C.A Criminal Law — Rape — Consent — Corroboration. Whether judge misdirected jury by concentrating jump attention on consent from victim's point of view — absence of any direction as to 'mens rea' of accused. Whether trial judge failed to warn jury adequately that it is dangerous to convict on the uncorroborated evidence of the woman — failure of judge to impress upon jury that warning should be taken seriously. Appeal allowed — conviction quashed — sentence set aside — new trial ordered

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 112/88

Cases referred to:
R. v. Robinson (unreported) S.C.C.A. 109/79 – delivered 22/1/79
R. v. Linval Richards and Vivian Barton (unreported) delivered 27/4/87
R. v. Anthony Powers (unreported) S.C.C.A. 205/79 delivered 26/10/81

BEFORE: THE HON. MR. JUSTICE CAREY, PRESIDENT (Ag.)
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.

REGINA VS. EVERTON WILLIAMS

Howard Hamilton Q.C., and Delroy Chuck for Applicant

Kent Pantry and Brian Sykes for Crown

September 22 and October 6, 1988

CAREY P. (Ag.):

On 22nd September, having heard the submissions of counsel, we treated the application for leave to appeal as the hearing of the appeal which we allowed. We quashed the conviction, set aside the sentence and in the interests of justice, we directed that a new trial should be had at the next session of the St. Ann Circuit Court. We intimated then that we would put our reasons in writing and hand them down later. This we now do.

The applicant was convicted in the St. Ann Circuit Court on 17th May last on an indictment which charged him with the rape of a young woman whose identity we do not propose to divulge but whom, we shall hereafter refer to as 'Miss X.' In light of our decision, the facts can be summarily stated.

The victim, aged fifteen years old who lives with her grandparents in Port Maria, St. Mary, found herself at midnight in Ocho Rios, needing to get home. The car in which she had been travelling from Montego Bay developed engine trouble and unsuccessful attempts to remedy the problem, resulted in her arrival in Ocho Rios at such a late hour. She was alone. While there, the applicant a stranger to her, drove up in his car. Persons among whom she stood awaiting transportation hailed him, and enquired whether he was going to Port Maria. The driver who had brought his car to a halt, acknowledged that he was. She got in and he set off. In the course of his journey, he stopped twice, having got off the main road to Port Maria. On the second occasion, because she had become somewhat alarmed, she asked him what he had in mind. Despite her cries and screams he had intercourse with her. She had removed her underwear and pants at his insistence because she was frightened. She had also told him that she was only fourteen years old. Thereafter the applicant drove to another place where he stopped and went into a building. She got out and made a note of the licence number. He returned and drove to a gas station where she left the car, boarded a bus and returned to the very spot from which she had started her traumatic journey.

The defence was consent. In the course of his evidence, he said that when he saw a group of persons, he heard shouts of "Port Maria" as well as "Teddy" which is his pet name. Miss X whom he did not know before, came up to his car. The learned trial judge described in her summing-up what occurred then in these words (at pp. 121-122):

> "..... she asked him if he was going to Port Maria and he said no. And he said it could probably be arranged that he could take her there, if they would go partying and he explained what partying meant; a little play on the side and he explained there too. And she was quite up to it. It is not that she said, yes or no, she was quite up to it, and she said, no problem.

> "She came in the car and he told her that he would give her what she needed, and they went - he was able to tell you where it was that he had gone to. Buckfield was the first place that he went. He came out the car and he had even invited her inside and she said she would stay outside. He came back. He drove to a spot in Content Gardens, Shaw Park area, and there they started to talk, and they were touching each other and building up to it, as he said, holding and kissing and they got into love making.
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> He said he didn't even use bad words, threats, anything at all to her. She was a willing person all the while, and the only time differences came up, is with the offer, because he said it was only fifty dollars ($50.00) he had, and he needed twenty dollars ($20.00) to buy gas and he knew an all-night open gas station, he said, so he could only give her thirty dollars ($30.00), and she was going on so bad, that he thought he would stop at a friend and get some more to give her. And they went on until they came to the gas station where the chain was, and he asked her and she pulled, and he drove in, and he says he was calling the friend on the compound, but nobody came out and the bus came by. He was the person who stopped the bus and put her on the bus to go back to Ocho Rios."

Plainly, the applicant having admitted intercourse, the sole issue requiring detailed and of course correct directions, was consent.

There were two main areas of complaint against the summing-up. In the first, learned counsel challenged the directions with respect to the issue of consent and in the second, those relating to the warning to be given the jury in the absence of corroboration.

Mr. Chuck in the course of his incisive and economical argument pointed to a number of instances in which the learned trial judge concentrated the jury's attention on consent from the victim's point of view. We set out a few extracts from the summing-up:

"'..... You assess the case and weigh the facts and come to the conclusion as to whether or not the consent he says that she gave was a true consent. .....'

'..... Before you can find this accused man guilty the Crown must satisfy you as to certain ingredients and you must be satisfied to the extent that you are sure that sexual intercourse took place; that the accused person was the person with whom sexual intercourse took place and that the time the intercourse took place the complainant did not consent. That is the burden that is put on the Prosecution....'

.....

'..... Along with that you have to consider the question of consent, and consent is the reaction of the person.....'

'..... Now, true consent is a matter of looking at the circumstances, because consent; if you are put in a state of fear, if the circumstances are such that you do not know what to do, and you yield because you are overcome, because of stronger force than you, because the circumstances; dark night everywhere, if you feel that that is enough to say, yield than go into the unknown, then that would not be true consent.

So, Mr. Foreman and Members of the Jury, you have to look in this particular case to see if there is anything that could satisfy you that she did not consent, because it is for the prosecution to satisfy you, not for him to negative consent.....'

'..... That when she tells you that she could not run for she didn't know where she was, she only know it's a main road there, and there was no useful purpose running, because she didn't know what way the danger was going to lead, did she consent? .....'

'..... That you have to look on and you have to look on his case because you are studying the case in its entirety to see whether or not she had really consented, because as I say, the fact that she did not struggle, scratch, scream or fight does not necessarily mean she consented. .....'

'..... If you think that on her word alone that the sexual intercourse that took place that night was without her consent. ..... '

> " '..... So, if it opened to you, Mr. Foreman and Members of the Jury, if you find that she did not consent, true consent as defined by law, that is her mind and her body was not together in it, then the verdict must be guilty.....' "

He also drew our attention to the absence of any directions with respect to the mental element of the accused as an ingredient of rape. Learned counsel for the Crown was constrained to admit that non-direction.

In R. v. Robinson (unreported) S.C.C.A. 109/79 delivered 22nd January 1979, a strong bench of this Court [Kerr, Rowe and Carey JJ.A.] dealt with this very point and delivered a considered judgment. We said (at p. 6):

> "Accordingly, there are cases in which this traditional definition may suffice. For example where there is unchallenged evidence that the resistance of the woman was overcome by violence or threat of imminent serious bodily injury and the specific issue was one of identification."

The learned trial judge in the present case defined rape in the traditional way alluded to in the judgment. She expressed herself in the following terms (at p. 105):

> "Now, Mr. Foreman and Members of the Jury, the offence is rape and the law says that this offence of rape is committed when a male has sexual intercourse with a female without her consent, by fear, by force or by fraud. Before you can find this accused man guilty the Crown must satisfy you as to certain ingredients and you must be satisfied to the extent that you are sure that sexual intercourse took place; that the accused person was the person with whom sexual intercourse took place and that the time the intercourse took place the complainant did not consent. That is the burden that is put on the Prosecution."

But we went on to point out that where consent is the issue, then the traditional direction is wholly inappropriate. More importantly that case lays it down that a trial judge is obliged to advert to the "mens rea" of the accused. We said this (at p. 6):

> "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 with indifference as to whether or not she consented - Director of Public Prosecutions v. Morgan (supra)."

Since we operate in a hierarchical system of Courts, it is expected that the decisions of this Court will be followed by judges of a lower Court unless of course, the decision can be distinguished. The principle laid down in R. v. Robinson must accordingly be followed. Despite the lack of a developed system of law reporting, decisions of this Court are none-the-less circulated among the judges and it is expected that they are read, and suitable notes made to update sample directions in the judges personal note-books.

We return to the matter in hand. In most cases where consent is in issue, the accused person will give evidence of facts which led him to that conclusion. If the trial judge then fails to direct the jury as to the essential mental element, can it be said that the defence has been fairly put to the jury? It is, in our view, a grave non-direction where the trial judge is guilty of such an omission; the defence cannot be said to have been properly put to the jury; the focus is all wrong.

This Court in R. v. Linval McLeod and Yvonne Berlin (unreported) delivered 27th April, 1987 returned to the need for a particular direction in Rape cases where consent was in issue. In an endeavour to be helpful, we said this (at p. 4):

> "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."

Coincidentially, the appeal of McLeod and Berlin related to directions given by the same trial judge in a case of Rape where consent was in issue. It is a matter of regret that both cases escaped her notice in light of the fact that the present case, was heard by her as recently as May last.

The second major area which formed the basis of complaint, was the warning as to the absence of corroboration. Mr. Hamilton who dealt with this aspect of the appeal, submitted that the learned trial judge did not impress upon the jury that the warning should be taken seriously. The impugned directions are these:

> "The law says, Mr. Foreman and Members of the Jury, that the Prosecution has to establish to your satisfaction that there was no consent and that it is unsafe to act on the uncorroborated evidence of a complainant. What they used to say in times gone by is that women were so fanciful, they imagined things which they may have thought happened, therefore, it is sometimes wiser to see that if you can find support from some independent source that would establish that there was no consent. In this case there is nobody to show, but of course, Mr. Foreman and Members of the Jury, you are seeing the factual thing. If you are satisfied that what she is telling you is the truth, if you can rely on her evidence, then you need no other corroboration. It is only that I warned you to examine carefully, to judge from her intelligence and her whole demeanour and conduct and if you are satisfied she is telling the truth you will need no more support."

We live it is true, in an age when sexist observations are anathema to some sections of society. But the requirement to warn a jury of the dangers of convicting on the uncorroborated evidence of the victim of a sexual assault, has not been modified or abolished. The observation that it is easy to cry rape and difficult to refute the allegation, is, we think, as valid today as when it was first expressed. Human nature, we venture to think, remains the same over the centuries. At all events, the authorities by which the judges are bound, require that the warning to the jury is not one to be glossed over or for which apologies need be made. The law is that it is dangerous and unsafe for a jury to convict on the uncorroborated evidence of a woman or girl. They may only do so having paid due heed to that warning.

In R. v. Anthony Lewis (unreported) S.C.C.A. 205/79 delivered 26th October 1981 we said this:

> " '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.'
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> 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."
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> [This dictum was approved of in R. v. McLeod and Berlin (supra)]."

In the impugned passage which we cited earlier in this judgment we agree with Mr. Hamilton that the jury were not told in terms that the warning to be extremely careful is a serious one. Mr. Pantry for the Crown was persuaded, and in the event agreed that the warning given by the learned trial judge was ineffective to convey the seriousness of the warning.

These reasons, we think, are sufficient to dispose of this application in favour of the applicant and in terms of the order which we have already spelt out.