

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 166/88

BEFORE: The Hon. Mr. Justice Rowe, President
The Hon. Mr. Justice Wright, J.A.
The Hon. Mr. Justice Forte, J.A.

R. v. WINSTON SMITH

Application for leave to appeal

Mr. Bryan Skyes for Crown

24th January, 1989

FORTE, J.A.

The applicant was convicted in the Saint Catherine Circuit Court on the 20th of July, 1988 on an indictment charging two counts. The first charged him with raping the complainant on the 24th of October, 1987 and the second count with robbery with aggravation of the same complainant of \$5.00 cash and one silver ring valued at \$250.00.

The conviction arose out of an incident which occurred on the 24th of October, 1987 when the complainant while walking on the road was grabbed from behind. She felt a knife which was put to her throat and then she heard a voice behind her telling her that if she cried out she would be killed. The person behind her who was later identified by the complainant as the applicant pulled her into an abandoned building. She became afraid. When he had her in the building, the applicant told her exactly what he wanted her there for and that was to have sexual intercourse with her. He also told her that after he had had sexual intercourse with her, he was going to kill her and made reference to the fact that he was not a homosexual. That

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reference was relevant having regard to the fact that the complainant had testified that she had known the applicant before that night, that he had always approached her with an invitation to have sexual intercourse with him and he had accused her on previous occasions of calling him a homosexual. Because of his threats and the fact that he was armed with a knife she was afraid of him on that night, and consequently submitted to his advances and he had sexual intercourse with her in various positions and on more than one occasion. In fact there were intervals in which he sat talking to her, threatening her with the knife and afterwards, continuing in his endeavours, had sexual intercourse with her again. During this time, of course, she was naked as he had taken off her clothes. She testified that she had intercourse with him because she wanted to live. After he was finished, he was not satisfied with what he had done to her body, but demanded from her money and whatever else she had to give him. In her fear, she gave him \$5.00 which she had and also a ring which she was wearing. After this, he left her. She then went to the police station where she made a report, and on the following day, having known him before, she went into the area where she thought she could find him. She saw him and pointed him out to the police and in his presence and hearing said and I quote:

"That's the man that rape me."

In reply the applicant stated:

"Is a gal whye me use to give money all the time."

The complainant also testified that the police searched the applicant at that time and found on him \$5.00 and her ring. He was then taken into custody. On this arrest he told the police officer "Iss long time me a give her money." He also said "I take from her \$6.05 and a silver ring." In his defence the applicant stated that the complainant is someone whom he had known before, that he had had sexual intercourse with her at least three or four times before and in fact on that night she had consented to have sexual intercourse with him for which he gave her a sum of \$40.00. However, while

the complainant was giving evidence, a suggestion was made to her by counsel for the defence that it was because the complainant wanted money and the applicant had not given her money why she had made a report to the police. Those were the facts upon which the applicant was convicted. At this hearing the applicant was not represented by counsel. However, Mr. Bryan Skyes appearing for the Crown quite rightly indicated to the Court that the learned trial judge in summing up the case to the jury omitted to give the jury adequate directions on the mens rea in relation to the offence of rape. This court has said in several judgments which were referred to by Mr. Skyes, (R. v. Kenneth Robertson (unreported) S.C.C.A. 109/79 dated 22nd January, 1982 R. v. Clinton McLeod et al (unreported) S.C.C.A 8 & 11/86 dated 27th April, 1987 and R. v. Everton Williams (unreported) S.C.C.A. 112/88 dated 6th October 1988) that the proper directions on mens rea must be given in a case of rape where the defence is one of consent, i.e. the jury must be told that if they believe or are in reasonable doubt that the applicant had an honest belief that the complainant was consenting to the act of sexual intercourse then he must be acquitted. Those directions do not appear anywhere in the summing up of the learned trial judge. However, the accounts by the complainant and that by the applicant were diametrically opposed to each other. Mr. Skyes for the Crown quite rightly pointed out that the applicant was also charged with robbery with aggravation, that the jury having heard the evidence convicted him of both rape and robbery with aggravation which he said clearly demonstrated that the jury must have accepted the account of the complainant. We agree with that submission, and conclude that the jury must have accepted that the incident occurred in the manner in which the complainant said it did. i.e. that she was raped having been threatened with a knife and thereafter robbed of her money and her ring.

In those circumstances, we are of the view that the omission of the learned trial judge, is not fatal to the conviction, as the facts did not allow for a conclusion that the applicant honestly believed that the complainant was consenting to the act of sexual intercourse. For those reasons, the application for leave to appeal is refused. The conviction and sentences are affirmed. We, however order that the sentences commence from the 20th October, 1988.