

GRENADA

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO. 1 OF 1991

BETWEEN ALBAN GILBERT - APPELLANT

 AND

 THE QUEEN - RESPONDENT

Before: The Honourable Mr. Justice Floissac - Chief Justice
 The Honourable Mr. Justice Byron, J.A.
 The Honourable Mr. Justice Singh, J.A. (Ag)

Appearances: Mr. Anselm Clouden for the Appellant
 Ms. Velma Hylton, D.P.P, for the Respondent

12TH & 14TH FEBRUARY, 1992

JUDGMENT

SATROHAN SINGH, J.A (Ag.)

On October 31st, 1990, the appellant herein was convicted on a three count indictment for rape and sentenced to imprisonment for ten years on each count to run concurrently. This appeal arises from that conviction.

The case presented by the Prosecution was that on Monday April 24, 1989, the victim left her home around 8.35 p.m walking alone in the direction of Archibald Avenue on her way to visit a friend, when the accused accosted her, grabbed her, pulled her on to one Bonaparte's property, dragged her into some tall grass, threw her down on the ground, squeezed her neck with both hands, undressed her and had sexual intercourse with her firstly with her lying on her back, then in a sitting position with her sitting on top of him, then in an attempted standing position which was uncomfortable for him and which position he converted into one where he had sexual intercourse with her from behind whilst she was again lying

down. The victim's evidence was that she did not agree to have sexual intercourse with the appellant, that she was petrified, she feared for her life, she had started blacking out when he pressed her throat and that she screamed for help but none came.

The appellant in his sworn testimony before the jury, admitted having sexual intercourse with the virtual complainant but only on two occasions, once whilst lying down and the other whilst standing up. He said that he saw her by the roundabout on Archibald Avenue, told her he would like to have sexual relations with her and she said, "Sure, where would we go" and they went across to where Mr. Bonaparte lives to the back of the garage. They kissed each other and she said, "O.K, I'm going to give it to you". He said he understood those words "in terms of sexual relations". They each then undressed and he had "sexual relations" with her. This evidence of the appellant is to a large extent supported by a caution statement he gave to the police on April 29, 1989, when he was detained by them for questioning.

Counsel for the appellant Mr. Anselm Clouden argued four grounds of appeal, three against conviction and one against sentence.

The first ground of appeal argued by Mr. Clouden questions the admission into evidence by the trial judge of the caution statement given by the appellant to the police on April 29, 1989 and he words it this way:-

"The learned trial judge failed to exercise his discretion to exclude the evidence (statement of the accused), that evidence having been obtained improperly by virtue of inducement or expectation of hope of advantage".

In that statement the appellant admits sexual relations with the victim but says it was done with her consent. The statement is confessional as to sexual intercourse with the victim but exculpatory with respect to the offence of rape or of any criminal act on the part of the appellant.

At the trial after the taking of the statement Det. Cpl. [redacted] testified that neither himself nor anyone else present used any threat, inducement, or force to get the accused to make it.

statement, and after the then counsel for the appellant advised the Court that he had no objection to its admissibility, the learned trial judge then admitted the statement as having been given freely and voluntarily.

However, when Detective Corporal James was being cross-examined, he admitted that he told the appellant sometime before the statement was taken, "Gilbert I am your friend, you know that I am the only one who could talk to you."

The record shows that after that evidence was given, the learned judge reconsidered the question of the admissibility of the appellant's caution statement and retained it in evidence as being freely and voluntarily given. The judge obviously had in his mind when he did this, the learning as appears in R v Sang (1980) AC 402 in the House of Lords when Lord Diplock answering a question put to the House by the Court of Appeal opined thus:

"(1) A trial judge in a criminal trial has always discretion to refuse to admit evidence if in his opinion its prejudicial effect outweighs its probative value. (2) Save with regard to admissions and confessions and generally with regard to evidence obtained from the accused after the commission of the offence, he has no discretion to refuse to admit relevant admissible evidence on the ground that it was obtained by improper or unfair means. The court is not concerned with how it was obtained. It is no ground for the exercise of discretion to exclude that the evidence was obtained as the result of the activities of an agent provocateur."

Counsel for the appellant argued that the trial judge should have done a Voir Dire on the admissibility of the statement and then should have exercised his discretion to exclude it from the consideration of the jury.

We do not agree. A Voir Dire is necessary when the voluntariness of a statement given by the accused to the police is challenged or when the voluntariness is evidentially apparent. In the instant matter, the appellant, not only did not challenge the voluntariness of the statement, but specifically offered no objection to its admissibility and the judge was right to conclude that the particular words used by the Corporal was not of a nature that was capable of imputing the free and voluntary nature of the statement.

Indeed, when one sees that the statement supports the defence raised by the appellant in his evidence at the trial and which was accepted by the jury could have assisted in his acquittal, it boggles the mind to understand why counsel for the appellant would seek to have it excluded. This ground fails.

Counsel for the appellant then argues as his second ground of appeal that:

The learned trial judge misdirected the jury in that he failed to direct them as to whether in rape the defendant can properly be convicted notwithstanding that he in fact believed that the woman consented, if such belief was not based on reasonable ground".

In DPP v Morgan (1975) 2 All E.R 347 the House of Lords in dealing with the question of consent in a matter of rape gave this ruling:-

The crime of rape consisted 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. It could not be committed if that essential mens rea were absent. Accordingly, if an accused in fact believed that the woman had consented, whether or not that belief was based on reasonable grounds, he could not be found guilty of rape".

Mr. Clouden argues that the judge did not direct the jury on the subjective test of honest belief.

The appellant's evidence in Court and his statement to the police show that he had specific consent from the victim to have sexual relation with her. Additionally, the evidence of the victim shows that she said or did certain things which counsel for the appellant contends were more consistent than not with consent and which could have led the appellant to the belief that she was consenting.

The main issue at the trial of this matter was consent. The learned trial judge in his summation to the jury directed them that it was the crucial issue. He then gave the jury the correct statutory definition of rape and therein told them of the element of non consent. He then went on to talk to them specifically on the issue of consent and in those directions spoke to them on the

question of honest belief. I would here insert what the judge told the jury:-

Let me tell you something about consent. It must be proved that the Accused had sexual intercourse with the complainant without her consent. The test is not - was the act against her will - but, was it without her consent. This emphasizes that it is not necessary for the Prosecution to prove a positive dissent of the woman. It is enough that she did not assent.

Consent, in this context, should be given its ordinary meaning. However, there is a vast difference between consent and submission and the two are not to be equated. There is a difference between real consent and mere submission. you need to apply your combined good sense, experience, and knowledge of human nature, to all the relevant facts of this case. The presence or absence of reasonable grounds for that belief is a matter to which you are to have regard in conjunction with any other relevant matter in considering whether the Accused so believed she gave consent."

Unlike D.P.P v Morgan (where the judge had in effect misdirected the jury that honest belief was objective or must necessarily be based on reasonable grounds), in the last sentence of the passage aforesaid, the learned judge directed the jury in language which must have conveyed to them that honest belief was subjective or was based on factors or evidence which included reasonable grounds for that belief.

In dealing with the evidence of the defence on the issue of consent, the trial judge went through the appellant's evidence and then gave this direction to the jury:-

"If that happened, this man has no right to be here. If you believe that this story is true or that it might be true, I direct you to send him home."

He then referred to certain arguments of the then counsel for the appellant and again directed the jury that if they found the position to be as counsel submitted on the question of consent to "send him home."

Looking at the summing up as a whole, we feel that the directions on the issue of consent and more specifically the subjective test of honest belief in the appellant, was brought squarely and firmly to the attention of the jury in explicit terms and in language that they would have understood. This ground also fails.

Counsel for the appellant then argued as his third ground of appeal that the judge's summing up was not fair and could not properly have assisted the jury to sift and weigh the evidence and that there was need to state the arguments on both sides.

In his summation to the jury, the learned trial judge dealt with the case for the Prosecution pointing out its merits and demerits. In his directions to the jury on the issue of corroboration he brought it home to the jury most forcibly that there was no evidence which would give the slightest semblance of corroboration of the victim's evidence on the issue of consent described by the trial judge as the crucial issue at the trial. He then presented the evidence of the defence to the jury and even referred to arguments made by counsel for the defence. When he came to do this he told the jury that the defence was the most important part of the trial.

Again, looking at the summing up as a whole, we feel that the trial judge dealt fairly and adequately with the sole issue of consent raised in the matter and that he properly assisted the jury on every aspect relevant to their deliberations. Accordingly, this ground also fails.

For all the above reasons, we can find no reason to interfere with the conviction of the appellant.

Counsel for the appellant's final ground was that the sentence was "hard and unconscionable".

The maximum penalty prescribed by law for this offence is imprisonment for fifteen years and also corporal punishment. The trial judge imposed a penalty of ten years. In doing so, he took into consideration that at the time of sentence the appellant already had one previous conviction for rape. However, it was brought to the attention of this court that subsequent to that penalty being imposed the appellant was retried and acquitted of that rape charge. In these circumstances, we feel obliged to treat him as a first offender and would vary or reduce the sentence to imprisonment for five years.

The appeal therefore stands dismissed with the conviction affirmed but the sentence varied to five years. We also feel that it was wrong in the circumstances of this matter to have indicted the appellant on three different counts of rape, on the premise that he had sexual intercourse with the victim on three occasions. We feel it was one continuous act of rape and accordingly we order that the convictions on the second and third count be merged with the conviction in the first count thereby resulting in one conviction only against the appellant.

(Sgd.) V.F. Floissac, Chief Justice

(Sgd.) C.M.D. Byron, J.A.

(Sgd.) Satrohan Singh, J.A. (Ag.)