JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 39/91

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

R v PAUL HENDRICKS

Delroy Chuck for the applicant

Miss Paulette Williams for the Crown

June 24 and July 17, 1991

BINGHAM J.A. (AG.)

The applicant was tried and convicted on an indictment charging him for rape before Smith J and a jury in the Saint Catherine Circuit Court at Spanish Town on 21st March, 1991. He was sentenced to three years imprisonment at hard labour.

His application for leave to appeal to a single judge having been refused, it has now been renewed before us.

On 24th June, having heard the submissions of Counsel we refused this application. We promised then to reduce our reasons into writing at a later date and this we now do. The facts to which this matter relate were that on 20th January, 1990 around 7:00 p.m. the complainant one Miss D was standing by the roadside on Young Street in Spanish Town awaiting transportation to take her to Ensom City to visit a friend.

The applicant drove up in his motor car and offered her a lift to her intended destination. He drove instead to his home at Ensom Acres where he forcibly removed the complainant from the car into his house despite her strong protestations. She resisted his advances in a manner which, to borrow the learned judge's description, "she ranted and railed." She then bit the appellant

in his chest, an act for which she received two blows to the head. This rendered her for a period unconscious. The applicant eventually managed to undress her and had his way by sexually assaulting her. Her ordeal did not cease until the following morning when the applicant drove her in his car back to Spanish Town and she managed to alight from the vehicle in a traffic jam and run away.

The applicant in his defence resorted to the usual practice of making an unsworn statement from the dock in which he said that it was the complainant who called to him as he drove by in his motor car. She requested a drive to Ensom City. She used some endearing words to him, then got into the car. He made a number of stops in the town and at each of these stops the complainant remained seated in the car. He eventually drove to Mowatt Park where they drank soup and ate roast fish. They danced closely and he made sexual advances to her and she responded in a positive manner. He then drove to his home where they showered together. There was sexual interplay which led eventually to the act of intercourse. He tried to leave her for a while to run an errand but she would have none of it. They then fell asleep in a loving embrace before awaking in the early hours of the next morning for a further bout of love-making. He then prepared breakfast which they both had and then drove her to Spanish Town putting her off at a convenient point. Her parting remarks were "see you later Pablo."

He was arrested later that day at his business place.

On this evidence, the sole issue left for the jury's determination was whether, given their respective accounts the act of intercourse was or was not consensual.

Mr. Chuck for the applicant sought and obtained leave to argue the following ground:-

> "1. That the learned trial judge failed to adequately direct and guide the jury on the mental element requirement for rape.
>
> In particular he failed to point out that the real issue was whether or not the accused honestly believed that the complainant was consenting."

He conceded that the directions given by the learned trial judge were correct in so far as it did address the question of the subjective mental element in the offence charged. He submitted that there was a non-direction as he omitted to tell them that before convicting they ought to find that the applicant did not honestly believe that the complainant was consenting to the act of sexual intercourse.

In support of this proposition he relied on:- R v Linval McLeod and Yvonne Berlin (unreported) S.C.C.A. 8 and 11/88 delivered on 27th April, 1987, D.P.P. v Morgan (1975) 2 All E.R. 347 and R v Everton Williams (unreported) S.C.C.A. 112/88 delivered on 6th October, 1988.

The learned trial judge in his directions to the jury on the law set against the background of these two contrasting accounts at paragraph 7 of the summing up said:-

> "A man commits rape if he has unlawful sexual intercourse with a woman who, at the time of the intercourse, does not consent to it, and at the time, he knows that she does not consent to the intercourse or that he is reckless as to whether or not she consents. So two aspects to the consent, the girl, that is the lady complainant, must not be consenting, and the accused must know that she was not consenting or is reckless in other words shut his eyes to it didn't care as to whether or not she was consenting."
>
> (emphasis supplied)

Given the complainant's account that she was not a willing participant in the act of sexual intercourse the underlined words can be seen as interwoven into the fabric of the Crown's case.

Having explained to the jury that there was no issue of sexual intercourse the learned trial judge in dealing with the issue of consent vel non said:-

> "so the real issue here is consent, and that is what you have to look at carefully when you are considering the evidence did Miss D consent? or if you find that she was not consenting did the accused know that she was not consenting? So you bear in mind that that is the real issue here as to whether or not sexual intercourse was consensual."

This latter direction was, based on applicant's account that, unless he had got the signals which he saw expressed in the complainant's mood on the night of the incident all wrong, she was clearly a willing and consenting party in the entire scenario. Taking all factors into consideration the learned trial judge left the matter for the jury's determination as to which of the two accounts they accepted as true. This was a credibility question for them to decide.

The sole issue being one relating to consent the directions were structured in a manner which took into consideration the guidelines as laid down in D.P.P. v Morgan (supra) and followed in R v McLeod and Berlin and R v Williams (supra). In all these cases as well as in R v Robinson (unreported) S.C.C.A 109/79 delivered on 22nd January, 1979, it was recognised by this Court that where consent was in issue the traditional direction which sought in defining the offence to address only the physical element (actus reus) constituent in the commission of the crime was wrong. In R v Everton Williams (supra) on facts which can be equated with those in this case, the learned trial judge had followed the traditional directions; this Court following R v Robinson (supra) said at page 5:-

> "Where consent is in issue, then the traditional direction is wholly inappropriate."

Further on at page 6 the Court then said:-

> "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 indifference as whether or not she consented."

Prior to R v Williams this Court had in R v McLeod and Berlin in dealing with the same matter said at pages 4 and 5:

> "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 a woman is consenting whereas from the woman's point of view, consent was the furthest thing from her mind.
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> In each case the fact 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....."
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> (emphasis supplied)

When the above principles are considered against the facts in this case, the proposition being advanced by learned Counsel for the applicant is untenable and has no merit. Unlike D.P.P. v Morgan and R v McLeod and Berlin which on the particular facts would call for a further direction based upon the accused honest belief or lack of it in relation to the issue of consent, this 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 directions given by the trial judge were as prescribed in R v McLeod and Berlin (supra)

There is accordingly no basis for interfering with the verdict to which the jury came. It was for these reasons that we came to the conclusion referred to at the commencement of this judgment and directed that the application be refused.

The sentence should commence on 21st June, 1991.