having her person violated. From the very outset and throughout the incident his advances were met by the words, "Don't let the devil fool you." As the jury accepted the account given by the complainant, it is in this context, therefore, that the sole ground of complaint falls to be considered.

Learned counsel for the appellant has submitted that on the issue of consent, the learned trial judge misdirected the jury in directing them that the appellant would be not guilty if he believed that the complainant consented, provided this belief was a reasonable belief.

Learned counsel for the Crown in response submitted that on the totality of the evidence the learned judge's directions on mens rea were not defective. Where the issue is that of consent vel non and the appellant mistakenly but honestly believed that the complainant was consenting then the terms of honest

belief or reasonable belief is of no moment. Even were it otherwise and the court was of the view that there was merit in the complaint this would be a suitable case for the application of the proviso.

The direction complained of appears at pages 8-9 of the record, viz.:

> "Further, the prosecution has to prove that the defendant intended to have sexual intercourse with this woman without her consent. Not merely that he intended to have sexual intercourse with her, but that he intended to have intercourse without her consent or recklessly, not caring whether she consented or not. Therefore, if the defendant believed or may have believed that M. consented to him having sexual intercourse with her, than there would be no such intention in his mind and he would not be guilty of the offence of rape.
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> But such a belief must be honestly held by the defendant. In the first place, he must believe that and secondly, his belief must be a reasonable belief, such a belief as a reasonable man would entertain if he applied his mind and thought about the matter.
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> It is not enough for the defence to rely on belief even though he honestly held it, if it was completely fanciful, contrary to every indication which would be given and which would carry some weight with a reasonable man; and of course the belief must not be a belief that the woman would consent at some time in the future, but that at that time when intercourse was taking place or when it began, she was consenting to it."
> [Emphasis supplied]

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 All E.R. 347.

Given the facts in this case, however, this ground of complaint is untenable. On the basis of the appellant's account, if accepted, the result would be a situation

in which there was consensual sexual intercourse between these two persons by arrangement supporting a verdict of not guilty. On the basis of the complainant's account, if accepted, the result would amount to a situation in which there was a forceful sexual assault on the complainant at knife point supporting the verdict arrived at.

Learned counsel for the appellant cited in support S.C.C.A. 8 and 11/96 ***R. v. Linval McLeod and Yvonne Berlin*** [1987] 24 J.L.R. 160. There the court, following ***D.P.P. v. Morgan*** (supra) and an earlier decision of the court in ***R. v. Kenneth Robinson*** S.C.C.A. 109/79 (unreported) delivered on 22nd January, 1982, in considering the matter of consent as an issue arising in sexual offence cases and reviewing the authorities had this to say (per Rowe, P.):

> "In each case the jury must be asked and must answer the question, 'Did this accused man intend to have sexual intercourse with this woman without her consent or not caring whether she consented or not?' This means that it is the man's subjective intention which is material and that leads to the situation where a man may honestly believe that a woman is consenting whereas from the woman's point of view, consent was the furthest thing from her mind.
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> In each case, the facts will indicate whether the focus of the summing-up should be to show that the accused man could not and did not hold the belief which he now asserts, e.g. if he battered his victim into submission or had his way with her at the point of a loaded firearm." [Emphasis supplied]

On these facts there was no room here for any suggestion that the appellant, based on the complainant's conduct, may either have obtained mixed signals or got his signals all wrong and had indulged in sexual intercourse with the complainant in the mistaken belief that she was consenting when in fact she was not.

complainant in the mistaken belief that she was consenting when in fact she was not.

In light of the defence put forward by the appellant there was no room for any direction based on honest belief. To borrow the words of Wolfe, J.A. (as he then was) in ***R. v. Aggrey Coombs*** S.C.C.A. 9/94 (unreported) delivered 20th March, 1995 (relied on by the Crown):

> "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.
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> The question of honest belief in a case of rape only arises where the man misreads or misunderstands the signals emanating from the woman."

In light of the above, 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.

Moreover, had we been satisfied that the directions were defective we would have had no hesitation in applying the proviso to section 14(1) of the Judicature (Appellate Jurisdiction) Act, as no substantial miscarriage of justice has been occasioned to the appellant.

This was a matter which fell to be resolved on the question of which of the two diametrically opposite accounts was to be believed. It boiled down entirely to a credibility issue for the jury to determine. The jury in accepting the version of the complainant, given the fact that there was no issue as to identity, had support from the medical evidence that the act of sexual intercourse was not voluntary.

Having found no valid basis for the ground of complaint which fails, it follows that the appeal is dismissed. The conviction and sentence are affirmed and sentence shall commence from 15th April, 1997.