C.A. CRIMINAL LAW — RAPE Consent — Correct direction at beginning of summing up that if applicant believed that complainant consented to sexual intercourse quitting of rape but failed to assist jury by pointing out inferences from which it could be found that applicant believed or may have believed that complainant consented — general direction not correlated to evidence. Appeal allowed, conviction quashed, sentence set aside, verdict of acquittal entered. [Pursuant "On the particular facts of this exceptional case neither the appellant nor the proviso was entitled for a new trial would be in the interest of justice" (p7)

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 40/88

Case referred to D.P.P. v Morgan (1972) 2 All ER 347 BEFORE: The Hon. Mr. Justice Kerr, J.A.
R. v Kenneth Robinson (unreported) The Hon. Mr. Justice Wright, J.A.
S.C.C.A. 109/79 delivered 22/11/82. The Hon. Mr. Justice Downer, J.A.

R. v. CHESTER GAYLE

Bert Samuels for the applicant

Marlene Harrison for the Crown

21st & 22nd June &
22nd July, 1988

DOWNER, J.A.:

The issue in this application for leave to appeal which we treated as an appeal, is whether the learned trial judge misdirected the jury at the end of his summing-up. The misdirection alleged was a failure to direct that since consent was in issue, and there was evidence from which the jury could find that the accused believed that the complainant consented to having sexual intercourse with him, or they could have been in doubt about it, then that should have been put to the jury as it may have resulted in an acquittal. Further, it was contended that this requirement should, in no way, be whittled down because there was a correct direction on how to treat consent at the beginning of the summing-up.

To determine if this contention was correct, we must examine the specific directions of Patterson, J., to the jury in the Home Circuit Court in the trial on 18th and 19th February, 1988 after

which the applicant Chester Gayle was found guilty and sentenced to four (4) years imprisonment with hard labour.

It was a short summing-up, taking up a mere 21 pages of the record and it started at 4:13 p.m., and was completed at 5:07 p.m. In recounting the facts, the judge reminded the jury that the Crown's case was that the complainant was in Cassava Piece going towards Constant Spring and she was walking along a lane at around 10:00 p.m. She said that she was going to meet her then current boyfriend who had promised her some money. She explained that she was dressed in trousers and she had on a blouse over which there was a wind-breaker. The applicant whom she knew for five (5) years came along and he walked behind her and on her way she had a casual conversation with two men. At the point where the lane joined Cassava Piece Road, they heard music and he suggested to her that he knew where the music was and ~~that she~~ should follow him. They both walked together and he ~~suggested a shorter~~ route although she had intended to go by the Constant Spring Main Road. This shorter route led to the bushes and he dragged her along, during which time she was crying. He told her to stop crying or he would hit her. He unzipped her pants, took off her wind-breaker and her blouse. As for the act of intercourse it is best to use the delicate language of the judge at page 11 of the record. Here it is:

> "Said all this time she was crying and he pushed her forward, face downwards, in a bending position, then the accused man drew down his pants, took out his penis and inserted it in her vagina and had sexual intercourse with her for about half an hour. She said, all this time she was crying and trying to back him off her. She did not agree for ~~the accused man to~~ have sexual ~~intercourse~~ with her."

After that she dressed, and went straight to the Constant Spring Police Station and reported the matter. Thenceforth, accompanied by the police, they went to the home of the applicant and he was that night arrested.

The defence gave a markedly different version. Firstly, in cross-examination , it was established that the complainant who was then eighteen years, first had a boyfriend in 1982, then at the time of the incident, Brenton Ramsay was her boyfriend. In between she had a child with another boyfriend.

As for his reasons for the incident it was put to her in cross-examination that she was waiting for the accused at the top of the hill in contrast to her version that she was awaiting her boyfriend. The suggestion was also that she asked for $30.00 after intercourse and the accused told her that he only had $12.00 and that it was because of that low offer why she reported the matter to the police. She denied these suggestions.

In his evidence, the accused confirmed that he knew her for five years, as she usually came to his house for prayer meetings. He said that he saw the complainant and decided to accompany her and when he reached the top of the hill he told her to wait for him. He then talked sex with her and they went to the bushes and did it. He also told the Court of her request for $30.00 and her refusal of his offer for $12.00. It was in those circumstances, he said, that she cried. They then parted and while he was at home in bed the police came with her and he was then arrested.

Miss Harrison for the Crown submitted that the issue before the jury was one of competing credibilities and once the correct direction was given in such a short summing-up, the failure to reiterate it at the conclusion was not fatal as it was clear from the jury's verdict, that the defence was rejected. Mr. Samuels on the other hand argued that the failure to relate the correct directions to the facts on the Crown's case may well have misled the jury and deprived the accused of a chance of acquittal. We must, therefore, examine the complaint in detail to determine the appeal.

Early in the general part of his summing-up at page 5 of the record, Patterson, J., gave this correct definition of rape which emphasised the issue of consent -

> "Now, what is the offence of rape that the prosecution must prove. The offence of rape is committed when a male person has sexual intercourse with a female person without her consent or with indifference as to whether or not she consents, by force, fear or fraud."

On page 7 of the record, the learned judge pointed out to the jury the necessity to consider the belief of the applicant in relation to the issue of consent which was laid down in the important case of D.P.P. v. Morgan [1972] 2 All E.R. 347 and applied in this jurisdiction in R. v. Kenneth Robinson (unreported) S.C.C.A. 109/79 delivered 22nd January, 1982. Here is how the learned judge directed the jury:

> "And the law says that if an accused person in fact believes that the woman had consented whether or not that belief was based on reasonable grounds, you Mr. Foreman and members of the jury, cannot in those circumstances find him guilty of rape, and the burden of proving the absence of such belief is on the prosecution."

Counsel on both sides as well as this Court agreed that this direction could not be faulted. But the learned trial judge further directed the jury on the issue on page 21 of the record at the end of his summing-up. Counsel for the applicant submitted that the summing-up in its latter stage amounted to a misdirection and deprived the applicant of the chance of an acquittal.

To appreciate the rival submissions, it is necessary to delineate those features of the Crown's case which raised the issue of the applicant's belief and also to reinforce that by pointing out those features of the defence which addressed the matter. It was common ground that they knew each other; that they walked through a short cut together after ten in the night; that on the Crown's case,

intercourse was for half an hour while on the case for the defence, it lasted fifteen minutes. Even more important was the fact of the position in which intercourse took place i.e., she bent over while his stance was from the rear.

It was against this background and after examining the evidence that the learned judge on the vital issue of consent directed the jury at page 21 of the record, thus:

> "So, Mr. Foreman and members of the jury, if you should find that the complainant had sexual intercourse with the accused man but she did not consent for the accused to have intercourse with her, your verdict would be guilty as charged. If on a full consideration of the evidence you are left in a state of mind where you cannot say whether or not the woman consented, your verdict would be not guilty. If you should find that she consented as the accused man said, again your verdict would be not guilty."

Counsel for the Crown contended that once the correct direction was given in the first place at page 7, there was no need to repeat it again. Mr. Samuels stressed that the jury had no assistance as to how to treat the circumstances adverted to on the Crown's case which may have led the accused to believe that the lady was consenting and the omission to direct the jury on this aspect at the end of the summing-up could well have misled the jury to return a verdict of guilty, without giving due weight to the state of the applicant's belief on the issue of consent.

In D.P.P. v. Morgan (supra) the issue of the appellant's belief, that the victim was consenting arose expressly on the evidence of the defence, while in the instant case, the issue arose both on the defence and more importantly, from inferences which could have been drawn from the Crown's case. The misdirection in this case was the failure of the learned trial judge to point out to the jury that even if the evidence of the applicant was rejected, it was still necessary to examine the Crown's case to determine whether they could feel sure about it before returning a verdict of guilty.

An essential requirement, therefore, for this summing-up was for the trial judge to point out that from the primary facts on the Crown's case, that sex lasted for as long as half an hour where the victim was bending over, while the applicant held her hands behind her and performed the act of intercourse from the rear, were facts which if accepted, the jury could infer that the applicant believed that consent had been given. The trial judge would also have had to point out that the Crown was relying on these features to negative consent.

Additionally, favourable implications for the defence were that the beginning of all this was an amicable walk at 10 o'clock in the night by two young people who had known each other for five years and this walk was through a short cut which traversed a foot-ball pitch and bushes. This would, of course, be balanced against the lady's story, that it was the applicant who invited her through the short cut as he purported to know where her boyfriend was and that she also said that he hit her and dragged her part of the way to the bushes.

In these circumstances, it was not enough as counsel for the Crown contended that those issues could be dismissed on the ground that they were not raised by the defence at the trial. We hold that the learned trial judge had a duty to assist the jury by pointing out that these were inferences from which it could be found, that the applicant believed or may have believed that the lady had consented. Further it was only by directing the jury along these lines that the trial judge could have alerted the jury as to whether or not the Crown had discharged "the burden of proving absence of such belief" to which the trial judge had quite properly referred in his general directions on page 7 of the record. His general directions early in his summing-up, impeccable though they were, were not co-related to the evidence raising the issue of honest belief that must be negatived by the prosecution.

We find that the submissions advanced on behalf of the applicant were well founded and on the particular facts of this exceptional case, neither the application of the proviso nor an order for a new trial would be in the interests of justice. Inasmuch, therefore, as the application involves important questions of law, we have treated the hearing of the application as the hearing of the appeal. The appeal is allowed, and it is ordered that the conviction be quashed, the sentence set aside and a verdict of acquittal entered.