JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 25/1999

BEFORE:THE HON. MR.JUSTICE FORTE, P.
THE HON. MR.JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE LANGRIN,J.A.

REGINA
v
DALBERT MCKNIGHT

Ravil Golding for appellant

Miss Paula Llewellyn, Deputy Director of Public Prosecutions and Sandra Chambers for the Crown

March 27 and July 17, 2001

LANGRIN, J.A.:

The appellant was convicted for rape in the St. Ann Circuit Court by Granville James J, and jury and sentenced to serve a term of seven (7) years imprisonment at hard labour. After hearing arguments we dismissed the appeal, affirmed the conviction and sentence and promised to reduce our reasons to writing. We now keep our promise.

The appellant is 33 years old and a father of two (2) children ages five (5) and three (3) who depend on him for support.

On the 22nd January, 1998 at about 6:00 a.m. M and her sister L accompanied their mother on her way to work. On reaching a part of the

journey, the sisters decided to return home and on their way back they stopped at a hut, occupied by the appellant and another person. They asked for one "Buttie" and the appellant said that he was not there. They went into the hut before they left and were then accompanied on the return journey by the appellant. On reaching a certain point which M described as a dark corner, the appellant went underneath a bridge. When he returned he tripped M and she fell. The appellant took off his shorts as well as M's clothes and had sexual intercourse with her in the presence of her sister. When M took up a piece of stick and attempted to hit the appellant, he said that he would throw her into a deep hole. M, said she bit him on the shoulder. Eventually, she left with her sister to her home. M was crying when her father called her and asked her what had happened. She told him that she had been raped.

L, a 12 year old schoolgirl and sister of the complainant, corroborated M's evidence on all the material particulars. She said M was on the road lying down and the appellant drew off her clothes and took out his "sinting" and put in her. She said M was crying and that M also demonstrated to the appellant that she was having her menstrual period. When they got to the house L spoke to the father and they went to the Police Station where the matter was reported to the Police.

The appellant, gave an unsworn statement. His statement was that he had sexual intercourse with M but he did not rape her. In other words, there was consent between the parties.

Counsel for the defence in his main ground of appeal argued that the learned trial judge erred in law in that he failed to give the jury any or any sufficient assistance on the issue of honest belief. More particularly, that the appellant honestly believed that the complainant, whether by word or action, was consenting to have sexual intercourse with him. Further, the learned trial judge failed to direct the jury that if the appellant honestly believed that the complainant consented to have sexual intercourse with him then he would not be guilty of the offence of rape. Counsel pointed out that the complainant did not give an absolute "no" to the proposed sexual intercourse but only stated that she was having her menstrual period. In fact, he argued that L said that the complainant had shown the appellant her private parts which may have been interpreted as an act of consent.

The learned trial judge at page 2 of the transcript gave the following directions on the issues:

> "The important factor that the prosecution must prove is that sexual intercourse took place without consent by the woman involved. The prosecution is saying that there was no consent. The defence is saying there was consent. This is where your function as judges of the facts of the case comes in.
>
> You will have to examine the circumstances and you decide whether there was consent or no consent, the verdict is in relation to this question of consent..."

On page 12 the learned judge continued his directions:

> "... He came back and what she said amounted to the fact that he tripped her. He used his foot to hit her foot and she fell down. He took off his shorts and took off her clothes and had sexual intercourse with her. She said that she took up a

> piece of stick and was going to hit him and she said he said that he could throw her in a hole, a deep hole. She said she bit him on the shoulder, bite him on his shoulder. All these are bits of evidence that have been tendered before you, Mr. Foreman, and members of the jury, and evidence for you to consider."

In ***DPP v Morgan*** [1975] 2 All E.R. 347 it was decided that if at the time of intercourse the defendant had a mistaken belief that the woman was consenting, he cannot be convicted of rape, even if he had no reasonable grounds for such a belief.

The facts of ***Morgan*** are instructive. ***Morgan,*** the senior non-commissioned officer in the Royal Air -Force invited the other three defendants, also in the Royal Air Force but complete strangers, to his house to have intercourse with his wife. At trial, the other three alleged that ***Morgan*** had told them that his wife might resist, but this would only be an excuse to stimulate her excitement. Mrs. Morgan was aroused from sleep in a bedroom which she shared with her eleven year old son. She was taken by all four defendants to another room where there was a double bed, and all four defendants had sexual intercourse with her.

At trial all four asserted that Mrs. Morgan was a willing party. The trial judge directed the jury that if they came to the conclusion that the victim did not consent, but the defendants believed or might have believed that she did they should convict if they were satisfied that the defendants had no reasonable grounds for so believing. All four defendants were convicted and the Court of Appeal dismissed their appeals against convictions.

In the House of Lords, the majority held that there had been a misdirection in law by the trial judge. It was said that where a defendant has had sexual intercourse with a woman without her consent, he cannot be convicted of rape if, in fact, he believed at the time that she was consenting, although he had no reasonable grounds for such a belief. Nevertheless, despite the misdirection, the House applied the proviso and dismissed the appeals on the ground that the jury would not have returned different verdicts even if they had been properly directed.

Lord Hailsham in his judgment had this to say at p.361:

> "Once one has accepted, what seems to me abundantly clear, that the prohibited act in rape is non-consensual sexual intercourse, and that the guilty state of mind is an intention to commit it, it seems to me to follow as a matter of inexorable logic that there is no room either for a 'defence' of honest belief or mistake, or of a defence of honest and reasonable belief and mistake. Either the prosecution proves that the accused had the requisite intent, or it does not. In the former case it succeeds, and in the latter it fails. Since honest belief clearly negatives intent, the reasonableness or otherwise of that belief can only be evidence for or against the view that the belief and therefore the intent was actually held...".(emphasis mine)

Lord Fraser of Tullybelton summarized the points at page 382:

> "...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 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 truly held by the defendant, but that is all".(emphasis mine)

The question arises as to when the jury should be directed on genuine but mistaken belief. The answer appears to depend on whether there are facts on which the jury could find that the defendant had a genuine but mistaken belief that the complainant was consenting. Where there are sufficient facts the judge should direct the jury that if the defendant may have had such a belief, they should acquit him. Where there is evidence, regardless of the source from which it emanates, that the complainant might have consented, even if the defendant does not claim such a belief, the judge should leave the defence of honest but mistaken belief to the jury.

It must be clearly understood that there is no general requirement that such a direction should be given in all cases of rape and it will always depend on the evidence whether such a direction is necessary.

The direction which Mr. Golding contends is lacking cannot be mandatory in circumstances where the defendant, in a rape case like the present one, asserted that the complainant had consented. The need for such a direction could only arise where there was evidence to suggest the possibility of a genuine mistaken belief by the defendant. Examples of cases where a direction on honest belief may not be necessary are where the defence is one of alibi, sex by arrangement and where there is a denial that sexual intercourse occurred. There may also not be the need for such a direction where the evidence is diametrically opposed, as in these circumstances the real issue is one of credibility. Such a credibility case was ***R v Paul Hendricks*** SCCA 39/91 (unreported) delivered on July 17, 1999.

The following judgments from this Court are also illustrative of the principle:

R. v Kenneth Robinson SCCA No. 109/79 (unreported) delivered on 22nd January, 1982;

R. v Linval Mcleod and Yvonne Berlin [1987] 24 JLR 60;

R. v Aggrey Coombs SCCA 9/94 (unreported) delivered 20th March 1995;

R. v Clement Jones SCCA No. 5/97 (unreported) delivered 27th April, 1998; and

R. v Courtney Gordon SCCA 132/96 delivered 1st March, 1999.

In the instant case, there was no evidential foundation on which one could erect an edifice of honest though mistaken belief. The surrounding circumstances of the rape as demonstrated in the evidence were not consistent with consensual voluntary intercourse.

In such a case as this any direction on the issue of honest though mistaken belief that the complainant was consenting would only tend to confuse the jury and would be wholly unnecessary.

Turning now to the second ground of appeal, it was submitted to us that the trial judge failed to deal adequately with the question of corroboration and the reasons for it. The failure or omission to give reasons, he argued, may cause the jury to be left to speculate.

Where the charge is rape the corroborative evidence must confirm in some material particular that intercourse has taken place without the woman's consent and also that the accused was the man who committed the

crime: See ***James v D.P.P*** [1971] 55 Cr. App. R 299 at p. 302. Applying the principle stated therein to the facts of the present case, it was important, for the trial judge to ascertain whether on the evidence there was the necessity to give any warning to the jury on the question of corroboration. L's evidence would have provided a sufficient basis on which the trial judge could have concluded that a corroboration warning was unnecessary. We are therefore of the view that given the evidence of L, as outlined supra it was open to the jury to find that there was corroboration on the issue of lack of consent.

Nevertheless the trial judge directed the jury as follows:

> "...the law requires that when a judge is summing up the case to you he should tell you that it is dangerous to convict on the uncorroborated evidence, the unsupported evidence of the complainant alone. But as I went on to tell you having given you this warning, if you are satisfied to the extent that you feel sure that the accused is guilty despite the absence of corroboration on the question of consent you can nevertheless return a verdict of guilty but it depends entirely on who you accept and what you reject and you consider all the evidence in this case. And remember I told you, you can only return a verdict of guilty if you are satisfied to the extent where you feel sure of the guilt of the accused."

We feel this direction enured to the benefit of the defendant since in the light of the evidence of L, there was sufficient evidence which was capable of amounting to corroboration. The judge had given appropriate directions on the danger of convicting on the sworn evidence of children. Therefore, this ground also fails.

We find that there was no merit in the other grounds so we do not propose to deal with them.

In the result, as earlier stated the appeal was dismissed and the conviction and sentence affirmed. It was ordered that the sentence commence on May 14, 1999.