JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 108/99

BEFORE: **THE HON MR. JUSTICE DOWNER, J.A.**
THE HON MR. JUSTICE BINGHAM, J.A.
THE HON MR. JUSTICE HARRISON, J.A.

REGINA V ANDREW FULLER

Delano Harrison Q.C., for Appellant

Miss Paula Tyndale for Crown

July 4 and 5, 2000 and December 20, 2001

HARRISON, J.A:

The appellant was convicted in the High Court Division of the Gun Court on the 21st day of May 1999, of the offences illegal possession of firearm – count one, and rape – counts two to five, and sentenced to five (5) years imprisonment on each count. The sentence on count one was ordered to run consecutively to counts two to five. We treated this application for leave as the hearing of the appeal.

The facts are that on the 19th day of May 1995, at about 2:30 p.m. the complainant was talking with a girl named Squits on the road at Waterhouse in the parish of St. Andrew, when on walking away five men blocked her path, and

held her hands. She resisted and cried out. She was pulled into certain premises, and into a room of a house where three of the men had sexual intercourse with her without her consent. The appellant then entered the room and told the other men to leave the girl alone or else he would shoot one of them. The appellant then had a firearm stuck in his waist. One of the men said "Father whey you a do?" The appellant chastisingly asked, "Don't you have sisters too?" The appellant took the complainant out of the house. Squits was outside and the complainant told Squits that she had been raped. Squits asked the appellant to take the complainant to the bus stop. He said that he would. While walking with the appellant, the complainant enquired where she was being taken. The appellant retorted that she should "shut up and come." The appellant continued walking with the complainant and she was pushed up to a fence and told to climb over. She at first refused to, and he told her, "If you don't go over the fence look wha gwine happen to you today." While climbing over the fence, the complainant told the applicant that "the wire is cutting my foot," to which he replied "you lucky." She was taken into a yard into a house, where the appellant ordered a man out of the house, pushed the complainant into a room, locked the door and put the key into his pocket. The complainant said to the appellant, "After you help me, how come you want to rape me after that." The appellant replied that he "would not call this rape." The complainant expressed a desire to go home. The appellant told her that she was not going home, pushed her down onto a bed in the room, took the firearm from his waist,

placed it on the dresser and told her to take off her clothes. She refused and the appellant took up the firearm and again ordered her to take off her clothes. She refused. He then took off her clothes. She again asked him "How could you want to rape me and you helped me." He told her that she chatted too much, "shut yuh mouth or you wi see." He pushed her down onto the bed and had sexual intercourse with her without her consent. After he had finished she again insisted that she wanted to go home. He told her that she was not going home but was staying with him for the night. The appellant further told her "you nuh fi walk with people who can't help you when you in a trouble." The complainant started to cry. It was then after 3:00 p.m. The appellant had sexual intercourse with the complainant three more times that night. The firearm was at those times under the pillow. She was able to see his face. The following morning the appellant opened the door. The complainant who had put on her clothes, ran through the door to a bus stop and took a bus home. At home the complainant sent a message to her mother who came home at about 8:00 a.m. Asked, she told her mother that she had been raped. The complainant and her mother went to the Olympic Gardens Police Station and made a report and she was taken to the Rape Unit. The following day she was examined by a doctor. The complainant's mother testified that the complainant reported to her that she had been raped. A Detective Constable received a report from the complainant and her mother on 20th April 1995, and as a consequence spoke to the girl named Squits. As a result he obtained warrants for the arrest of the appellant. On

February 6, 1995, the appellant was taken to the Olympic Gardens Police Station by police officers. Detective Daley told the appellant of her investigations, showed and read the warrant to him and arrested him for the offence of carnal abuse, abduction and illegal possession of firearm. He cautioned the appellant who said "Officer say mi rape her, but mi nuh use nuh gun."

The appellant gave evidence in his defence. He said that at about 1:00 p.m. on the day of the alleged offence, he was told something and he went from Christian Lane to a yard on Balcombe Drive at about 1:00 p.m. He shouted and said "Trapper Jack ah come." He heard running and things falling. He did not see the person running. He went to the door of a house and saw "this black girl coming out." He invited her to "go round to where Chris is." She went to one Richie's house, bathed and ate. At about 5:00 p.m. the complainant, Richie and himself, went to the bus stop. There the complainant leaned against him, a gesture which he interpreted as a loving one indicating a willingness to indulge in an intimate relationship. They left the bus stop and he and the complainant went to his home where they watched television, she slept for the night and they had sexual intercourse. The next morning he cooked breakfast and she ate. He gave her his telephone number and his name and she left. He denied the allegations in the prosecution's case, asserted that he had no gun and that he had sexual intercourse with the complainant once and with her consent.

Mr. Harrison for the appellant argued as his ground of appeal:

> "Despite the applicant's defence - consent – to the charge of rape, the learned trial judge insuperably

> failed to direct himself on the issue of the applicant's honest belief in the complainant's consent."

In advancing his argument, counsel submitted that the applicant, having raised the issue of consent to the act of sexual intercourse on a charge of rape, had a right to have the mental element of his honest belief that the complainant was consenting considered by the tribunal of fact on the facts of the case. The failure of the learned trial judge to do so amounted to a non-direction which was fatal to the conviction.

Miss Tyndale for the Crown submitted that if in the circumstances of the case the conduct of the complainant could give rise to the belief that she was consenting, then the issue of honest belief could arise. In the circumstances of the instant case, where the prosecution's case was alleging four acts of unlawful sexual intercourse, and, the use of force by the means of a firearm, there was no conduct on the part of the complainant which could lead the applicant to believe that she was consenting. He could not have had an honest belief and therefore there was no basis to say that the learned trial judge omitted to direct himself.

The question of consent by the complainant to the act of sexual intercourse is an essential element in the consideration of the offence of rape. The definition of rape is, having sexual intercourse with the complainant without her consent or with indifference whether or not she consented. The mens rea of the accused is ever present in the consideration of this crime: (***Director of Public Prosecutions v Morgan*** [1975] 2 All ER 347). The latter case firmly established that the mental element is an essential ingredient which the

prosecution must prove, as existing in an accused before he can be convicted for the offence of rape.

The latter principle was adopted by this court and followed in the case of ***R v Kenneth Robinson*** SCCA No 109/72 delivered on 22nd January 1982, (unreported). Kerr, J.A. relying on ***Director of Public Prosecutions v Morgan*** (supra), on p. 6, 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 with indifference as to whether or not she consented ."

Whenever the issue in the case is whether or not the complainant consented, the learned trial judge must direct the tribunal of fact that the prosecution must consider the mens rea of the accused, that is, his intention to have sexual intercourse with the complainant without her consent or with indifference, namely, not caring, whether or not she consented.

In ***R v Kenneth Robinson*** (supra) the learned trial judge failed to direct the jury to consider specifically the mens rea of the appellant, and therefore the Court held that, in that respect, the summing-up was flawed.

Where an accused raises a defence that he honestly believed that when he had sexual intercourse with a complainant she was consenting, a direction to the jury is dependent on the facts of the particular case. That defence attracts an examination of the state of mind of the accused. It requires a subjective test.

Consequently, where the accused entertains the honest belief that the complainant was consenting to sexual intercourse, but he is mistaken in that belief he is entitled to be acquitted, even though that belief was not based on reasonable grounds. That was the view of the majority in ***Director of Public Prosecutions v Morgan*** (supra), and embraced by this Court in ***R v Kenneth Robinson*** (supra) and later cases. However, the tribunal of fact is obliged to consider whether or not from the evidence, the accused then in fact formed that belief that she was consenting. In addressing that latter point, Kerr, J.A. in ***R v Kenneth Robinson*** (supra) at p. 9, said:

> "Rarely if ever, will the proposition of law as stated by the majority in ***Director of Public Prosecutions v Morgan*** pose a problem. On the assumption that jurors are reasonable, intelligent and practical, they will no doubt consider, as they are entitled to do, the absence of reasonable grounds as an important factor in determining whether an accused in fact had a bona fide belief that the woman was consenting."

The directions of a trial judge to a tribunal of fact must be peculiarly suited to the specific facts of the case under consideration. Therefore, there may be cases in which, although honest but mistaken belief is raised by the defence, a direction by the trial judge on that said issue is inappropriate. Again, the ***Robinson*** case is instructive. The facts on the prosecution's case are that at 5:00 p.m. the appellant was conveying the complainant, a schoolgirl, 17 years old, in his motor car, with other passengers who later left the car. On reaching Negril, Westmoreland, the appellant drove into a lane and stopped. The complainant attempted to leave the car. He held her by the neck, ordered her to

remain and drove her to a deserted beach. It was then nightfall. He ordered her to undress. She refused and again attempted to leave, and he began to strangle her. She struggled. He jumped on her back, punched her and threatened to throw her into the sea. Afraid and tired, and to avoid further assault she reluctantly returned to the car. The appellant stripped her naked and had sexual intercourse with her. Attempting to scream, he choked her. She was a virgin. After he had finished, and on his insistence, they headed for the beach. She then ran away, and hid in the bushes and eventually wandered naked, cold and shivering to the premises of a lady to whom she made a report. The appellant meanwhile had searched unsuccessfully for her, after which he drove away with her clothing, books and money. The medical examination showed, that there was swelling and bruising to the vagina and she had multiple scratches and swelling all over her body. The appellant in his defence, gave evidence of a prior association, an arrangement one week before to go to the beach and caressing and consensual sexual intercourse on the beach. He admitted that he hit her but that was because she made an unkind remark about his wife. They then agreed to go for a swim, she turned back and did not return. He searched for her and not having found her, he drove away. He denied that he was a stranger to her.

The prosecution's case was therefore in sharp contrast to that of the defence. It was argued, on appeal, that the learned trial judge wrongly omitted to tell the jury that if the appellant had an honest belief that the complainant

was consenting he was entitled to be acquitted even if that belief is not based on reasonable grounds. This Court agreed, that that was a correct statement of the law based on **Director of Public Prosecutions v Morgan** (supra). (See also ***R v Cogan*** [1975] 2 All E R at page 1059). But in relation to the defence of honest but mistaken belief, Kerr, J. A., at p. 11 said:

> "The jury faced as they were with the two versions, obviously and with every justification rejected the story of the appellant and in particular his claim to any antecedent relationship and accepted the case for the prosecution.
>
> It is therefore difficult to see how a question of honest but mistaken belief that she was consenting could arise as a separate and distinct issue requiring specific directions.
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> As Winneke, C.J. observed in ***R v Flannery and Prendergast v R*** (1969) V. R. at p. 34:
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> > 'There will, of course, be cases where the evidence does not raise an issue of a genuine but mistaken belief as to the consent of the woman and, therefore, in which no direction in respect of such a question is called for ...' "

The fact therefore that an accused man raises the defence of honest but mistaken belief does not as an inevitable consequence oblige a trial judge, in every instance to give a direction on that issue. The particular circumstances of the case will so determine. This Court has consistently maintained that approach.

In ***R v Linval McLeod et al*** (1987) 24 JLR 160, in allowing an appeal where it was argued, inter alia, that the trial judge had, by omission misdirected the jury as to the mens rea on a charge of rape, Rowe, P., at p. 163 said:

> "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."

In ***R v Fitzroy Brown*** (1992) 29 JLR 142, the appeal was allowed and the conviction quashed. The defence was one of honest but mistaken belief. Although the complainant denied that she consented, her evidence contained serious discrepancies giving rise to questions on her credibility. The learned trial judge failed to give any directions on the honest belief of the appellant. Having adverted to various areas of the evidence, Carey, J A at p. 145, said:

> "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 focused 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 and Anor*** (supra) has not been expressed in clear and unequivocal terms."

Judges should not therefore in a trial for the offence of rape, in an act of benevolence or "fairness to the accused" or as a matter of course, whenever the accused raises the honest but mistaken belief defence, give such a direction. It may merely cause confusion in the minds of the jury and serve to mislead them.

In ***R v Clement Jones*** SCCA 5/97 delivered 27th April 1998, where the complainant was raped repeatedly by the appellant by the use of a knife and received injuries, but the appellant projected a picture of previous intimate association and consensual sexual intercourse on the relevant night, the trial judge gave a direction on honest but mistaken belief. This Court held, in dismissing the appeal that a direction on honest belief was not necessary. Bingham, J.A. at p. 6 said:

> "On these facts there was no room here for any suggestion that the appellant based on the complainant's conduct, may either have obtained mixed signals or got his signals all wrong and had indulged in sexual intercourse with the mistaken belief that she was consenting when in fact she was not."

In a recent case in England, ***R v Adkins*** [2000] 2 All ER 185, the appellant who was convicted on a charge of rape, contended that it had been consensual sexual intercourse. It was argued that whenever the defence of consent arose, implicit in that defence was one of honest belief that the complainant was consenting. In dismissing the appeal, the Court of Appeal held that on the facts, there was no room for honest but mistaken belief and therefore the judge was under no obligation to give any direction on honest but mistaken belief. The headnote reads:

> "**Held** - It was not necessary to give a direction as to honest belief in every case of rape where consent was in issue. Rather, such a direction was required only when, on the evidence in the case, there was room for the possibility of a genuine mistaken belief that the victim had consented. That conclusion accorded

> with the basic principle that the jury should not be subjected to unnecessary and irrelevant directions."

In the instant case, the evidence discloses that on the prosecution's case, the appellant came into the room with a gun in his waist and ordered out six men who were about to continue the offence of rape against the complainant. He was therefore well aware of the complainant's prior ordeal. Contrary to his promise to the complainant's friend to take the complainant to the bus stop, the appellant pushed her over a fence, threatened her with harm and pushed her into a house. When asked by the complainant how come he wanted to rape her after he helped her, he responded that he would not call it rape and pushed her onto the bed. He ordered her at gunpoint to take off her clothes, and on her refusal, he took them off. Despite her protests, requests to be allowed to go home and, crying, he thereafter proceeded to have forcible sexual intercourse with her four times without her consent. The following morning after the appellant opened the door, the complainant ran from the room, took a bus home and made a report to her mother and to the police.

On the above account there was nothing, on the prosecution's case, to raise even a possibility that the appellant could have entertained a belief that the complainant was consenting to the act of sexual intercourse. The absence of any such belief is further fortified by the words of the appellant himself in response to the police officer when he was told of the report received, that he is alleged to have raped the complainant; namely, "Me rape her but me never have any gun." That statement on the prosecution's case was a clear admission

of guilt, devoid of any substance or flavour of lack of consent or any intimation or suggestion of honest belief that the complainant was consenting.

His defence was that of consent simpliciter, by a compliant willing partner engaged in an intimate relationship.

The learned trial judge was faced with two diverse accounts, clearly in conflict with each other. The appellant was not putting forward any picture of misconstruing the actions of the complainant to cause him to hold a bona fide belief that she was consenting when she was not. Nor did any such conduct on the part of the complainant arise on any aspect of the prosecution's case, that could cause him to hold that belief.

In the circumstances of the case the learned trial judge had the obligation to direct his mind to the question of the mental element involved in the offence of rape, as it related to the appellant and the issue of consent simpliciter. Once the trial judge was convinced that there was evidence on the prosecution's case that the complainant was saying that there was no consent, there would be no reason to embark on an excursion into the realm of honest belief. Any direction on bona fide honest belief would have been inappropriate and unnecessary, and would probably cause confusion in the jurors' minds.

In the instant case there was no basis for any such direction on honest belief. That ground of appeal therefore fails.

Mr. Harrison further intimated that the learned trial judge's comment of the improbability of a fifteen year old girl child having sexual intercourse with a

man after "... three instances of sexual intercourse" was speculative and an improper basis for rejecting the defence and therefore the verdict was unreasonable. The learned trial judge was merely commenting on the state of the evidence, as a tribunal of fact, as he was entitled to do. It was not his sole basis for rejecting the defence. There is no merit in such a complaint.

Consequently, the appeal is dismissed and the conviction and sentence are affirmed. Sentence shall commence as from 21st August 1999.