JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 133 of 1991

BEFORE: THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.
THE HON. MR. JUSTICE GORDON, J.A.

REGINA vs. TREVOR DAVIS

Enoch Blake for the appellant

Miss Caroline Reid for the Crown

September 28, 1992 and January 25, 1993

WRIGHT, J.A.:

Hereunder are the reasons for our decision on September 28, 1992, to allow the appeal, quash the conviction for rape, set aside the sentence and enter a verdict of acquittal. The appellant had been convicted and sentenced after trial in the St. Catherine Circuit Court on July 19, 1991, before Reckord, J. and a jury. He sought to impeach his conviction and sentence on the under-mentioned grounds of appeal:

"1. The verdict was unreasonable and unwarranted and cannot be supported having regard to the evidence in that consent was never negatived on the Crown's case and in particular:

(a) Complainant's behaviour i.e., going off on a 'joy ride', stopping for drinks at Clubs, drinking and smoking in a laid-back fashion and visiting the Linstead Police Station but at no time protesting, attempting to escape or reporting rape;

(b) Independent evidence of Corporal Clacken and Corporal Gift Drummond demonstrated that the

"Complainant was under no pressure as would vitiate consent.

2. The Learned Trial Judge erred in law in that he (a) found that there was a case to go to the Jury and as such, overruled the submission of no case and (b) failed to adequately and properly direct the Jury on the Defence of Consent."

The issue raised by the ground of appeal was so incontestable that counsel for the Crown, quite commendably, readily conceded the validity of the complaint. For present purposes, therefore, it is not necessary to set out the facts in extenso. The indictment containing four counts of rape derived from what appears to have been a flirtatious interlude over the period April 22-24, 1990. Earlier in the said month, the complainant chanced upon the appellant and one Paulette McCatty at some place in Greenwich Town. McCatty made the introductions and advised the complainant that she and the appellant were due to be married in about two weeks time. In response to McCatty's request, the complainant supplied her address (where she lived with her mother) and after a long discussion they parted with a promise to meet again. After further contact the couple arrived at the complainant's home about 9:10 p.m. on April 22 and invited her out for a drink nearby but they eventually ended up in Ocho Rios where they arrived at about midnight. The complainant testified that she was dressed only in a yellow jumper suit and that she had yielded to the persuasion to go to Ocho Rios after she had been assured she would be taken back home in time for work next morning. On the way to Ocho Rios they had drinks. In Ocho Rios they ate at a restaurant and then repaired to a hotel where two rooms were booked on separate floors. They all assembled in one room and then the appellant asked if she was ready to go to her room to which he then accompanied her. Once there he told her to undress and go to bed with him. The sudden turn of events seemed to have taken her by surprise so she played for time and

expressed the wish to have a shower. She turned on the shower but did not have a bath and when she emerged from the bathroom she was scantily clad in her panty with a towel thrown over her. The appellant had in the meantime left the room but she claims that he returned with a kitchen knife which he placed on the bedside table and ordered her to bed. She insisted that she was a non-consenting party to the three acts of sexual intercourse which she recounted as having taken place during the course of the night as the appellant alternated between her room and McCatty's whom the appellant called "Mummy". McCatty in turn called him "Daddy". But even after the first act about which she complained she called room-service asking only that she be awakened early the next morning. It is relevant to note that she made no complaint though she had the opportunity to do so.

After the third act of sexual intercourse she went to McCatty's room where McCatty, who appeared to have engineered the escapade, enquired of her "if everybody was okay", and the appellant replied informing McCatty of the enjoyable time he had had. Thereafter she accepted McCatty's invitation to join them as they cuddled in bed.

Next morning they left on the return journey home and when they reached Linstead the appellant sent McCatty to the Victoria Mutual Society to draw the amount of $40,000. The amount was paid by Manager's Cheque which he encashed at another bank. They were on the road all of that Monday during which time they imbibed several bottles of Heineken beer. It was not until sometime Monday night that they arrived at his residence in Linstead and there the three of them joined in multiple sexual intercourse. During their stay in Linstead they went to the Motor Vehicle Examination Depot as well as the Tax Office. They also visited one Tootsie's Bar after which the appellant announced that he had been robbed of his $40,000. This became the subject-matter of reports at the Linstead and Spanish Town

Police Stations but at none of the places where she had the opportunity to report her alleged ordeal did she make any such report. Previously they had gone to the Ocho Rios Police Station but she made no report there either. She even admitted that at times she was alone in the car but made no effort to leave.

Her cross-examination was embarrassing. She admitted that she never gave even a hint to anyone that she was being terrorized. She admitted, too, that as they had their beers they smoked ganja. She also admitted that the appellant had given her money to telephone home. Instead she called her neighbour and assured her she was alright. She conceded, too, that the appellant had given her money which she used to buy panties and that the appellant washed her clothes while she put on clothes supplied by McCatty. She denied telling the Police at Linstead Police Station that the appellant was her boyfriend. However, Detective Corporal Clacken, who was called by the defence, testified that when the appellant attended at the Police Station to make the report of the robbery he was so drunk and unstable that he had to seek information from the complainant concerning the appellant's condition. She assured the officer that nothing was wrong with him and told him in addition that he was her boyfriend and that their relationship had begun just days earlier. She made no report of rape there.

It was not until midnight on Tuesday April 24 that the complainant returned home to see an angry crowd which set upon the appellant and McCatty and beat them until Police intervened and rescued them. During her daughter's absence her mother, in panic, had made enquiry at the radio stations, the hospital, Police Station and the Gleaner Company. In fact, the complainant was reported missing in the Star. Hence the public reception on her return.

After the trial judge had overruled a submission of no case to answer, the appellant gave sworn testimony, a rare occurrence, in which he related the sordid details of the escapade to which he maintained the complainant was a fully consenting

party but that the matter went sour when he was not able to provide the agreed sum because of the loss of his money. In addition to Detective Corporal Clacken, already mentioned, he called Detective Corporal Drummond of the Rape Unit who had interviewed the complainant and taken her statement of some eighteen to nineteen pages and it was her testimony that she did not prefer charges against the appellant because of the contents of that statement. Indeed, she said that the complainant told her she had expected to get $20,000 to purchase a television and set up herself in business but her expectations had not materialized. In the midst of that, however, the witness said that the complainant "never told her that she had consented to him having sex with her. She told me she never consented to him having sex with her."

Corporal Pauline Johnson of the Hunts Bay Police Station who had to do with the complainant and the appellant when they were taken to the Station testified that she made no report of rape against the appellant despite the insistence of her mother. "She just kept down her head and was crying", the officer said. It was only the mother who used the word rape. But lest it be thought that this was a girl under her mother's care it needs to be stated that the complainant is a married woman who at the time was estranged from her husband. That, in brief, was the evidence before the Court.

This is a remarkable case in that it cannot be often that the prosecution presents a case of this nature, so pregnant with the element of consent even if the complainant denies that she consented. The maxim "action speaks louder than words" was amply demonstrated here. It is abundantly clear that the no-case submission was justified and ought to have been upheld because the case carried the seeds of its own destruction. It is just possible that the hostile atmosphere of the trial, apparent from the record, tipped the scales against counsel though this should

not have been allowed to happen. This Court upholds counsel's right to be firm and vigorous in the defence of his client provided he conducts himself with due respect for the Court even if he feels nettled by the overruling of his no-case submission. Rudeness on his part is inexcusable and remarks recorded as falling from the lips of defence counsel are deplorable and cannot be condoned. But in the final analysis, it is the judge's responsibility to hold the reins of control to ensure a fair trial in an atmosphere consonant with the dignity of the Court.

Having regard to the nature of the evidence, once the trial judge ruled that the case should go to the jury it was incumbent upon him to give the most careful and meticulous directions to the jury to ensure that they were not swayed by the Court-room atmosphere nor by any perception that the complainant had not had a fair deal. First and foremost, he is required to state the law correctly otherwise the jury would be misdirected in coming to their verdict. His definition of rape, appearing at page 8 of the summing-up, is as follows:

> "I am going to tell you what the law says about rape. The offence of rape is committed when a male person has sexual intercourse with a female person without her consent whether by force, by fear or fraud. So the ingredients of the offence are firstly, sexual intercourse. These two people are big, responsible men and women. They had sexual intercourse, both of them, so you don't have any problem with that. But I will just tell you that this act of sexual intercourse, all it means is that you have to be satisfied that the male penis penetrated the sexual organ of the complainant.
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> The second thing that must be proved, that the complainant consented - sorry, I made a mistake. It must be proved that the complainant did not give her consent. The Crown must prove this and I wish to repeat it because we had a little error there: The Crown must prove that the complainant did not consent to the accused man having sexual intercourse with her; not only that he never - that it was without her consent, but also it could have been by means of force, because at one time she was telling you that he was threatening her - he put

> "down a knife there - or through fear, because she feared that if she had done anything he would have used the knife on her, or through fraud. There is no question of fraud in this case, so we won't go into that. So if the complainant yields to sex through fear of death, this is not consent; either fear of death or fear of any serious bodily injury, then that wouldn't be consent."

The defect in defining the law applicable is obvious as the trial judge omitted to include:

> "or with indifference as to whether she consents or not." (See R. v. Morgan [1976] A.C. 182) "and with the intention to have sexual intercourse whether she consented or not."

And he never took the opportunity thereafter to correct that error. Accordingly, this vital aspect of the law, particularly in a case with such tarnished evidence, was absent from the jury's deliberation. It was inevitable that a miscarriage of justice would result.

From such evidence as we have related it is self-evident and needs no persuasion of argument that the verdict is unreasonable and cannot be supported having regard to the evidence. It seems rather that the jury vented its revulsion at the conduct of the parties upon the appellant - a danger against which a proper summing-up would ensure - and further being ill-equipped because of the defective definition of the law they seemed to have been at the mercy of the court-room tension and their emotions. A conviction was certainly unwarranted. Hence the decision of the Court to which reference was made earlier.