CA: CRIMINAL LAW — Rape — absence of direction as to "mens rea" of accused — on facts of case Court bound to apply proviso. Corroboration: whether judge failed to give adequate directions on corroboration — whether judge failed to point out to jury that evidence in case disclosed no corroboration with regard to lack of consent; Appeal dismissed — application of proviso.

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EVIDENCE

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 225/87

Case referred to:
R. v Robinson (unreported) S.C.C.A. 109/79 dated 22/11/82

BEFORE: THE HON. MR. JUSTICE CAREY, P. (AG.)
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MS. JUSTICE MORGAN, J.A.

R. vs ANTHONY BROWN

C. Dennis Morrison for appellant

Canute Brown for Crown

November 7, 1988

CAREY, P. (AG.):

This matter comes before the court by leave of the single judge. The appellant was convicted in the Home Circuit Court on the 24th of November 1987, before Malcolm, J., sitting with a jury for the offence of rape and sentenced to 12 years imprisonment at hard labour.

The allegations upon which the conviction was based, were these: On the 11th of December 1986, at about 11:15 in the evening, the victim of the offence was walking alone along the Collins-Green Avenue when she was accosted by a man. He referred to her disrespectfully as, "hey gal, you believe a anything mi a beg you fa;" after this, she felt herself grabbed from behind the neck and theb a knife was presented at her throat. In the event, this man compelled her to bend forward and in that position he had sexual intercourse with her. The young lady made a report to a police officer who accompanied her to certain premises, she identified

her assailant as this applicant. The witness stated that she saw this applicant whom she knew before, with a group of men and he spoke with the officer; he said "Mr. Brown mi really deal wid di daughta, mi did fi give her a ten dollar and because mi no give her she sey mi and you can deal." In his defence, he acknowledged that he had sexual intercourse with her, but it was with her consent.

Although the single judge had granted leave on the absence of directions as to "mens rea" in the summing up of the learned trial judge, Mr. Morrison stated that he did not think, having regard to the facts in this particular case, that it would have been helpful to the jury.

We entirely agree with his approach. On the Crown's case, the traditional directions that were in fact given by the trial judge were correct. We have said that where consent is the issue then the learned trial judge should allude to the question of the "mens rea" of the accused. So that, even if it is accepted that the learned trial judge had omitted to conform to that dictum, this was the sort of case in which this court would have been bound to apply the proviso and in that respect, this case would be no different from the case of R v. Robinson (unreported) S.C.C.A. 109/79 dated January 22, 1982.

We can therefore look at the only ground which Mr. Morrison advanced in argument. That ground was framed in this way:

> "That the learned trial judge failed to give any or any adequate direction to the jury on the requirement of corroboration and, in particular, failed to point out to the jury that the evidence in the case disclosed no corroboration with respect to the critical issue of lack of consent."

The learned trial judge, in the course of his summing-up, gave the usual warning as to the danger of convicting on the uncorroborative evidence of the victim. He did not, as counsel correctly pointed out, go on to indicate that there was no corroboration in this case.

He did make it clear to the jury that the report of the victim to the police officer was not corroboration. There was in fact, no corroborative evidence in this case and therefore, although the learned trial judge did not set out to explain what corroboration meant, in the absence of any evidence of corroboration there was no evidence which the jury could consider as amounting to such.

The effect of that non-direction could not result in any miscarriage of justice. What the omission demonstrated is that the learned trial judge was not as careful as he ought to have been in his directions to the jury. And if it were necessary, in regard to that ground also, we would have applied the proviso.

We do not think that that ground can succeed, and the result will be that the appeal will be dismissed. On the question of sentence, Mr. Morrison quite candidly conceded that he did not think he could properly argue that the sentence imposed was manifestly excessive. We entirely agree, and in that respect the sentence is also affirmed and the court will direct sentence to commence from the date of conviction.