

MONTSERRAT

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO. 2 of 1991

BETWEEN:

GERARD MEAD	- Appellant
and	
THE QUEEN	- Respondent

Before: The Honourable Mr. Justice Floissac - Chief Justice
The Honourable Mr. Justice Byron
The Honourable Miss Justice Joseph (Acting)

Appearances: K. Allen for the Appellant
Miss E. Henry for the Respondent

1991; Nov. 12, 13, 14.

JUDGMENT

FLOISSAC, C.J.

On the 9th July 1991, the appellant was convicted of rape on the person of Elizabeth Loebman (the complainant) contrary to section 117 of the Montserrat Penal Code No. 12 of 1983 and was sentenced to five years' imprisonment. He now appeals against his conviction and sentence.

This is not a typical case of alleged rape by a stranger or by an accused person who was never intimately connected with the complainant. This is a case where the appellant and the complainant had conabited for several months up to the fortnight before the 1st or 2nd April 1991 when the appellant is alleged to have raped the complainant. The complainant admitted in evidence that: "He was my boyfriend for about 2 years 10 months back and forth. Our relationship ended late March."

The evidence of the complainant is that she and Wendell Dorsette were on the beach at Foxes Bay from 4.30 p.m. on the 1st April 1991 to 12.30 a.m. of the following day. Dorsette then drove her to her home. While they were walking towards the gate of her house, the appellant suddenly appeared. An altercation and a struggle ensued between the appellant and Dorsette. The latter

/filed....

fled and left the appellant and the complainant engaged in a quarrel which resulted in violence. The complainant's version is that the appellant assaulted and beat her, dragged her into the bush and there raped her. According to the complainant "I had sex with the accused prior to that occasion. On those occasions he did not beat me before he had sexual intercourse with me".

At the trial, the appellant elected to make an unsworn statement from the dock where he admitted that he had sexual intercourse with the complainant at the place and time alleged by the complainant but did so with the complainant's consent. As a result of that admission, the sole issue at the trial was the complainant's consent or otherwise to the sexual intercourse.

Counsel for the appellant submitted in effect, and Counsel for the respondent conceded that the learned trial Judge misdirected the jury in the following respects (inter alia):-

1. The learned Judge failed to warn the jury that if there was no corroboration of the complainant's testimony that she did not consent to the sexual intercourse, it would be dangerous to convict the appellant on such uncorroborated testimony.

In this respect, attention is drawn to the case of Maxie Angus Anderson Ensor (1989) 89 Cr. App. R. 139. There, the Lord Chief Justice (delivering the judgment of the Court of Appeal) said at page 147, "There is no doubt that, as the law stands, the warning as to the need to look for corroboration and the danger of convicting without it must be given in relation to each of the two ingredients of the offence, where both are in dispute. There was here a failure to give such a direction, which in our view constituted a material misdirection"

2. The learned Judge told the jury that the medical evidence of Dr. Brenda Osborne that there was spermatozoa in the complainant's vagina was capable of amounting to the corroboration when in fact the medical evidence was only corroboration of the admitted sexual intercourse and was incapable of amounting to corroboration of the lack of consent.

On this point, reference was made to the decision of the Privy Council in Eric James V R (1970) 16 W.I.R. 272. There, Viscount Dilhorne (delivering the opinion of the Board) said at page 275:

/"True it.....

"True it is that the medical evidence and the evidence of what was found on Miss Hall's clothing and on the articles taken from her bed confirmed her testimony that intercourse with her had taken place on her bed but there was no medical evidence that intercourse had taken place without her consent; and the Judge directed the jury that if they accepted that evidence it could amount to corroboration in the sense in which he had already explained to them that the word was to be understood.

In their Lordships' view this direction was entirely wrong. Independent evidence that intercourse had taken place is not evidence confirming in some material particular either that the crime of rape had been committed or, if it had been, that it had been committed by the accused. It does not show that the intercourse took place without consent or that the accused was a party to it.

There was in this case no evidence capable of amounting to corroboration of Miss Hall's evidence that she had been raped, and raped by the accused. The Judge should have told the jury that. His failure to do so was a serious misdirection, so serious as to make it inevitable that the conviction should be quashed."

Notwithstanding these misdirections, Counsel for the respondent invited the Court to dismiss the appeal on the ground that no substantial miscarriage of justice had occurred as a result thereof. I could agree to this course of action only if I felt sure that the jury (properly directed) would inevitably or undoubtedly have returned the same verdict of guilty.

In any event, having regard to the evidence (including the facts emphasised in the judgment of Byron J.A.) and having regard to the summing up and all the other circumstances of the case, I have a reasonable or lurking doubt that justice may not have been done by the verdict and that the verdict is therefore unsafe and unsatisfactory.

I would therefore allow the appeal, quash the conviction and set aside the sentence.

V.F. FLOISSAC,
Chief Justice

BYRON, J.A.

In this case the summing up of the trial Judge contained grave misdirections some of which were explained by the learned Chief Justice, with whose conclusions I agree.

The crucial issue of this case, being whether the virtual complainant consented to the sexual intercourse with the appellant, depended on the way the jury resolved their conflicting accounts of what transpired.

It seemed that the real crux of the appellant's defence was that although he had stopped living with the complainant their relationship had not ended and he got angry when he saw her with another man and after chasing the man away assaulted her. He said that after the assault they talked in the bushes about their relationship and eventually they reconciled and made love to each other with her consent. There was some evidence capable of supporting his claims because the complainant admitted that he escorted her home after the incident occurred and on the way she asked him what to say about the condition of her face and he told her to say she fell off a bike and that on reaching home she did not report the matter to the police and expressed reluctance to have it reported by her flat mates. She admitted that even when the appellant was on bail pending trial she associated with him and went to the beach with him and his children and sisters.

One of the complaints of the appellant was that the Judge never isolated the evidence capable of supporting the defence and put it to the jury in that light.

There was justification for this criticism because the Judge only mentioned these points amid the evidence adduced by the prosecution. The effect of this was in my view, that he omitted to direct the attention of the jury in an adequate manner to the factual basis for the defence of consent.

I have mentioned this because in addition to an accumulation of other deficiencies in the summing-up, which need not be recounted, the misdirections on the crucial issue of corroboration, where the Judge compounded his failure to warn the jury that it was dangerous to convict on the evidence of the complainant because there was no corroboration by actually pointing out to the jury evidence incapable of amounting to corroboration as being corroborative and then

/failed to.....

failed to put the defence of consent squarely and fairly to the jury, I am satisfied that the Court should resist the respondent's application to apply the proviso.

I agree that the conviction should be quashed, and the sentence set aside.

C.M.D. BYRON,
Justice of Appeal

JOSEPH, MONICA J.A. (Acting)

On the authorities cited by the learned Chief Justice, and the additional observations of Byron J.A. the misdirections by the learned trial Judge to the jury are fatal. I, too, am satisfied that it is unsafe and unsatisfactory to allow the verdict to stand.

The cumulative effect of these misdirections preclude the Court from applying the proviso.

MONICA JOSEPH
Justice of Appeal (Aq.)