CRIMINAL LAW — Rape — Trial — Consent — "mens rea" — honest belief on part of accused — subjective intention — unreasonableness of verdict — whether Judge failed to direct jury properly on the issue of intention and the state of mind of the accused — whether verdict unreasonable and cannot be supported having regard to evidence. APPEAL allowed, conviction quashed, sentence set aside, judgment and verdict of acquittal entered. JAMAICA

① R v Linval McLeod and Anor S.C.C.A. Bands 11/86 — 27.4.87

② D.P.P. v Morgan (1975) 2 All ER 347

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 154/90

EVIDENCE

CRIMINAL PRACTICE

COR: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.

REGINA VS. FITZROY BROWN

Delroy Chuck for the appellant

Brian Clarke for the Crown

31st March & 11th May, 1992

CAREY, J.A.

On 31st March when we allowed this appeal, quashed the conviction, set aside the sentence and entered a judgment and verdict of acquittal, we intimated that we would put our reasons in writing. These now follow.

The appellant was convicted in the Home Circuit Court on 1st November, 1990 before Smith, J., and a jury, of rape and sentenced to 5 years hard labour. The matter came before this Court by leave of the single judge who was not satisfied with the trial judge's treatment of the defence of honest belief on the part of the appellant. Mr. Chuck who argued this appeal in his usual lucid and economic style, put forward two grounds of appeal. The first of these involved the issue of the mens rea of the crime of rape and was stated thus:

> "That the learned trial judge failed to properly and adequately direct the jury on the issue of intention and the state of mind of the accused. His summing up left no doubt in the mind of the jury that consent of the complainant is the only issue which is the actus reus of the crime without giving an adequate direction of the mens rea of the appellant."

The second ground was one of fact viz., that the verdict was unreasonable and cannot be supported having regard to the evidence.

The victim and the appellant are known to each other; they lived across the road from each other. He is a taxi driver; she was a student at a training college. According to her version, she requested the appellant to take her to the hostel and offerred to pay him. She left home with him at about 6:00 p.m. and he deposited her at the destination where she paid him. She entered the hostel to fetch a book which she required and left to return home. She was surprised to see that he had remained, and inquired his reason for doing so. He said he was waiting to take her home. She entered the cab as she had enough funds to pay the fare. Instead of taking her home however, he drove to Oceana Hotel and parked on the top floor in a parking lot there. During the journey she did ask where he was taking her but his reply was - "just cool." When they arrived at the top floor, upon her enquiry, he said he wished to be intimate with her. She demurred, and asked to be taken home. Despite his entreaties and protestations of love, she declined to have intercourse with him.

At this point they had left the car and were standing by a wall in front of the vehicle. She screamed. He grabbed hold of her and struck her head two or three times against the wall. Then he produced a knife, demanding to know the reasons for so much noise. When he put the knife at her throat, she became silent. He pulled her to the rear seat of the car, then went to the front of the car where he obtained a condom which she placed onto him. Thereafter he had intercourse with her.

Later they drove out. She said nothing to the guards who were there. Somewhere along the way, she managed to step out of the car and thus made her escape. She refrained from disclosing her ordeal to an aunt with whom she lived because of the aunt's illness. She arrived home at 11:30 p.m. The first person to whom she divulged the incident was her father and this she did the following morning.

Under cross-examination, she revealed serious inconsistences in her evidence. At the preliminary examination, she was shown to have testified that she had agreed with the appellant to wait and take her home. Before the jury, she said that there was no such agreement. She was surprised to see him waiting on her. She also said at the trial that she did not know the appellant's girl-friend but at the preliminary she spoke to the contrary. Indeed, she had insisted at the trial, that she could never have said anything of the sort; but had to agree when her evidence at a previous trial was shown to her, that she had said just that. She also swore to the jury that what she had previously stated at the preliminary examination was untrue, while her testimony before them was the truth. We would have thought that these discrepancies seriously affected her credit.

The appellant gave sworn evidence and called witnesses. He testified that he was well acquainted with the alleged victim and had been intimate with her on a number of occasions previously. On the day in question, she had invited him to assist her by taking her to the hostel. It was agreed that he would wait for her and return home. She did return in a matter of some ten to fifteen minutes with books. He set off and in the course of the journey, she asked where he was going. He told her he was taking her home but she requested that he treat her to ice cream. He went to Road Runner in New Kingston which, unfortunately was closed. There he met a couple whom he knew. Both couples drove to Creamy Corner, Savannah Mall where they had ice cream.

The victim gave conflicting stories about the couple, denying before the jury that they had met any such persons, but resiling from that position when confronted by her deposition. From there, he drove along Constant Spring Road. She suggested that since it was early, they should "cool out" some where. He drove downtown to the U.D.C. car park on the top floor. They went

sight seeing and afterwards were intimate. He took her home but she asked to be let out in Vineyard Town so she could visit a friend. He set the time of their return at between 9:35 - 9:50 p.m.

Essentially, his defence was that he honestly believed that she had consented to sexual intercourse. His witness Wayne Chang confirmed that both couples met near Road Runner and afterwards went to Savannah Mall.

Since D.P.P. v. Morgan [1975] 2 All E.R. 347 it has been laid down that the crime of rape consists in having sexual intercourse with a woman with intent to do so without her consent or with indifference as to whether or not she consented. If an accused believed that the woman had consented, whether or not that belief was based on reasonable grounds, he could not be found guilty of rape. The question for the jury in these circumstances was whether the accused held an honest belief in the victim's consent. A jury might be led to believe that once they have found that the victim did not consent, a verdict of guilty is inevitable. But it is the man's subjective intention which is material. As was pointed out in R. v. Linval McLeod & Anor. S.C.C.A. 8 & 11/86 (Unreported) delivered 27th April, 1987:

> "...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."

If the jury are to be assisted where the defence of honest belief is raised, the trial judge must, in dealing with that defence, tell the jury that if the evidence given by the accused leads them to the conclusion that the accused held an honest belief that the woman was consenting, although from her point of view, she was objecting, they are in duty bound to acquit. He should go on to say that if the prosecution story leaves them in doubt whether he had such a belief the case has not been proved and they must acquit. If however, they are satisfied so they feel sure that the accused had intercourse with the woman with intent to do so without

her consent or with indifference whether or not she consented, then they are entitled to return a verdict of guilty.

In the instant case, the learned judge gave some directions on the mens rea of the crime at page 3. He said this:

> "The prosecution must prove that the accused person intended to have sexual intercourse with Miss McIntosh, well knowing that she was not consenting."

At page 8, he said this:-

> "That is the real issue, Mr. Foreman and your members, consent. Now consent, Mr. Foreman and your members, in the context of rape, you have to give it its ordinary meaning. But you must remember, or I should tell you, I should say, that force or fear or even fraud would nullify or vitiate consent. You, Mr. Foreman and your members, must bear in mind that there is a difference between consent and submission. If a person, through fear of injury to herself or being exhausted after a long resistance, should yield, then that wouldn't be true and free consent. So in this case if you accept the evidence, if you feel sure that Miss McIntosh was protesting as she said, that she said she is not here for that, she said, "take me home," that she resisted, that the accused hit her head against the wall, as she said, that the accused pulled a knife, pushed her down in the back seat of the car and forced her to put on this condom and then had sexual intercourse with her, if you accept that, then it would be open to you to find that Miss McIntosh was not consenting and that the accused well knew. But it's a matter for you as to what you accept."

These latter directions were concerned not with the mens rea of rape but the actus reus i.e. the force or fear to which reference is often made in the traditional directions on rape. Here, of course, the learned trial judge was dealing with the Crown's case, and no fault can be found in this regard. When he came to deal with the defence, his directions are as follows at pages 8 - 9:

> "Remember that what the accused is saying is that, 'we were friends before. On three or four other previous occasions we had intercourse and on

> "this occasion I took her about, treating her to ice cream and then we went to the car park and even there I was feeding her with ice cream and that she consented to intercourse.' That is the accused's side. So you have two diametrically opposed versions as to consent or no consent and as I said before that is the crucial evidence."

At the end of his summation in defining the issue, he said this at page 45:

> "The real issue is really consent. There is - you should not have any difficulty finding that, although you are judges of fact, that there was sexual intercourse and so it is whether or not Miss McIntosh was consenting and that the accused had sex well knowing that she was not consenting. That is what you look at carefully."

Nowhere in the extracts quoted, did the learned judge bring home to the jury that if the appellant honestly believed that she was consenting, they were bound to acquit. He focussed throughout on the reality of consent. Did she or did she not consent? But with respect, that is not to put the defence accurately or at all to the jury. The material subjective element referred to in R. v. McLeod & Anor. (supra) has not been expressed in clear and unequivocal terms. We think therefore that there is merit in the first ground of appeal.

With respect to the second ground of appeal, we are of opinion that the victim's credit was seriously eroded by the discrepancies in her evidence which we have earlier isolated. They could not be regarded as peripheral matters and in no case did she proffer any explanation. There is one other example where we think her credit was damaged, which we omitted. In the course of her testimony before the jury, she suggested that she had not met Wayne Chang but was constrained to retract when a previous statement was put to her.

We would point out too that her version of events does not tally with the time period she gave. Nothing she related,

would have occupied a period beginning at 6:00 p.m. and ending at 11:00 p.m. or thereabouts. The appellant's time span was more in keeping with the events he testified to. The places he visited and the distances he travelled are more consistent with his time period. Finally, it is difficult to understand how the appellant could have left her in the rear of the car while he procured a condom from the front. The victim was a witness whose credit had been seriously eroded, if not destroyed and had admitted to perjury. In these circumstances, the verdict returned must be unreasonable. The appellant is entitled to succeed on this ground as well.

It was for these reasons that we concluded this appeal in the manner stated at the outset.