JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 109/79

BEFORE: THE HON. MR. JUSTICE KERR, J.A.
THE HON. MR. JUSTICE ROWE, J.A.
THE HON. MR. JUSTICE CAREY, J.A.

THE QUEEN

VS.

KENNETH ROBINSON

Mr. H.G. Edwards, Q.C., for the Appellant.

Mr. F.A. Smith for the Crown.

June 2; September 21, 1981;
and January 22, 1982.

KERR, J.A.:

This application for leave to appeal from a conviction for Rape in the Westmoreland Circuit on May 31, 1979, before Parnell, J. and a jury, was treated as the hearing of the appeal, the appeal was dismissed and the conviction affirmed. We now set out herein our reasons for so doing.

On Wednesday, February 28, 1979, at about 5 p.m. the complainant, a school-girl of seventeen years of age, was in the village of Little London, in front of the Post Office with others, including her friend Nola Rayson. She was in need of transportation to her home at Negril. Along came the appellant driving his motor-car. Rayson said she stopped him and at her request he agreed to drive complainant to Negril. The complainant went in and to Rayson's parting instruction - 'take care of her' they set out in the direction of Negril.

According to the complainant after the other passenger left and she was then with him in the front seat, she had to object to his putting his arm around her. At Sheffield where he stopped to take on

passengers she attempted to leave tendering money for her fare. He refused the fare and persuaded her to continue the journey with him.

At Negril the other passengers left before the car reached the area of premises - the Coconut Grove. The appellant then turned off into a lane, she opened the door and attempted to leave but he held her by the neck and started to strangle her, and ordered her to shut the door. The car drove on towards a deserted beach and stopped. It was now night.

Her account of what followed was of a humiliating and traumatic experience. He stopped the car near a lonely beach and ordered her to take off her panties when she refused he started to strangle her and she struggled attempting to leave the car and was halfway out when he jumped on her back - and punched her with his fist, saying 'you bitch you, a going give it to you hard and good and when I done with you I going take you and dump you in the sea'. Exhausted and afraid and to avoid further injury she went back in the car and assisted in removing her panties. He stripped her naked - sucked her private parts - and then he made his bruising attempts at intercourse. Whenever she tried to scream he would choke her. After this first session of about six minutes he came off. Then there was a repeat performance with the addition of his forcing his penis into her mouth. It was during the second round of his attempts to enter her he expressed surprise that she was a virgin.

He ceased his endeavours at intercourse which lasted over twenty minutes and at his insistence they set out for the beach. She seized the opportunity to run away into the bush. He chased and searched for her but in the thickness of the thicket he failed to find her and he returned to the car and drove off with her clothes, shoes, books and money amongst other things.

She wandered along the beach until she came to the premises of one Mrs. Gruber. According to Mrs. Gruber about 10 p.m. while at her business place The Negril Sands Club - she received certain

information and looking towards the beach she saw the complainant sitting on the sand naked, cold and shivering. It had been raining earlier - she took her in, clothed her and gave her a drink. Complainant made a report to Mrs. Gruber who took her home in a taxi.

Dr. Campbell who examine her on March 1, found that her vaginal membrane was intact and the vaginal cavity could not admit one finger. The lips of the vagina were slightly swollen and there was tenderness at the entrance and a slightly bloody discharge. There were multiple scratches and minor swellings all over her body. The injuries to the vagina could be caused by an erect penis while the multiple scratches and minor injuries to the body were consistent with her trying to get out of the bushes. Despite appellant's efforts, the complainant was still a 'virgo intacta'.

According to Constable Darby, the investigating officer, he saw the appellant on March 14, and informed him of the complaint made about the incident of night of the 28th February. The accused then told him he was in Falmouth that night.

The sole issue in this case was consent.

The complainant according to the trial judge was vigorously cross-examined. Among the suggestions which were put in keeping with his defence, were that she and the appellant had been friends for some months having met at the Negril Beach the August before and that they had seen each other several times; that she had been driven by him in his car on several occasions prior to that day; that they had met at Little London by arrangement; that she agreed to go to the spot on the beach that night, and that she consented to sexual intercourse oral and vaginal. All these suggestions were positively denied. The complainant was emphatic that he was a stranger and she only learnt his name from him that night.

The appellant, a married man living with his wife and six children and hitherto of good character in his evidence on oath and in keeping with the cross-examination gave a history of his association with the girl. He spoke of occasions when he took her from school in

his car, of the friendship maturing so that they were on kissing terms and sex was discussed but no intercourse occurred. He said that the meeting at Little London had been arranged a week before and she agreed to drive down to the beach with him that night. There according to him they caressed and fondled each other, made love, and that he had intercourse with her for five or six minutes. That while having intercourse she complained that he was hurting her, she said she did not want to be pregnant and afterwards she slapped him in the face for being rough. She made certain disparging remarks which he thought referred to his wife and in anger he thumped her two or three times. He then invited her to go to the sea for a swim and they came out the car. On the way to the beach, she turned back saying she would soon return but she did not. After some minutes he called and looked for her but in vain. He eventually drove home. It was fourteen days after in Savanna-la-mar, that the police spoke to him about the affair. In cross-examination he denied the prosecution's case and in particular the telling to Detective Darby he was in Falmouth that night in question. He however said that when he found the complainant had left he made no enquiries of her either that night or anytime thereafter.

Of the grounds of appeal against conviction we propose to deal only with Ground 2 which merited careful consideration.

Ground 2:

> "The directions on the law and facts as to Consent were inadequate. This was prejudicial to the defence."

In support Mr. Edwards submitted that the learned trial judge in his directions to the jury omitted from the definition of rape an essential element, namely mens rea; that the mens rea in rape is the intention to have sexual intercourse with the complainant without her consent or recklessly not caring whether she consented or not. Further, that having regard to the nature and conduct of the defence it was incumbent on the trial judge to have directed the jury that if the appellant honestly believed that the complainant consented even if he had no reasonable grounds for such belief he was entitled to be

acquitted and that the burden of proving the absence of such belief lay on the prosecution. He cited in support a number of cases including Director of Public Prosecutions v. Morgan (1975) 2 All E.R. p. 347; R. v. Cogan (1975) 2 All E.R. p. 1080; R. v. Flannery & Prendergast (1969) V.R. p. 31.

The learned trial judge in his directions gave the time-honoured definition of rape thus (page 6):

> "Now, Mr. Foreman and members of the jury, the indictment charges the accused man with rape and the particulars state, Kenneth Robinson, on the 28th day of February, 1979, in the parish of Westmoreland, had sexual intercourse with Angella Weise, without her consent. Well, just as how the indictment had it, that is what rape is, it is where a man has carnal knowledge of a woman without her consent, by force, fear or fraud."

In elaboration and to be specific he continued:

> "As far as this case is concerned, the question of fraud is out, so it is a combination between force and fear, that is what she has been saying how he got to have intercourse with her that night. Now, a good defence to a charge of rape, just as the indictment says, is that the woman did consent. So, you notice that what you have to decide in this case - there is no dispute, there is no challenge that the accused did have intercourse with her. She said so and he said so too. Where the dispute arises now, where the difference lies in this case is: was it with or without her consent, ..."

Of this definition Lord Hailsham in Director of Public Prosecutions v. Morgan (supra) at page 358 said:

> ".....the appellants' counsel had a fairly impressive list of authorities directly applying to the crime of rape and saying that the prohibited act is sexual intercourse without consent, and the intention is to do the prohibited act, that is to have sexual intercourse without consent or irrespective of whether the victim consents or not. First amongst these authorities I would cite the traditional definition of rape as enshrined in the current Archbold: 'Rape consists in having unlawful intercourse with a woman without her consent by force, fear or fraud', for which are cited as authorities 1 East PC 434 and 1 Hale 627 et seq. It is true that this definition contains no express explicit reference to a mental element, and the model indictment displayed some paragraphs later observes the same reticence. But this is misleading.

> Not only would it be repugnant for any common law crime of this gravity to lack mental element, but as Lord Diplock pointed out in Sweet v. Parsley, both statutory and common law offences employ habitually in their defintions words which impliedly import into the defintion of the crime an implication of an intent or state of mind in the accused. I regard the words 'force, fear or fraud' as of this sort."

Accordingly, there are cases in which this traditional definition may suffice. For example where there is unchallenged evidence that the resistance of the woman was overcome by violence or threat of imminent serious bodily injury and the specific issue was one of identification.

However, where from the nature of the defence the mens rea of the accused is directly in issue the trial judge in defining Rape should tell the jury that the crime involved having sexual intercourse with a woman with intent to do so without her consent or with indifference as to whether or not she consented - Director of Public Prosecutions v. Morgan (supra).

In the instant case the issue was whether or not there was consent and in our view the mens rea of the appellant was in issue.

Further the reported cases show that there are cases where the issue of honest but mistaken belief on the part of the accused that the woman had consented arose and demanded specific directions.

In Director of Public Prosecutions v. Morgan (supra) at page 347 (headnote):

> "One of the 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 reluctant 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 the 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. Statements made by the appellants to the police corroborated Mrs. M's story, but at the trial the appellants challenged 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 the appellants had intended to have intercourse with Mrs. M without her consent and that if the 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."

The learned trial judge in that case had directed the jury thus as set out at page 356:

> "First of all, let me deal with the crime of rape. What are its ingredients? What have the prosecution to prove to your satisfaction before you can find a defendant guilty of rape? The crime of rape consists in having unlawful sexual intercourse with a woman without her consent and by force. By force. Those words mean exactly what they say. It does not mean there has to be a fight or blows have to be inflicted. It means that there has to be some violence used against the woman to overbear her will or that there has to be a threat of violence as a result of which her will is overborne. You will bear in mind that force or the threat of force carries greater weight when there are four men involved than when there is one man involved. In other words, measure the force in deciding whether force is used. One of the elements to which you will have regard is the number of men involved in the incident. Further, the prosecution have to prove that each defendant intended to have sexual intercourse with this woman without her consent. Not merely that he intended to have intercourse with her but that he intended to have intercourse without her consent. Therefore, if the defendant believed or may have believed that Mrs. Morgan consented to him having sexual intercourse with her, then there would be no such intent in his mind and he would be not guilty of the offence of rape, but such a belief must be honestly held by the defendant in the first place. He must really 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. It is not enough for a defendant to reply upon a belief, even though he honestly held it, if it was completely fanciful; contrary to every indication which could be given which would carry some weight with a reasonable man. And, of course, the belief must be not a belief that the woman would consent at some time in the future, but a belief that at the time when intercourse was taking place or when it began that she was then consisting to it."

In Director of Public Prosecutions v. Morgan - it was the second proposition about the mental element that was the gravamen of complaint; it being contended on behalf of the appellant that an honest belief is enough; it matters not whether it be also reasonable.

A majority of the House of Lords (Lord Cross of Chelsea, Lord Hailsham and Lord Fraser of Tullybelton) decided in favour of the appellant. Lord Simon of Glaisdale and Lord Edmund Davies, while agreeing on the mens rea being the intention to have sexual intercourse without the consent of the complaining woman or recklessly not caring whether she consented or not nevertheless were firmly of opinion that the honest belief that she consented must be based on reasonable grounds.

In his speech Lord Hailsham at page 361 acknowledged as a sage observation the statement of Stephen, J. in R. v. Tolson (1889) 23 Q.B.D. at page 185:

> "..... that 'mens rea' means a number of quite different things in relation to different crimes."

He then considered the applicability of that statement to the mens rea in a number of crimes both at common law and by statute and concluded:

> "I am content to rest my view of the instant case on the crime to 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 if 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."

Both Lord Cross of Chelsea and Lord Fraser of Tullybelton was of the same view but each individualistic in style and presentation.

It is not necessary for the purpose of this appeal to review the reasoning of the judges in support of their respective opinions.

It is enough to say that notwithstanding Lord Simon of Glaisdale's commendable concern with policy, his careful analysis and the erudite exposition of Lord Edmund Davies two fundamental factors remain undisturbed - one legal, the other factual.

These are:

(1) That mens rea is subjective in the sense that it is the intention of the accused which is in issue.

(2) A man may hold an honest belief even though through obtuseness of mind or some other cause there may not be reasonable grounds for such belief.

The decision on this point was applied in R. v. Cogan (1975) 2 All E.R. page 1059.

Rarely if ever, will the proposition of law as stated by the majority in Director of Public Prosecutions v. Morgan pose a problem. On the assumption that jurors are reasonable, intelligent and practical, they will no doubt consider, as they are entitled to do, the absence of reasonable grounds as an important factor in determining whether an accused in fact had a bona fide belief that the woman was consenting. None but the extremely credulous and perverse would conceive that a man of sound mind and memory who used violence or the threat of serious bodily injury to overcome a woman's resistence and so have sexually intercourse could in such circumstances have a bona fide belief that she was consenting. The absence of reasonable grounds may be a consideration for the jury; it is quite another thing for a judge to direct them that per se it negatives a bona fide belief.

As Lord Cross of Chelsea said in Director of Public Prosecutions v. Morgan at page 349:

> "When it is said - as it was for example by Stephen J in R. v. Tolson - that the mental element in rape is an intention to have intercourse without the woman's consent that means not simply an intention to have intercourse with a woman who is not in fact consenting to it but an intention to have non-consensual intercourse, not of course, in the sense that it must be shown that the defendant would have been unwilling to have had intercourse with the woman if he had thought that she was consenting to it, but in the sense that he was either aware that she was not consenting or did not care whether or not she consented. That does not mean that the Crown is obliged to adduce positive evidence as to the defendant's state of mind. If it adduces evidence to show that intercourse took place and that the woman did not consent to it then in the absence of any evidence from the defendant the jury

> will certainly draw the inference that he was aware that she was not consenting. So as a practical matter he is bound - if he wishes to raise the point - to give evidence to the effect that he believed that she was consenting and as to his reasons for that belief....."

and per Lord Hailsham at page 356:

> "No doubt a defendant will wish to raise argument or lead evidence to show that this belief was reasonable, since this will support its honesty. No doubt the prosecution will seek to cross-examine or raise arguments or adduce evidence to undermine the contention that the belief is reasonable, because, in the nature of the case, the fact that a belief cannot reasonably be held is a strong ground for saying that it was not in fact held honestly at all."

So it is that their Lordships in Director of Public Prosecutions v. Morgan having considered and decided the question of Law in favour of the appellant turned their attention to the practicalities and considered the evidence and the issues raised at the trial. In that regard Lord Hailsham had this to say: - (p. 355):

> "The choice before the jury was thus between two stories each wholly incompatible with the other, and in my opinion it would have been quite sufficient for the judge, after suitable warnings about the burden of proof, corroboration, separate verdicts and the admissibility of the statements only against the makers, to tell the jury that they must really choose between the two versions, the one of a violent and unmistakeable rape of a singularly unpleasant kind, and the other of active co-operation in a sexual orgy, always remembering that if in reasonable doubt as to which was true they must give the appellants the benefit of it."

In Director of Public Prosecutions v. Morgan there was a positive misdirection in defining a negative or exculpatory issue raised on the evidence while in the instant case it was a non-direction. The observation is pertinent to our consideration whether the omission to give directions as to the mens rea resulted in a miscarriage of justice.

The jury in the instant case were faced with two diametrically different stories. That of the prosecution: - a young girl of sixteen years of age, presumably inexperienced or of limited experience in sexual intercourse, accepting a drive home from a

stranger who had been requested to do so by the friend who enjoined him to 'take care of her', of being driven against her will to a lonely beach - beaten and subjected to a disgusting and humiliating experience in which she was brutally ravished - and had to flee naked through the bushes reasonably apprehending even more serious injuries. The other, as given by the appellant, of an acquaintanceship that under his careful husbandry had ripened into intimacy of a romantic rendezous in Little London, of an assignation on the beach, of sexual intercourse that was no more than mission accomplished.

In his directions to the jury after carefully reviewing the evidence of the appellant the learned trial judge directed them thus:

> "The question whether the prosecution has satisfied you to the extent that you feel sure, has to be asked on the background of what he has said: that he was friendly with the girl, albeit he didn't have intercourse with her before; he had made prior arrangement to meet her and that is what happened on the 28th of February and that what took place on the beach it was with her consent. If that is so, he is not guilty and the prosecution has to show you that that is not so. They have to remove all reasonable doubt."

The jury faced as they were with the two versions, obviously and with every justification rejected the story of the appellant and in particular his claim to any antecedent relationship and accepted the case for the prosecution.

It is therefore difficult to see how a question of honest but mistaken belief that she was consenting could arise as a separate and distinct issue requiring specific directions.

As Winneke, C.J. observed in R. v. Flannery and Prendergast (1969) V.R. at page 34:

> "There will, of course, be cases where the evidence does not raise an issue of a genuine but mistaken belief as to the consent of the woman and, therefore, in which no direction in respect of such a question is called for ....."

The issues here were clear cut - was it an affair between a man and his girlfriend or was it abduction and rape of a young girl by a ruthless stranger?

In the circumstances notwithstanding that in defining rape, the learned trial judge omitted to expressly include the mens rea which is the intention to have sexual intercourse with the woman without her consent or with indifference as to whether or not she consented we are of the view that had there been any such directions any reasonable jury would inevitably have come to the same conclusion.

Accordingly in our view this is a proper case for the application of the proviso to Section 14(1) of the Judicature (Appellate Jurisdiction) Act.

With respect to the appeal against sentence we considered inter alia the appellant's previous good character, his age, and his settled family life, and notwithstanding his reprehensible conduct in relation to the complainant we were of the view that a sentence of five years imprisonment would be adequate punishment. Accordingly to that extent the appeal against sentence was allowed.