JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 9/94

BEFORE: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE GORDON, J.A.
THE HON. MR. JUSTICE WOLFE, J.A.

REGINA
vs.
AGGREY COOMBS

Howard Hamilton, Q.C. for the applicant

Delroy Chuck for the Crown

February 27 and March 20, 1995

WOLFE, J.A.:

At the conclusion of the arguments we refused this application for leave to appeal and promised to put our reasons for so doing into writing. We now do so.

The applicant was convicted on the 7th day of January, 1994, in the St. James Circuit Court for the offence of rape before Pitter, J., sitting with a jury. He was sentenced to be imprisoned for five years at hard labour.

The evidence adduced at the trial disclosed that the complainant, P.S., and the applicant knew each other very well. He was a part-time taxi operator. P.S. and other members of her family were accustomed to use his taxi to and from home. On the 1st day of November, 1993, P.S. was at the taxi-stand waiting on transportation to get home when she saw the applicant. She spoke to him about taking her home. He said he had to go to Flankers before. This was not convenient for her and she told him so. After the applicant had spoken to another man he told her that he would not be going to Flankers again and he could take her home but he had to make a short stop somewhere along Gloucester Avenue to collect something at the Camp. She entered the vehicle and was eventually lured to premises near to the Seawind Hotel where she was sexually assaulted. A report was made to the police and the applicant was arrested and charged with the offence of rape. The applicant admitted having sexual intercourse with P.S. but said he did so with her consent.

Two grounds of appeal were argued before us. In ground 1 the complaint is that the learned trial judge misdirected the jury on the question of whether or not the applicant honestly believed that the complainant had consented. Mr. Hamilton submitted that the directions given by the learned trial judge re the question of honest belief were defective. In addressing the subject of honest belief, the judge said: (pages 4-5)

> "Further, the Prosecution will have to prove to you that the accused intended to have sexual intercourse with her without her consent not merely that he intended to have sexual intercourse but that he intended to have this sexual intercourse without her consent. Therefore, if he believed or may have believed that she was consenting to him having sexual intercourse with her then there

> "is no such intent in his mind and he would not be guilty. But such a belief Madam Foreman and members of the jury, must be honestly held by the defendant in the first case. He must really believe that she was consenting to have sexual intercourse with her and this belief must be a reasonable belief, such a belief that a reasonable person entertains in his mind and thought. It is not enough for the accused man to rely under (sic) belief even though he honestly held it, if it was completely fanciful.
>
> So, even if he thinks that she was consenting to him, it must be a reasonable belief."

This direction gave rise to the complaint that the jury were left to believe that the belief held by the applicant must be a reasonable belief. We are of the view that the submission is mere semantics. The jury could have been left in no doubt that if the applicant honestly believed that the complainant was consenting then they would have had to find him not guilty. In using the words reasonable and fanciful, the learned trial judge was doing no more than bringing home to the mind of the jurors that an honest belief had to be held on a reasonable basis. It could not be fanciful. A man cannot be heard to say, for example, I honestly believe she was consenting when sexual intercourse takes place under the threat of a firearm being held to the head of a person. This, to use the language of the judge, would be fanciful.

In any event, the defence was not that the applicant honestly believed that P.S. was consenting. He said sexual intercourse took place by arrangement. They had gone to the dead end to have sex but it was not convenient so they went to Seawind for that purpose

and that purpose alone. Furthermore, on the 5th November, 1993, when he was accosted by Detective Corporal Usher and told of the report, he said:

> "Mr. Usher, a no rape me rape har, a she give me and because me tell har, har pussy no good, she vex and sey a rape mi rape har."

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.

Had we been satisfied that the directions on honest belief 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 applicant.

The second ground complains that the learned trial judge misdirected the jury on the vital question of corroboration in that he pointed out evidence as being capable of amounting to corroboration which in fact was not corroboration. The trial judge, on corroboration, said: (pages 5-6)

> "Now, corroboration, Madam Foreman and members of the jury, is simply this, some independent evidence which confirms in some material particular, not merely that the offence has been committed, but that the accused committed it. The corroborative evidence must confirm in some material particular that intercourse has taken place. Well as I said earlier on that aspect there has been corroborated (sic) because he has corroborated her story that intercourse did take place, and that it has taken place without her consent and that the accused was the man who committed the crime.
>
> Now, bearing this warning in mind, you must look at the particular facts of this case, and after having given full weight to the warning that it is dangerous to convict on the uncorroborated evidence, you must come to the conclusion that the complainant is no doubt speaking the truth.Then the fact that there is no consideration (sic) does not matter, and you are entitled to convict but you must be very sure that she has spoken the truth before you can act on that evidence. In this case there is no corroboration of consent. The only corroboration you have so far as the incident is concerned is the fact that intercourse did take place between the accused and the complainant.
>
> [Emphasis supplied]

It is clear that in using the word corroboration, when dealing with the question of sexual intercourse, the judge was using that word in respect to the fact of sexual intercourse having taken place with the applicant. There is nothing wrong with that. What is important is whether or not the jury was made to understand that corroboration in the offence of rape involved the triple concept of intercourse, absence of consent and

implication of the accused. The direction set out above clearly indicates that Pitter, J. did point out the triple consent to the jury. (See the emphasised portions of the direction). Further, he placed the matter beyond the possibility of confusion when he emphasised that "In this case there is no corroboration of consent."

In **R. v. Stora** [1975] 24 W.I.R. 300, this court held:

> "...that such terms as 'corroboration', 'support', 'strengthen' and 'confirm' may be used interchangeably in a trial judge's charge to a jury but whatever synonym was chosen it was imperative that the jury be made to understand that such synonym embraced the triple concept of intercourse, absence of consent and implication of the accused; if reference was intended to one factor only of this concept then this should be made absolutely clear as otherwise there was a real danger of the jury regarding evidence as corroboration when it was not."

The danger apprehended in **Stora's** case was not possible in the instant case, as the judge in unequivocal terms said there was no corroboration as to the element of consent.

Mr. Hamilton, Q.C. urged that the judge might have given the jury the impression that the burden was on the applicant to adduce corroborative evidence in that he spoke about the corroboration of consent as opposed to corroboration of the lack or absence of consent. With respect, we find this argument quite hopeless.

In concluding his summation, the learned judge said:

> "As I indicated earlier, the issue in this case is one of consent. <u>There is no corroboration to the witness' story</u>. The whole case rest or fall on what she says but of course you will recall what I told you. If you reject what he says, if you can't believe a word that he says, if you say no, I don't believe that he is

> "speaking the truth, you don't just say, well for that reason because I don't believe him I am going to convict him."
>
> [Emphasis supplied]

From this passage, the jury must have understood that there was no burden on the applicant to adduce evidence to corroborate his story that P.S. consented. The underlined portion above makes it clear that it was the complainant's allegation that she did not consent which had to be corroborated by the prosecutor.

In the result, we did not find either ground meritorious.