JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS. 8 & 11/86

BEFORE: The Hon. Mr. Justice Rowe, P.
The Hon. Mr. Justice Carey, J.A.
The Hon. Mr. Justice White, J.A.

R. v. LINVAL McLEOD & YVONNE BERLIN

Richard Small, Mrs. Donna Scott-Bhoorasingh and Mrs. Nicole Scott-Bonnick for appellants.

Kent Pantry and Miss Marlene Harrison for the Crown.

March 12, 13; & April 27, 1987

ROWE, P.:

The male appellant was convicted for rape, the female appellant for aiding and abetting him in the commission of the rape and both were sentenced by McKain J. in the Clarendon Circuit Court to serve a term of seven years imprisonment at hard labour. After a two day hearing, we allowed the appeals, quashed the convictions, set aside the sentences, entered verdicts of acquittal and promised to reduce our reasons to writing, a promise we now keep.

McLeod, a man of 35 years of age and father of eight children lived in common law relationship with Berlin, aged 20 years, at a district in Clarendon. A young girl, whose age did not appear from the summing-up, and who on the assessment of the trial judge was of markedly sub-normal intelligence, was said to have been boasting to the appellant Berlin and some other young women at a shop on the morning of June 6, 1985, of her sexual prowess and of the poor performance of her male sex partners.

The appellant McLeod said he too had overheard this conversation, and the boasts of the young girl.

It was not a disputed fact that McLeod was lying in bed in his room sometime later in that day, because, McLeod says, he was not feeling well. The time of the various events were not indicated in the summing-up. Be that as it may, the complainant and the female appellant entered the bedroom shared by the two appellants and saw the male appellant in bed. The proseuction's case was that the female appellant put her hand around the neck of the complainant and dragged her from the shop into the room, that she threatened to beat the complainant, and left the room having first bolted the door on the inside. Berlin spoke to McLeod before she went outside. After that departure, the male appellant, still lying on the bed, held on to the complainant and drew her to the bed. The complainant further said that she told the male appellant to let her go but he ignored her and did nothing.

The complainant partly undressed. She took off her model shorts and panties and later she re-clothed herself. Berlin re-entered the room, opened the drawer of a machine, extracted a condom, threw it on the bed and returned outside. McLeod's immediate reaction to this gift was to enquire of Berlin if she was getting off her head. After this, said the complainant, she again took off her panties and went into the bed with the male appellant. She said, "She resisted a little and then afterwards when the man said, 'You gone too far' then she consented." The sexual act completed, the complainant said she dressed herself and went home. On the following day, in answer to her mother's questions, the complainant related what occurred concerning the appellants. According to the mother the complaint was that Berlin had threatened to cut up the complainant, had ordered her to take off her clothes, and not to make any noise, and when the complainant had refused, Berlin took off the complainant's clothes and ordered McLeod to get to work, having first given him the "boot", meaning the condom. No medical

evidence was available although the complainant was examined by a doctor and there was an admission that at the request of the complainant's mother, the male accused had provided $60.00 towards medical expenses.

The appellant McLeod gave an unsworn statement. McLeod's averment that when Berlin and the complainant came into the room he enquired of Berlin what she had brought the girl there for, was supported by the complainant herself. McLeod said he enquired of the complainant if a little girl like herself could have as many men as she claimed and her reply was that he should try her. She sat on the bed, then got up, and removed her shorts which she later replaced. She taunted him that he had no use and about that time Berlin re-entered the room and threw him the condom. Again the complainant removed her clothes and lay on the bed. He was reluctant and the taunts resumed to the effect that if certain named persons had been in his place they would have finished already. Spurred on in this way, said the male appellant, he had sexual intercourse with the complainant although he refused her suggestion to remove his own clothes. He and the complainant laughed and talked until Berlin came into the room and enquired if he had fixed her up yet. The pleasant laughter and joking was enjoyed by Berlin who straightened the complainant's hair and she left in a happy mood. A week went by before he learnt that he was to be accused of rape.

The defence of the appellant Berlin was that three girls including the complainant were at a shop when the complainant began relating stories of all the different men she could take, but all those men were soft. Berlin offered McLeod in words, "Try Linval, Linval is my man. I can guarantee him to you." The offer was accepted in terms, "Come we go round to Mr. Linval." Away they went. Berlin hugged the complainant around her neck and they chatted and laughed along the way. On reaching the room, McLeod showed curiosity at the presence of the complainant who was then left by Berlin inside the room. Berlin said she spoke to one Olga for a while then returned to the room, produced the condom and again left the room. While in there, however, she gave encouragement to the complainant by enquiring if the complainant's hesitancy was due to fear of her. Addressing the girl by name, she said,

"Is me you 'fraid of." The girl laughed and Berlin left the two inside, closed the door and again chatted with Olga, giving full opportunity to the male appellant to satisfy his immoral appetite. Five minutes later she went back to the door and at the request of the complainant combed her hair and the complainant left. Berlin was putting before the jury a state of facts in which the complainant wishing to indulge her sexual appetite was given full encouragement and opportunity so to do without any resort to force or persuasion.

Counsel for the appellants have attacked the summing-up on a plethora of grounds, viz, that there was misdirection as to the mens rea appropriate in the particular case charging rape, that the directions on corroboration as well as on fresh complaint were inadequate and wrong, and that the directions on aiding and abetting were inadequate, confused, contradictory and wrong. There was the familar sweeping-up ground that the verdict was unreasonable, followed by the complaint of excessive sentence.

The crime of rape received extensive treatment in the Director of Public Prosecutions v. Morgan [1975] 2 All E.R. 347. It was made clear in that case that a distinction must be drawn between the actus reus of rape and the mens rea of rape. The actus reus consists of sexual intercourse without the consent of the victim, while the mens rea is the intention on the part of the man to commit the act without the woman's consent or willy nilly not caring whether or not the woman consented. These propositions of law were accepted and adopted in Jamaica in R. v. Kenneth Robinson, S.C.C.A. 109/79, in which judgment was delivered by Kerr J.A. on January 22, 1982. 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. That was not the allegation of the Crown in the instant case. McLeod on his part was saying, "This girl consented. I thought she consented. She took off her clothes twice and came into my bed. She taunted me. I had no reason to believe that she was not consenting." On that state of the evidence, the learned trial judge directed the jury after this fashion: At page 7 of the Record she said:

> "Consent is a major issue and consent does not mean that she did not say yes, because in circumstances sometimes, maybe if you are so tired or afraid that something will happen to you or you are put in circumstances where you say, 'Rather than die I will yield, I will not resist,' it is not a true consent. Consent means with mind and body, that you were willing from the very beginning, that you had it in your mind that you are going along with it.
>
> If in the circumstances you are pushed into a room and you say, 'I am going to be shot', you say, 'Rather than be shot, if the alternative is to have sex', and you are so fearful that you say, 'I will go along with it', then there is no consent."

Then at p. 23 she directed as follows:

> "Was the sex offence freely in there? Did the girl say, 'Let's go on with it?' or 'Blacka could have done better?' Because even if he feels that he is a man and there is challenge as to his manliness, for him to decide to hold her down would still be rape, regardless how he thinks his manliness has been challenged. Is it that with the state of her mind she could not comprehend satisfactorily what was happening?"

The passages quoted above demonstrate that the learned trial judge was concerned only with the actus reus of rape, and gave no guidance to the jury on the mental element, which in a case of this nature was of the utmost gravity.

There are law reformers who suggest that the requirement for corroboration as a rule of practice, circumscribed though it be, in sexual cases, is discriminatory of women and should be abolished.

At the moment, however, the law is that it is dangerous for a jury to convict for the offence of rape on the uncorroborated evidence of a woman or girl. They may only do so after having been warned by the judge of the danger and after giving heed to that warning. In R. v. Anthony Lewis, S.C.C.A. 205/79, the court delivered judgment on October 26, 1981. In giving judgment, I said:

> "The true test is that if the jury have given full force and effect to the warning, that is to say, if they have looked with a suspicious eye upon the complainant's evidence and they have agonized upon the dangers inherent in acting upon her unfortified word, and they nevertheless are quite convinced that her version is truthful and reliable, then they may convict."

See also R. v. Gammon [1959] 43 Cr. App. R. 155 at 160; and R. v. Henry, R. v. Manning [1969] 113 Sol. Jo. 12.

At page 18 of the record the learned trial judge told the jury that:

> "There is no corroboration, but as I have already told you, it is not necessary. It is desirable but not necessary."

The earlier passage to which the judge referred is the one at page 12 of the record where she said:

> "I have to warn you at this stage, although it is a matter that the law says that a person who complains about rape might have many reasons, many excuses, many surprises, all sorts of reasons not genuinely so to make a complaint to cry out for rape, and the law says that in the case of an adult, strictly speaking you do not need corroboration. If the witness on her evidence alone satisfies you, you can convict. Unfortunately in this case, when you are listening you will have to take into consideration well, the mental state of the complainant, because you saw her there, you have to say what you think of it. The reason why the law from time to time requires that you might need corroboration, but it is not necessary here, is because in its wisdom the law says people can imagine things, women can imagine things - that is a presumption - says women don't know their minds and they might think it happened when it didn't happen. As I say, there are laws for the protection of imbeciles and innocents and all that, and maybe in a more sophisticated area it might well be that an order might have been made to examine the complainant to see her ability to relate anything before we go on; but we go on building a house with what kind of bricks and mortar we have. We cannot build on a sophisticated society. You have to go on what you hear."

Nowhere in that passage were the jury told that the warning to be extremely careful is a serious one. Nor were they told that they could only convict after first giving heed to the warning. But the matter does not stop there. This evidence called for extra special care as the learned trial judge from her personal observations, concluded that the complainant was a person of very low mental capacity from which the natural inference could be drawn that she might be more prone to fantasy and prevarication than one of normal intelligence. This was a reasonable inference when one considers the account given by the complainant's mother of the report which she extracted from the complainant, and compares that with the evidence of the complainant herself.

The directions on corroboration were inadequate, and the warning, such as it was, was ineffective to convey the seriousness thereof as is established in the decided cases.

A recent complaint by the female victim of a sexual offence is admissible in evidence to show the consistency of the conduct of the victim with the evidence given at trial and as tending to negative consent. R. v. Lillyman [1896] 2 Q.B. 167. Whether the complaint was made as speedily as could be expected is a matter for the trial judge. R. v. Cummings [1948] 1 All E.R. 551. In the instant case the mother of the complainant said she questioned the girl on the day after the alleged incident and got some answers. The girl said the questioning was one week later, but the trial judge was not at all impressed with her evidence as to time. Consider this direction to the jury:

> "Would the girl know Sunday from Monday from Tuesday."

What seems unclear is whether the trial judge was of the view that the account given to the mother under questioning fell within the ambit of fresh complaint. In directing the jury at p. 18 she said:

> "The law says that sometimes when a person makes fresh complaint, that is, immediately a thing happens they complain about it, it shows the consistency of what they have been holding all the while. In this case you wouldn't call it fresh complaint because it happened a day before and the mother was not told until the other day. It was not volunteered. That will not affect the e question, 'Did the accused man rape her without her consent?'"

The uncertainty implicit in the above passage led Mr. Small to submit that the girl's mother's evidence ought to have been admissible on one ground only, that is to say, to show that the complainant's evidence was wholly untrustworthy. We incline to the view that in admitting the mother's evidence the trial judge was exercising her discretion on the basis of the complainant's perceived defect of reason and that her discretion in admitting the complaint ought not to be interferred with.

Finally, Mr. Small submitted that where an accused is charged with aiding and abetting it is necessary at least to prove the mens rea of the principal offence and that in the instant case the jury should have been told that before they could have considered the guilt of the appellant Berlin, they would have to be satisfied that she believed that the complainant had not consented. Initially the learned trial judge appears to have been telling the jury that assisting to set up a situation whereby sexual intercourse could take place would amount to aiding and abetting as charged. She said at p. 8 of the Record:

> "The matter of aiding and abetting is another. If a person procures, the expression is aid and abet, counsel and procure, if a person assists or sets up a situation whereby sexual intercourse took place, then, of course, the law says we don't have what is commonly called agent provocateur. In other words you can't set up yourself or any immoral thing. So what is commonly called sport houses are not permitted. There is a law against it. So no person could set themselves up and get people to carry on any immoral thing; and the law says - the Defence says being there and being outside - if you arrange a situation whereby sexual intercourse is going to take place without their consent; as a matter of fact if they can prove that you are taking somebody into a place to have that and they don't even know what was going to happen to them and you had it in your mind that sexual intercourse was going to take place and sexual intercourse takes place, then it says even at this you are aiding and abetting the

"commission of sexual intercourse.

> Another thing is, of course, if from the start you are satisfied that there was consent and you say there is no rape, you would still have to go on to consider the case against the female, because the case against the male is one thing as I pointed out. Up to now there is no charge against male rapists for aiding and abetting and females don't rape either, but females aid and abet and counsel and procure. You would have to go on to say what was the female Yvonne Berlin's part in this affair; what was the legal implication?"

These directions were inappropriate, unhelpful and capable of misleading the jury. The gravamen of the charge of aiding and abetting against Berlin was not that she made it easy for sexual intercourse to take place between the appellant McLeod and the complainant, but that the appellant Berlin knew that the complainant was not consenting to that act of sexual intercourse and nevertheless aided and abetted its occurrence. As the summing-up was devoid of any directions to that effect we are of the view that there is merit in the sixth ground of appeal as filed and argued.

The two appellants displayed conduct, which on any objective basis, could be indulged in only by persons wholly immoral. Nevertheless, as they were not charged for immorality, they were entitled to have their cases left to the jury as to whether or not they believed that the complainant was a willing, consenting party and furthermore that they could only be convicted if the jury, having given full weight to a warning of the danger inherent in action upon the uncorroborated evidence of the complainant, were nevertheless convinced that she was speaking the truth. The summing-up was defective in these and other respects already referred to and we felt constrained to allow the appeals.