NMLS

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 58 OF 2005

BEFORE: THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE MORRISON, J.A.
THE HON. MISS JUSTICE SMITH, J.A. (Ag.)

O'NEIL McGANN
v
REGINA

Delano Harrison Q.C. for the Appellant.

Miss D. Barnett and Miss Claudette Thompson for the Crown.

July 9, 2008 and November 21, 2008

HARRISON, J.A:

1. We are today fulfilling our promise made on July 9, 2008 to put in writing and hand down our reasons for treating this application for leave to appeal against a conviction for rape, as the hearing of the appeal. We allowed the appeal, quashed the conviction and set aside the sentence. We also directed that a judgment and verdict of acquittal be entered.

2. The appellant was convicted in the Home Circuit Court on April 4, 2005 before Sykes J. sitting with a jury who thereupon sentenced him to imprisonment for seven (7) years at hard labour.

3. On the Crown's case the victim was offered a lift by the appellant on the 9th of June 2002. He was on his way to King Weston and she was on her way there to attend

a dance. Whilst they were on their way he made a wrong turn and upon being asked where he was taking her, he responded that he was taking her to one of his friends. She told him she did not wish to go with him and that he should stop the car but he continued driving. She began to cry. She opened the car door in the vicinity of Castleton Police Station but he closed it and told her, "b..c.. gal, tap di noise in a mi car." He continued driving, turned at Grandy Hole Bridge and asked her if she knew what was a "battery". She did not respond and he told her that is when a group of men have sex with the woman. On reaching near Gibbs Hill he inserted his finger into her vagina. He drove to a lonely place, stopped the car and told her to come over to him. She refused and he grabbed her and told her to come out of the car. He came out, dragged her from the car and took her behind the car where he took off her panty and told her to bend over. She told him no and he held her around her waist and had sexual intercourse with her without her consent.

4. After he had sexual intercourse with her she went back in the car and befriended him so that he could take her home. He told her that he had sex with her because he heard that she was friendly with the policeman known as "Muscle Daddy". He drove off then stopped at a shop and purchased a drink of Smirnoff Ice for her.

5. He resumed driving and when he reached near to where the dance was held he stopped and she alighted from the car and walked away. She saw him later at the dance but made no report to anyone there. She also did not make a report to anyone at her home. However she telephoned a Cons. Burey subsequently and spoke to him.

6. On the Monday following the dance she went to see a friend and on her way back home she saw the applicant. He stopped his car; alighted from it and told her that someone had told him that she had gone to the station. Later that day she went to the police station and made a report.

7. The defence was one of consent. He told the court that the complainant and himself were both travelling in his motor car during the night of June 9, 2002. She was driving the vehicle at one stage but on reaching a certain point along the Junction road he took over because she was driving too slowly. He was heading to Gibbs Hill in order to check on one Donovan. She was seated in the front passenger seat and while he was driving she started touching him on his penis. He then started to touch her on her breast and told her to take off her panty. She did so and he inserted his finger in her vagina. He then turned on the Gibbs Hill road and stopped the car. He said he was getting uncomfortable because she was coming over on him. They started kissing and he told her that he knew of a better place. He started to drive again and she returned to the passenger seat. Further along the road he stopped in the vicinity of a water tank. They started kissing and the complainant came over into his seat. She pulled down his shorts and sat in his lap facing the front windscreen. Her head was touching the car ceiling and he told her to come out of the car. She opened the door and left her panties inside the car between the seats. They then had sexual intercourse for five to seven minutes. When they were finished they returned to the car. He said he did not force her and he did not threaten her in order to have sexual intercourse with her.

9. It was plain to see that the applicant having admitted sexual intercourse, the issue requiring detailed and correct directions, was whether the appellant honestly believed that the complainant was consenting to sexual intercourse.

10. There were three areas of complaint. The first ground of appeal states as follows:

> "That the learned trial judge failed utterly to direct the jury as to how to approach inferences from facts they found proved: a non-direction which, it is submitted, constituted a material misdirection in the particular circumstances of the case at Bar."

11. Mr. Harrison Q.C. submitted that at no time did the judge instruct the jury as to the manner in which they should draw inferences from facts found by them. He submitted that this misdirection was especially grave, because the jury were faced with the duty of determining what, if any, meaning to attach to evidence with regard to the encounter between the complainant and applicant. He further submitted that the learned trial judge, without the relevant guidance throughout his charge, unfairly suggested that the jury might infer the Applicant's guilt from the above narrative.

12. Miss Barnett, the Attorney at Law for the Crown, agreed with Mr. Harrison's submissions but submitted that although the learned judge had failed to give the jury directions on the drawing of inferences this should not necessarily result in the quashing of the conviction.

13. At pages 35 – 36 the learned judge said:

> "Now, she says, on Monday, the following day, she was on the road going to see a friend when I was coming back she said she saw the accused and it was in the vicinity of the dance that she saw him, he was driving at the time, he came out of the car and according to her, she said somebody called him and told him that she, the young lady, went to the station. Now if that is so, that is quite a remarkable conversation for the accused man to be having with her on a Monday morning, because the evidence is that, at that time she had not reported the incident to a living soul, nobody. So if it is that he is having this conversation with her, why would he be saying this? What is the significance of this bit of evidence in those circumstances? Is it an acknowledgement that he had done something wrong? Why would he be telling her that somebody told him that she went to the station? Is it a way of making an enquiry of her, have you really reported this matter to the police?..."

The learned judge also said at page 68:

> "Now, the account goes on. He says he went down where the dance was, after he let her out he was still in the shorts along - - he was there with some of his friends for about half an hour, did not have on his shirt and then went home, then after he went home he saw her the following Monday morning, he was nearby the place where the dance was kept, so that was common ground and then he said he called her and asked her how come she goh a station seh I raped her, and remember what I told you about that, that at that point , based upon the narrative by the complainant, she had not told anybody about this, and I told you, you can't speculate about what she told Mr. Burey, if you accept that she called Mr. Burey on this phone, there is no evidence before you as to the content of the conversation between herself and Mr. Burey, the first report being made to the police was on the Monday morning. So, again, if that is so, then this conversation really does, indeed, sound strange".

And at page 69 he continues:

> "He says that on the Monday morning now he came by this news was that when he was working in Kingston, the

> Monday morning, my girlfriend told him that his girlfriend told him that the girl weh yuh goh have sex with last night, goh station go seh you rape har. Now what do you make of this conversation, allegedly coming from the girlfriend, quite astounding, if he is to be believed, the girlfriend sounds completely relaxed..."

14. Now, in **McGreevy v Director of Public Prosecutions** [1973] 1 All ER 503 Lord Morris of Borth-y-Gest's said at page 507:

> 'The particular form and style of a summing-up, provided it contains what must on any view be certain essential elements, must depend not only on the particular features of a particular case but also on the view formed by a judge as to the form and style that will be fair and reasonable and helpful. The solemn function of those concerned in a criminal trial is to clear the innocent and convict the guilty. It is, however, not for the judge but for the jury to decide what evidence is to be accepted and what conclusion should be drawn from it. It is not to be assumed that members of a jury will abandon their reasoning powers and, having decided that they accept as true some particular piece of evidence, will not proceed further to consider whether the effect of that piece of evidence is to point to guilt or is neutral or is to point to innocence. Nor is it to be assumed that in the process of weighing up a great many separate pieces of evidence they will forget the fundamental direction, if carefully given to them, that they must not convict unless they are satisfied that guilt has been proved and has been proved beyond all reasonable doubt.'

Lord Morris continued later (at page 510):

> 'In my view, the basic necessity before guilt on a criminal charge can be pronounced is that the jury are satisfied of guilt beyond all reasonable doubt. This is a conception that a jury can readily be made to understand. So also can a jury readily understand that from one piece of evidence which they accept various inferences might be drawn. It requires no more than ordinary common sense for a jury to understand that, if one suggested inference from an accepted piece of evidence leads to a conclusion of guilt and

> another suggested inference to a conclusion of innocence, a jury could not on that piece of evidence alone be satisfied of guilt beyond all reasonable doubt unless they wholly rejected and excluded the later suggestion. Furthermore a jury can fully understand that if the facts which they accept are consistent with guilt but also consistent with innocence they could not say that they were satisfied of guilt beyond all reasonable doubt. Equally a jury can fully understand that if a fact which they accept is inconsistent with guilt or may be so they could not say that they were satisfied of guilt beyond all reasonable doubt.'

15. We think that in the instant case, it was essential that the learned judge should have spelt out the possible inferences that could be drawn from the evidence and it was also necessary for him to instruct the jury that they must rule out all inferences consistent with innocence before they could be satisfied that the inference of guilt had been proved correct. We therefore hold that the judge's failure to direct the jury on how they should draw possible inferences was a non-direction which amounted to a misdirection.

16. The second ground of appeal concerned the mental element of rape and in particular the issue of the applicant's honest belief that the complainant had consented to the act of sexual intercourse. It was contended by Mr. Harrison Q.C that the learned judge had misdirected the jury on this important issue. At page 3 of the summation the learned judge said:

> "Now, in this particular case, it is agreed that sexual intercourse took place, so it may very well be that you may not have much difficulty in concluding that the physical act required by the male that that occurred, since he is saying, I had sexual intercourse with her, she is saying he had sexual intercourse with me, the question really is, one, did she consent, or two, did he know that

> she was not consenting or he did not care whether or not she was consenting".

17. In **R. v. Linval McLeod and Yvonne Berlin** (1988) 25 JLR 382, this Court stressed the need for a particular direction in rape cases where consent was in issue. The court said at p. 385:

> "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.
> "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 his loaded firearm."

18. We repeat for emphasis, 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.

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

20. Mr. Harrison Q. C submitted that in the instant case, there was ample material which could have caused the Applicant to entertain an honest belief that the complainant was consenting to sexual intercourse.

21. Mr. Harrison argued that at no stage did the applicant brandish any weapon. He also argued that when the applicant inserted his finger into her vagina, she did not object by "word or deed". He submitted that a jury might be led to believe that once they find that the victim did not consent, a verdict of guilty is inevitable..." He referred to the case of **R v Fitzroy Brown** (1992) 29 JLR 142 where it was held:

> "(i) the crime of rape consists of having sexual intercourse with a woman without her consent or being indifferent as to whether she consented or not. If the accused man honestly believed that the woman had consented, whether or not that belief was based on reasonable grounds, he could not be found guilty of rape and the jury would have to acquit him. The trial judge did not direct the jury on this question and as a result the conviction cannot stand;..."

22. At pages 74 – 75 of the summation in the instant case, the learned judge directed the jury as follows:

> "So, Mr. Foreman and members of the jury, the accused man is saying this is a consensual sexual encounter that took place on the 9th of June 2002. She wasn't intimidated. She was the one who suggested that I allow her to drive down the hill. She was the one who initiated sexual contact with me on the night in question. When we got up by Gibbs Hill, she was the one who came voluntarily and sat on my penis. She was the one who came out of the car. She was the one who went around the back. I told her to open her legs and she did. I told her to bend forward, she did ...I had sex with her. All this talk about rape is not true. That is essentially what the case is for the Defence".

23. It is quite clear from the above excerpt that the learned judge failed to direct the jury on the applicant's honest belief that the complainant was consenting to sexual intercourse. In his written submissions Mr. Harrison Q.C stated as follows:

> "The learned judge thus failed, utterly, to bring home to the jury, at that critical stage (or before), that "if the evidence given by the [Applicant] [led] them to the conclusion that the [Applicant] held an honest [belief] that the [Complainant] was consenting, although from her point of view, she was objecting, they [were] duty bound to acquit". The learned trial judge failed, as well, to go on further to say that "if the prosecution story [left] them in doubt whether [Applicant] had such a belief the case [had] not been proved and they [should] acquit".

24. Miss Barnett for her part submitted that the learned judge did remind the jury of the mental element that was required to be established in rape cases. She referred us to page 3 of the summation where the learned judge said: "...the question really is, one, did she consent, or two, did he know that she was not consenting or did he not care whether or not she was consenting?" She also referred us to pages 27 and 28 where the learned judge said inter alia:

> "...All that evidence the Prosecution is putting before you to show two things, (1) this young woman was not consenting to sex and, (2) that the accused man knew that she was not consenting to sex. That is the evidence or, the suggestion of this evidence. If he didn't know that she was consenting in light of her reluctance he must have been really reckless whether or not she was consenting or he didn't care. That is why the Prosecution was putting up this evidence before you."

25. We have given careful consideration to the submissions and are satisfied that nowhere in the extracts quoted, did the learned judge bring home to the jury that if the applicant honestly believed that she was consenting, they were bound to acquit. He focussed throughout on the reality of consent. Did she or did she not consent. But with respect, that was not to put the defence accurately or at all to the jury. The material

subjective element referred to in **R. v. McLeod & Anor** (supra) had not been expressed in clear and unequivocal terms. We think therefore that there was merit in the second ground of appeal.

26. The third ground of appeal which arose for our consideration was whether the verdict was unreasonable and cannot be supported having regard to the evidence. As we understood Mr. Harrison's arguments, he contended inter alia:

> (i) that there was lack of any negative or adverse response, on the part of the complainant, to applicant's insertion of his finger into her vagina before, actual sexual intercourse.
>
> (ii) that there is not any report of the alleged rape by the complainant to anyone after the applicant dropped her off at the dance and when she saw him later on that night.
>
> (iii) though she had spoken to Cons. Burey by the dance the complainant made no report to him about the alleged rape.
>
> (iv) that previous to the events of the night of June 9, 2002, the complainant had visited the applicant's house without being invited.

27. Miss Barnett was of the view however, that the verdict was not unreasonable although she conceded that the judge's treatment of inferences was inadequate. She submitted that if the court were minded to quash the conviction then a re-trial should be ordered.

28. We agreed with the submissions of Mr. Harrison Q.C and in the circumstances, we were of the view that from the evidence as we have related in this judgment, it was self-evident and needed no persuasion of argument that the verdict was unreasonable

and could not be supported having regard to the evidence. We therefore concluded that the third ground of appeal ought to succeed as well.

29. It was for these reasons that we concluded that the verdict could not stand.