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JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 13/93

COR: THE HON. MR. JUSTICE CAREY, P. (AG.)
THE HON. MR. JUSTICE GORDON, J.A.
THE HON. MR. JUSTICE WOLFE, J.A.

R. V. PAUL THOMPSON

Delroy Chuck for Applicant
Lloyd Hibbert for Crown

22nd March & 1st April, 1993

GORDON, J.A.

On 21st January 1992 in the St. James Circuit Court before
Pictor J, and a jury, the applicant was convicted of rape, committed
on 18th October 1991, and sentenced to 7 years imprisonment at hard
labour. His application for leave to Appeal was heard and refused
on the 23rd March 1993, and in keeping with the promise we then made
we now deliver our reasons.

These are the facts that were placed before the jury.

The victim, a 17 year old (to whom we will refer as Miss X)
from the hills of St. James visited Montego Bay and went to the beach
with friends. From the beach they went on a boat ride in and around
the harbour at Montego Bay and on their return, the applicant who
was the driver of the boat said "Let the lighter one come off first."
Her friends disembarked and she was about to follow them when the
applicant restrained her, holding her by the hand and immediately
he drove the boat out to sea.

Alarmed she asked him "where you taking me." At that time
there were, in addition to herself and the applicant, two tourists
on the boat. The applicant replied "I going drop off the two white
people at Jack Tar." He did as he said he would, and she asked him

to take her back to the beach. He said he was going to "look more business" and she went on her knees and begged him to take her back to shore. She was a non-swimmer and he headed out to sea. He asked her to have sexual intercourse with him but she refused. She was a virgin and a christian, she said, and it was against her religion. He threatened her "If you dont agree with me a going carry you out further out to sea." As she tearfully refused, begging him to take her back, he drove further and further out to sea. At a distance she estimated as about 1½ miles from shore, he held her and raped her. She observed he had a knife stuck in his waist and this made her even more fearful.

On her return to shore, she ran to her friends crying and reported her ordeal. She and the applicant were taken to the applicant's employer Mrs. Hall. In Mrs. Hall's presence, the complainant repeated her report of rape, the applicant said the complainant had consented and he paid her \$300.00. Mrs. Hall contacted the police. Constable Karl Brown received the report and arrested and charged the applicant who said on arrest "she gi me and me pay her for it." In cross-examination the constable said the applicant said he had forced the girl. Medical evidence indicated that the complainant's hymen was ruptured recently and the doctor found other evidence supportive of an act of recent sexual intercourse.

In his defence, the applicant in a statement from the dock said he took the complainant and her friends along with others for a ride. When the others left the boat the complainant remained and he offered and she accepted \$200.00 "to have sex" with him. He said he did not rape her they had sexual intercourse with her consent.

Mr. Chuck obtained leave to argue supplementary grounds of appeal. He urged:

"The Learned Trial Judge, at no point in his summing up, addressed the jury on the 'Honest Belief' of the applicant which is the very genesis of a proper and fair direction in the crime of rape."

"Moreover, the Learned Trial Judge failed to direct the jury that if they had a reasonable doubt that the applicant may have the honest belief that she is consenting then they should also acquit. The Learned Trial Judge in his summing-up, concentrated wholly on the state of mind of the victim, when in the crime of rape, the accused's state of mind is of singular importance."

The ground advanced by Mr. Chuck was based on D.P.P. v. Morris [1975] 2 All E.R. 347 and the principles established there:

"Held (i) Lord Simon of Glaisdale and Lord Edmund-Davies dissenting) The crime of rape consisted in having sexual intercourse with a woman with intent to do so without her consent or with indifference as to whether or not she consented. It could not be committed if that essential mens rea were absent. Accordingly, if an accused in fact believed that the woman had consented, whether or not that belief was based on reasonable grounds, he could not be found guilty of rape." [Emphasis added]

We find that nowhere in the summing-up did the learned judge use the term "honest belief." The term belief was used in the directions given in this context:

"Now, if the accused in fact believed that the woman had consented, whether or not that belief was based on reasonable grounds, he could not be found guilty of rape. But, then, look at the evidence to see whether there was any consent and whether this belief would be reasonable if he says he thought she had consented." [Emphasis added]

Mr. Chuck contended that although the law may have been correctly stated in the first sentence this was nullified by the directions given in the second because the law clearly states that the belief must be "honest" not "reasonable."

In the context of the directions thus given the term honest although not specifically stated must be taken to be intended. One has however to look at the case as it was presented. The defence was that the complainant consented to the act of sexual intercourse hence there was no rape.

Honest belief involves a state of mind and this must be articulated by the individual who relies on it or at least it must arise on the evidence. The applicant's defence however was that there was consensual sexual intercourse and he paid for what he got indeed he asserted that not being satisfied with the complainant's performance, he reclaimed the sum of \$300 he had paid the complainant. There was therefore no assertion of an "honest belief" in consent. There was no evidence giving rise to an inference that he might have had an honest belief that there was consent. What evidence there was from the applicant was that there was total, unqualified consent by the victim and the defence in these terms was properly left for the consideration of the jury.

In D.P.P. v. Morgan (supra) the appellants testified that they believed the victim consented to their advances and her protests were in keeping with what they were led to expect as expressions of total acceptance and enjoyment of the sexual acts perpetrated by the appellants. The appellants having testified, were cross-examined and the jury had evidence on which to assess the honesty of their belief in the victim's consent. The test for "honest belief" is subjective in rape as it is in self-defence. The state of the applicant's mind was important. The evidence discloses that he had a fixed intention to have sexual intercourse with the complainant "without her consent or with indifference as to whether or not, she consented." To this end he forcibly abducted this unspoilt "country girl" out to sea and in her defenceless position, he a complete stranger to her, and one armed with a knife, he had sexual intercourse with her.

The directions given by the learned trial judge were apposite to the facts and circumstances of this case and the defence of consensual sexual intercourse advanced by the applicant. In this regard he followed D.P.P. vs. Morgan, R. v. Robinson (unreported) S.C.C.A. 109/79 delivered 22nd January 1979, and R. v. Paul Hendricks (unreported) S.C.C.A. 39/91 delivered 17th July 1991. In the case of Paul Hendricks, the facts were similar to those in the instant case in that the complainant therein was abducted and sexually abused. On appeal, the applicant challenged the absence of directions based upon the applicant's "honest belief" in consent. This court held that the "case fell to be determined entirely upon which of the accounts the jury accepted. As there was no complaint being levelled at the directions which took into consideration the physical and mental elements constituent in the offence, the jury in arriving at a verdict adverse to the applicant accepted the account as related by the complainant." The application for leave was rejected.

We conclude that there is no merit in the points raised on appeal by applicant's counsel. The issue in the case as has been stated was consent and the learned trial judge's directions on this issue were correct. In other respects, the summing-up was fair. In the light of the evidence, we find that no reasonable jury, properly directed could have failed to convict the applicant. But in the event we had found the trial judge to be in error in omitting the objective "honest" in regard to belief, we would have applied the proviso to section 14 of the Judicature (Appellate Jurisdiction) Act and refused the application for leave to appeal.