Hon C.J. Sir Denis Malone

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CICA NO. 20 of 1991
NO. 21 of 1991
NO. 38 of 1991

BEFORE: THE HONOURABLE THE PRESIDENT MR. JUSTICE EDWARD ZACCA, OJ
THE RIGHT HONOURABLE MR. JUSTICE P. TELFORD GEORGES, PC JA
THE HONOURABLE MR. JUSTICE JAMES S. KERR, JA

AL HANDEL PEARSON	V.	REGINA
HUMPHREY ANTHONY DAVIS	V.	REGINA
CARLOS BENJAMIN ROSE	V.	REGINA

Mr. Delroy Murray of Truman Bodden & Co. for the appellant Pearson;
Miss Sheri Bodden of Ian Boxall & Co. for the appellant Davis;
Mr. Delano Harrison instructed by Neville Levy and Associates for the appellant Rose.

25TH, 26TH JUNE & 12TH AUGUST, 1992

KERR, J. A.

on the 31st July, 1991, in the Grand Court at George Town before Sir Denis Malone, C.J., and a jury the appellants were jointly charged, tried and convicted of rape on Nathelia Williams. It was the case for the prosecution that a gang of five - the three appellants and Phil Thompson and Davis McLean - in the early hours of the morning of the 10th June, 1990, in the bedroom of an apartment owned by the mother of the appellant, Pierson, each allegedly raped her and in turn, aided, abetted and actively assisted each other in so doing. Thompson and McLean had previously pleaded guilty, been sentenced and were witnesses for the prosecution at the trial of the appellants.

The complainant, a girl of 18 years, on the night of June 9, 1991, attended a party at North Sound Road, George Town.

At about 1.15 a.m. she left the party and went on the road, apparently seeking a place to answer a call of nature. On the way there she met the appellant, Rose, and introductions were made. She went to a convenient spot and on return, stopped for a friendly conversation during which he hugged her. In evidence she said when she told him she wanted to go home he offered to take her and held her by the hand, pulling her towards a parked car in which were his friends. At first she was unwilling to go but on seeing another woman (Gillian Russell), her nervous apprehensions ended and she willingly entered the car. The car set off with a complement of four men and two women. She sat beside appellant, Rose, in the back seat. The car stopped and deposited Gillian at her house and then drove to the apartment. The four men got out and she followed and told Rose she would walk home as he was not interested in taking her home. The other three men then left in the car and Rose took her into the house saying they would return to take her home. In a bedroom there she refused his request to have sex saying that she could not go to bed with a man she was seeing for the first time. Appellant, Davis, then came in the room and both men then left the room locking her in. She heard them talking outside. Then Davis re-entered the room but she refused to talk with him. She eventually got past them and went outside but Rose pulled her back into the room and despite her struggles, took off her clothes, including her elastic-waist panties and despite her telling him she didn't want to have sexual intercourse because of a bad back he put her on the bed and had intercourse. While he was doing this she pulled his hair and screamed for help. Appellant, Davis, then entered the bedroom and appellant, Rose, picked up her clothes and ran with them out of the room. Thompson and McLean prevented her from following. Rose then came and took her back to the room and held her down by her hands while Davis had intercourse with

her. The others then came into the room and Davis had sex with her now on the bed while one of them held her hands. There were five men in the room and all five had intercourse with her in the following order - Davis, then Rose again, then one of those who pleaded guilty (Thompson), then Pierson and the other man who pleaded guilty (McLean). She was screaming telling him to stop. After they were finished her clothes were given to her and she was threatened that if she talked she would be killed. McLean offered to take her home. On the way he insisted in having and had intercourse with her in a parked van. He threatened to kill her if she talked and she promised to be silent because she was afraid. He gave her directions to reach her home and left her. On the way she made a report to some men in a jeep and they took her to the Police Station where she made a report and was examined later that day by a doctor. Later that day while in company with the police she saw the car of the night at the "Big M" (Mr. Donald's). At the request of the police the patrons came out and she idenfitied Davis, Thompson and McLean as three of the five men. In cross-examination she said Rose pulled her down on top of him and started to make love. She denied all questions suggesting any form of acquiescence to love-making and objected to the suggestion that she consented to have intercourse with him. Her hands were held while Davis had intercourse - she tried to push him off with her feet. She said she can't remember if Pierson was among the men at the "Big M". Rose, Davis and the "fat man" had sex twice. She did not attend an identification parade. Prior to the dock identification she had not identified Pierson.

Phil Thompson who was serving a sentence of two years imprisonment, six months of which was suspended, in evidence said that at about midnight he was with McLean and the three appellants in a car driven by one Ricky. They left the party for Pierson's apartment at Windsor Park where appellants,

Pierson and Davis complained of feeling ill. The others and himself returned to the party. Sometime later when McLean, Ricky and himself were by the car he saw Rose in conversation with complainat. After sometime both came in the car in which were the four men, complainant and Gillian Rose. After taking Gillian home the car drove to Pierson's apartment. Rose and Williams went into the apartment and McLean, Ricky and himself left for the gas station. Shortly after they returned, he went into the apartment and saw Rose and complainant making love. He noticed a little forcing by Rose and a little struggling from complainant. She was trying to get out. Rose came out and called Davis and both returned to the room. Rose held complainant down on the bed by holding her hands while Davis had intercourse. McLean (witness) was also standing by the room door. Pierson was present. To his suggestion that they should take hold of her and let her go home, Pierson replied "She already in the room. Make her take wood". He (Thompson), then had intercourse with complainant after the others at his request left the room. After this the complainant then ran out the room but Rose brought her back and McLean had intercourse. While he was getting on her the complainant scratched him. After McLean had intercourse complainant ran out the room. She was naked then. McLean got her clothes and she put them on. McLean who lived at Rock Hole, which was near her home at School Road, offered to take her home. He left with her but returned alone about ten minutes after.

In cross-examination, he said when he first went to the bedroom he heard no screaming but when she was with Humphrey Davis he heard screaming. In answer to Pierson's Counsel, he said complainant identified McLean, Davis and himself at the Big M. Earlier Pierson had complained of being drunk and when he went to the apartment Pierson was sleeping on the floor. He was not so drunk as to be in error when he said Pierson had intercourse

with complainant. He was cross-examined about certain inconsistencies in his previous statements. On the 16th April when he gave his statement he was not drunk and the statement was crystal clear - it was not clear on the 10th as he was still drunk.

Davis McLean, the convicted accomplice serving two years imprisonment, gave evidence substantially the same as Thompson concerning the events leading up to the drive to Al Pierson's apartment. According to McLean, Rose and Williams left the car, Rose telling them to go and come back The car with Ricky, the driver, McLean and himself, left for the gas station but returned about 15 minutes later. When he returned he saw Davis, Rose and complainant outside and Pierson asleep on the living-room floor. Rose pulled her into the house saying Davis was his brother. At the door of the master-bedroom she held on to the edge but Rose pulled her inside. She lifted up her blouse and Rose opened her pants and she took them off. She was crying; Rose pulled her down on the bed on top of him and had intercourse with her. Davis, Thompson and himself were at the door. After Rose got off her he called Davis and held her hands behind her head while Davis had intercourse with her. Pierson joined them at the door and when Thompson suggested that they help the complainant, Pierson said, "The bitch is in the house so let the bitch take wood". Complainant got away and ran out of the bedroom. Rose caught her, brought her back and held her hands while Pierson had intercourse in the bedroom. Then it was Thompson's turn, even though she told him her back was hurting and she could not take it any more. Then he, McLean, went after Thompson. Rose held her hands and Pierson and Thompson each held a leg. She freed a hand and scratched him. Thompson prevented him from hitting her. She jumped up and ran naked out of the room. Thompson took her back in the room and again had sex with her. After

that he (McLean) took her clothes to her and she put them on. He walked with her a part of the way home.

In cross-examination he said that she and Rose were fondling before she willingly went in the car. He denied having sex with her on the way home. He turned back to tell the others that complainant was saying that they raped her.

In cross-examination by Pierson's Counsel he said that a battery was planned in the car. A battery is where a female is with a male who has friends who are all to have sexual intercourse with the female. The only time he had intercourse with complainant was when they held her down.

Pierson was at the "Big M", but complainant did not point him out.

Detective Constable Patrick Scott was present when the complainant identified the convicted accomplices and Davis at the "Big M". He tendered in evidence the written statements and interviews taken by the police of Rose and Pierson and these being in general exculpatory were admitted without objections. The admissibility of the statement and interview of appellant, Davis, was challenged and as the admissibility by the trial Judge is in question before us this will be dealt with in due course.

Doctor Catroina Johnson who examined the complainant on the 10th June, found:

(i) superficial scuff marks on her back, over her shoulders and this could be caused by her being held down on the carpet by one while another raped;

(ii) redness in the lining of the vagina consistent with intercourse by five men and the amount of redness was unusaul for ordinary intercourse but implied more forceful entry and would be so painful as unlikely to be caused by consensual intercourse.

Submissions of no case to answer were refused and the appellants were called to answer.

Rose gave evidence to the effect that during his conversation with complainant on the road outside the party, they became friendly; he hugged her but when he attempted to kiss her she objected saying that she did not like the smell of rum. She agreed to go home with him. They joined the others in the car and after leaving Gillian at home they drove to Pierson's apartment. He told Ricky, the driver to come back for complainant before 5.00 a.m. which was the time she said she had to be home. The car left with Ricky, McLean and Thompson. After the car left complainant and himself went into the apartment and into the bedroom. She took off her clothes and they made love. She willingly consented to intercourse which lasted about half hour. After intercourse he left the bedroom and went to his kitchen for water. On returning he heard something going on in the bedroom. He did not feel good about it. He turned back and went to the hall and sat down. While there complainant came from the bedroom looking vexed and said "I gave those persons". She asked to be taken home. As Ricky was not back he decided to take her home but McLean offered to walk with her home as he lived at Rock Hole and she left with him. McLean returned 15 minutes after and said "the girl cry rape". When they enquired of McLean how could this be, McLean said that it was a joke he merely returned to borrow a bicycle. He denied assisting anyone to rape the complainant. Pierson was asleep on the floor until Davis and himself were ready to go home. He did not see Pierson in the bedroom that night. He saw no one in the room having sex with the complainant. The bedroom door was closed when he came back from the kitchen. In answer to Crown Counsel he said that there was no conversation about battery in the car. The apartment was a three-bedroom one. There was no water in the kitchen and he was only away

there for a few minutes. He did not know who was in the bedroom with the complainant. Thompson, McLean and himself were outside the apartment and Davis was asleep on the floor of the living-room.

Called by the defence, Gillian Lawrence gave evidence as to complainant willingly entering the car with Rose and Mrs Christine Pierson gave evidence as to the layout of the rooms in the apartment and that in June 1990 there was no light in the apartment and no street light shone into the bedroom.

The other appellants in the exercise of their options remained silent and their case rested on the submissions made on their behalf.

The following grounds of appeal which rest on Counsel's interpretation of certain evidence given by the complainant can conveniently be dealt with together:

"1. That the Learned Chief Justice misdirected the jury thereby rendering their verdict unsafe and unsatisfactory by failing to address the admission by the complainant and Detective Constable Scott that the complainant was alleging that she had been raped by five men being, Carlos Rose, Humphrey Davis, Phil Thompson, Davis McLean and the driver of the car one Ricky Ebanks.

2. That the Learned Chief Justice erred in law in ruling that there was a case for the Appellant to answer on a no-case submission being made on behalf of the Appellant at the close of the Crown's case and thereby the resulting verdict was unsafe and unsatisfactory."

Now identification was the pivotal issue in Pierson's case.

As a plinth to the argument in support of these grounds, was Counsel's interpretation of the following evidence of the complainant as appears on the record thus:

"There were four men in the car. One was Rose. The driver who was of fair complexion. Another was a short man and the fourth was Rose's brother. He is not here. Humphrey Davis was not in the car.

Q: Pierson was not in the car?

A: I don't know. Only thing I know is the driver was of fair complexion. Pierson resembles the guy that is absent.

Q: Prior to yesterday you have not identified Pierson as one of the number who raped you?

A: Yes.

Q: You said the room was dark?

A: Yes.

Q: Which absent guy told driver to go back?

A: The fat one.

Q: After the car left with the three men leaving you with Rose at the condo did you see the three men again?

A: Yes.

Q: Did you notice that after conversing with Rose, 3 men in the car returned and stood by the door and tried to touch you?

A: Yes.

Q: You told police Rose held your hands and one of the four men came and had sex with you?

A: Yes.

Q: Who is the man?

A: Humphrey Davis."

Mr. Murray submitted that on this evidence there were six men - the driver, Ricky - and the five accused at the apartment and only five men raped her. No attempt was made to clear up this ambiguity and this was crucial as the complainant only made a dock identification which was of little or no probative value.

In that regard it seems in order and convenient to deal with this evidence in relation to ground 2, that the no-case submission should have been upheld by the trial Judge.

Now the Learned Chief Justice, in dealing with the complainant's evidence of identification of this appellant, said:

> "The evidence of the girl, in the case of Pierson, is in itself inherently weak as to the identity of Pierson. I"ll deal with that later. But it is that as a condition of that evidence. For while she says that five men had sex with her she never until she came into this court name Pierson as one of the five men and indeed she seemed to imply that the driver of the car was one of the five for Pierson was not the driver of the car. So her identification of Pierson as one of the five is inherently weak."

In our view, this was a fair description of her evidence of identification.

Now as to this ambiguity of the complainant's evidence, the presence of the driver "Ricky" in the apartment at the material time was never specifically put to her and indeed was never made an issue. On the other hand, there was the unchallenged positive statement of McLean that "Ricky's wife came and he left with her before the girl was raped". Mr. Murray, therefore, now seeks to make too much of this apparent ambiguity in the complainant's evidence.

In his very full and well presented submission of "no case to answer", Mr. Murray who appeared for Pierson at the trial, in addition to the weaknesses or uncertainties in the complainant's evidence, industriously identified discrepancies between her evidence and that of the accomplices, McLean and Thompson, and inconsistencies in and discrepancies between the evidence of the accomplices and concluded that the case for the prosecution was so discredited that no reasonable tribunal could rely on it and that is the burthen of his submission before us.

In R. v Galbraith (1981), p. 124, the following guidelines on the approach of a trial judge to a submission of no case to answer appeared in the headnote"

> "The court gave the following guidelines on how a judge should approach a submission of no case to answer - (1) If there is no evidence that the crime alleged has been committed by the defendant, the case should be stopped. (2) If there is some evidence but it is of a tenuous character, i.e. because of inherent weakness or vagueness or because it is inconsistent with other evidence (a) where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. (b) Where, however, the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other

> matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury." (Emphasis supplied).

In the instant case the ambiguity or uncertainties and descrepancies upon which Mr. Murray relied in his no case submission were later in the main painstakingly identified by the Learned Chief Justice in his summation and will be referred to in greater detail later. It is enough to say that the core of the case for the prosecution remained intact and these matters relevant to credibility were eminently for the consideration of the jury.

Accordingly, the trial judge was correct in ruling that Pierson had a case to answer.

Now with respect to ground 1, Counsel submitted that in the light of the complainant's failure to identify the appellant, Pierson, the Judge erred in directing that her evidence was capable of amounting to corroboration of the evidence of the accomplices. If this were so, then the evidence of the accomplices stood uncorroborated and the jury should have been so addressed.

Now there was no criticism or complaint concerning the Judge's directions defining corroboration or of his warning to the jurors of relying on the uncorroborated evidence of the accomplices, McLean and Thompson.

Now after describing the complainant's evidence of identification of Pierson as inherently weak, the Judge continued:

> "It would, therefore, be unsafe for you and unwise of you to use her evidence in Pierson's case as corroborative of McLean and Thompson unless after taking into

account her evidence along with all other evidence relating to the point you found that you could feel sure of it that Pierson was in the house, that including Pierson there were five men in the house and that the girl was raped by each of those five men. If you came to that conclusion on the facts then in Pierson's case it would be open to you to take the girl's evidence as corroborative of Thompson and McLean. But if you you can't come to that conclusion then the girl's evidence cannot be treated as corrobroative of Thompson and McLean in the case of Pierson."

On the evidence relating to Pierson's presence and Ricky's absence at the material time, said:

"She speaks of (you'll remember and she demonstrated) bracing herself against the doorway or entry to the house but he pulled her in. So at that point we have five men. We have three men and the girl in the apartment. The men being Pierson, Humphrey Davis and Rose and the girl being Miss Williams. The other two men McLean and Thompson remain in the car with Ricky. Rose's evidence is that he expected Ricky to come back for the girl at about 5 o'clock in the morning to take her home because he says the girl had agreed to spend the night with him. There is other evidence to the effect that the car went away and returned in about 15 minutes depositing McLean and Thompson. They had been to a snacket at the place. Ricky may have gone into the house. I don't know if the evidence is quite clear about it. But it seems to be generally agreed Ricky left the scene and drove off in the car and in fact, according to Rose, he never came back as he had promised that he would, So at that point you now have five men in the house and the girl Williams.

So if there had been any question as to the whereabouts of ricky the matter might have been complicated from the Crown's point of view. But it appears to be general common ground that although Ricky came back in the car with McLean and Thompson if he did go into the house he soon left it. So Ricky is out of the picture. No one is accusing Ricky of anything. So w hat you are really being asked by the Crown is, How many men were in that room? Who were they? If there were four and Ricky is out of the picture, then it must be Pierson, McLean, Thompson, Humphrey Davis and Rose who goes back into the room."

Thus, if Ricky is absent, the inference that Pierson is the fifth man seems inescapable. It is only on this basis did the Judge leave the complainant's evidence on this aspect of the case as capable of amounting to corroboration of the evidence of the accomplices.

In the circumstances, it cannot be said that he erred in so doing.

The third ground of appeal reads:

> "That the Learned Chief Justice failed to direct the jury firmly and clearly upon the evidence relating to the charge against the Appellant on the one hand and to the other Defendants on the other hand thereby leaving the danger present of the jury consciously or unconsciously coming to the conclusion that they could pool all the evidence together and regard it in respect of each Defendant in turn as part of the whole case against the Appellant."

The Learned Trial Judge early in his directions said:

> "Because you may find one of the 3 guilty it does not follow that you conclude the other two to be guilty. Or because you find one of the three not guilty it does not follow that you find the other two not guilty. Each is entitled to his own verdict which may be the same or may differ from those of another or others. That is because there are really three cases being tried together and as I will explain, some of the evidence is applicable to all of the cases but some of the evidence is applicable to only one or the other."

Of the written statement and interview taken by the police and tendered in evidence he said:

> "Pierson is saying he had no sexual intercourse at all with the girl. So his statement is not inculpatory. It is exculpatory."

Dealing specifically with the defence of the appellant, Pierson, the Judge said:

> "And so, finally, I come to the case of Pierson. And the first point in his case what I think, it is that the girl, Miss Williams, cannot be relied upon as a witness who identified Pierson as one of the men. And that is because, as was mentioned earlier today, the identification

> is by way of a dock identification which should be avoided wherever it is practicable and there is no reason to suppose that it wasn't practicable in this case and it was not avoided. So the whole identification of Pierson isn't worth anything to you. I think that is his first point. Then ..... to that is this, Pierson was in that police station just about the same time as the others were there that morning of the 10th June. Pierson, it seems, was interviewed and Pierson was discharged or at least released. The police never answered the question: Was Pierson in McDonald's? They never answered that question. The answer came, "it was possible". "He may have been". "I don't remember seeing him". Words to that effect. Now what Murray is saying is: The reasonable probability is that Pierson was in McDonald's with these other men and that Pierson came out of McDonald's with them. But that Miss Williams never once said: "You, you and you". She points to three who, none of them was Pierson. She never once picked out Pierson. That is what the defence is suggesting to you that the identification of Miss Williams of Pierson is wholly unreliable. In that connection, I think, the defence says be very careful how you do your mathematics. Five men in the house. Raped five times by five different men. Can you be sure of Miss Williams on that? ..... Does it then follow that all five in that house raped that girl? Because of the unreliability of Miss Williams and the unreliability of McLean and Thompson the defence is suggesting to you, don't jump to that conclusion. So how can you be sure that Pierson was one of those who raped Miss Williams. His story is that he slept. In fact it is a bit deeper than that. He said he had had too much liquor to the point where he felt ill. And that was why he had gone to house earlier that evening. He was never in the car. Never with the girl."

and as regards conflicts in the evidence said:

> "So I turn with that to the conflicts that Mr. Murray brought to light in the case of Pierson. And here, again, it is for you to decide how to resolve these conflicts. It is for you to decide whether you think the conflicts are of any real importance go to the main issues or whether they are purely peripheral matters which could easily lead to inconsistencies. Some of them are repeats of what Mr. Quin has said but nontheless I will put them to you. McLean and Thompson deny that they barred the bedroom door. Miss Williams says that they did at one point. Williams also said that they barred the front door at one point in the morning. McLean admits that he did so. When I said that Thompson denied it I do not mean that he Thompson barred the door. The girl says she was raped by Humphrey Davis on

> the carpet before being put in the bed and in that regard you may remember there was evidence from Dr. Johnson that she had some of abrasions of pressure marks on the back which would be consistent with being rubbed on a rough surface like a carpet. Mr. Murray points out Thompson denies it took place on the carpet. And the gist of McLean's evidence seems to be the same as Thompson's that there was no raping on the carpet.
>
> Rose, Davis, Rose again, Thompson, Pierson and McLean is the sequence which the girl gives for the several rapes that took place. Rose first Davis second Rose again Thompson, Pierson and McLean. Thompson's sequence is Rose, Davis, Pierson, himself, Thompson and perhaps McLean. You remember the question about not seeing the penis and all that unpleasantness. On cross-examination Thompson says he did not see Rose having sex with the girl as the door was closed. And the first person he saw rape the girl was Humphrey Davis then he avers the next was Pierson and then McLean.
>
> McLean's sequence in examination in chief is Rose, Humphrey Davis, Al Pierson and Thompson, himself, and then Rose again. Now Rose is at the end of the line. So, you may not remember the sequence. It is difficult to but what Mr. Murray is saying is that none of them agree on the sequences. None of them. None of the three crucial witnesses agree on it. So how can you be sure of them".

In our view it was a commendably careful effort on the part of the Learned Chief Justice.

There really is no merit in this ground of appeal.

For these reasons we dismissed Pierson's appeal against conviction.

On behalf of the appellant, Davis, the following grounds of appeal are co-relative:

"1. THAT the Learned Chief Justice erred in law in ruling that once the trial had begun the Appellant must continue to be self represented albeit the Appellant has requested after the first morning of the hearing that he be represented by Counsel. As a result the Appellant was not properly represented during the trial thereby rendering the verdict unsafe and unsatisfactory;

2. THAT the Learned Chief Justice erred in law in ruling that there was in inducement by way of a promise made to the Appellant by police officer Mr. Scott that he would be released from custody once he had made a statement. It is a part of the evidence that police officer Scott admitted that he had the Appellant handcuffed that he has said if the Appellant made a statement he would let him go. The Learned Chief Justice failed to address his mind to this crucial piece of evidence when considering whether or not to admit the Appellant's statement and interview and admitted the Appellant's statement and interview despite this evidence thereby rendering the verdict unsafe and unsatisfactory;

3. THAT the Learned Chief Justice failed to direct the jury on the voluntary or involuntary nature of the Appellant's statement and interview. By failing to leave to the jury the question of whether the Appellant's statement and interview was voluntary or involuntary the resulting verdict is both unsafe and unsatisfactory;".

However, it seems convenient to deal first with grounds 2 and 3 together.

Counsel submitted that the caution statement and interview statement given to the police by the appellant were wrongly admitted in evidence as they were not voluntary, having been obtained by inducement held out to him by a person in authority, namely, police officer Scott.

At the trial the appellant's challenge to admissibility was heard on the voire dire in the absence of the jury. The following appears in the record:

XX'D Witness (Detective Patrick Scott (P. 45))

"Q: You had me handcuffed and said when you make a statement I will let you go.

A: That is correct.

Q: You told me when the interview was complete I could go.

A. That is incorrect."

The appellant also gave evidence; he said in cross-esamination: (p. 46).

> "Scott did not threaten me. He was calm. I was scared he might lick me or something but he did not threaten me nor did anyone else."

and at page 47:

> "I complained when he did not let me go. I gave the statement because he promised to let me go."

In addition the appellant also challenged the accuracy and genuineness of certain parts of the statements.

In ruling on the admissibility of the statements the Judge said thus:

"The case of the accused appears to be that the answers recorded at the interview and the statement attributed to him are not his but fabrications of the police officer. He, the accused, was not threatened but he was fearful he might be beaten and had been promised that after being interviewed he would be released. So he signed the statement and initialled the answer recorded.

The police officer, Mr. Scott, appeared to me to be an honest witness who performed his duty in accordance with the Judge's Rules. I have no doubt that the accused knew why he was at the police station and that there has been no fabrication by the police. It is probable that the accused was nervous but not because he was threatened or because force was applied to him. I am satisfied also that there was no inducement by way of a promise that he would be released from custody."

In our view it is enough to say that the finding that there was no inducement, in the light of the admission by Detective Scott and the unchallenged evidence of the appellant that he gave the statement because Scott promised to let him go, was clearly against the weight of the evidence.

Further, although the Judge did advise the appellant, Davis, he could "go over the ground with the jury present so that they can determine the value of the statements, if any, as evidence", the appellant's brief and pointless cross-examination was clearly indicative that he did not appreciate the importance of so doing. This is indicative of the disadvantage of not being represented by Counsel. The trial judge ought to have assisted the appellant in eliciting the circumstances under which the statements were given as these were relevant to what weight, if any, should be given to them by the jury and which would have called for appropriate directions.

The request for legal representation was made after the luncheon interval and before the examination-in-chief of the complainant, the first witness, was completed. It was communicated to the Judge by Crown Counsel. In response to this request the Judge said:

"This morning before trial this matter was gone into. I asked you more than once if you felt able to conduct your own case and you said yes. Now that the trial has begun I cannot find you counsel. It must continue as it is."

In support of her submissions that the Learned Chief Justice erred in so ruling she referred to the following amongst other cases:

R v. Kelly (1929) 21 Cr. App R. 151

R v. Elton (1942) 28 Cr. App R. 126

R v. Howes (1964) 48 Cr. App R. 172

In R v. Kelly on the absence of Counsel the Court said:

"it always seems a pity in a case of rape that a prisoner should not be defended".

In R v. Elton where the request for Counsel was made under similar circumstances the Court made the following observations on the desirability for legal representations in cases of this nature:

"This Court has often said that in cases of sexual nature that legal aid should be given to a prisoner without means who asks for it, if only because it prevents him from having a feeling of grievance."

Mr. Archer quite properly, in our view, did not seek to defend the Judge's ruling on the admissibility of the statements. On the treatment of the appellant's request for representation he conceded that the Judge ought to have permitted the appellant to obtain Counsel having regard to the nature of the case, the time at which the application was made and the fact that his Counsel withdrew at the morning of the trial. He, however, submitted that independently of the statements there was so strong a case against the appellant that Counsel would have made no difference and that in the end it was whether this Court felt that in all the circumstances there was no miscarriage of justice.

In our view, having regard to the nature of the case, the circumstances in which the application for Counsel was made, the

Learned Chief Justice erred in declining to give the appellant the opportunity of being represented by Counsel. There is no doubt that the absence of Counsel was detrimental to the appellant in the presentation of the defence with the resultant deficiencies from the appellant's inadequacy in representing himself.

Accordingly, we gave anxious consideration whether in the circumstances the conviction should be quashed or the proviso applied on the ground that there was no miscarriage of justice.

In R v. Kingston (1948) 32 Cr. App R. 183, where the circumstances were similar, Humphreys J in delivering the judgment of the Court quashing the conviction said: (p. 190)

> "The circumstances of this case are such that we have two courses open to us. Either we must ignore all that happened at Manchester and say there is nothing before us which would justify our quashing this conviction or we must say that the whole matter is so unsatisfactory that we think the conviction ought not to stand. On the whole we have come to the conclusion though not without considerable hesitation that the lesser of the two evils is to quash the conviction because it is always better that a guilty person should escape conviction than that a possibly innocent person should be convicted".

This passage was quoted and described in R v. Howes (1964) 48 Cr. App R. 172 at pp 179-180 as "very strong words".

From the summary in the headnote of Howes' case the following excerpts are directly relevant:

> "Where a person without means to conduct his own defence is charged with a serious offence even if it appears likely to plead guilty cases must be rare in which justice does not demand that he should be granted full legal aid solicitor and counsel. The power to grant counsel only is intended to be exercised to avoid a case being adjourned. It is not to be used as an economy in the country."
>
> .....
>
> "The appellant who was charged with a serious offence applied to quarter sessions for legal aid but was refused. At trial he obtained a

> dock brief but the Counsel whom he selected returned the brief without informing the Court. At the opening of the trial the appellant who was then unrepresented, owing to a misunderstanding did not apply for a dock brief but did so in the course of the trial. The Deputy Chairman, who did not realise the actual position, refused the application and conducted his own defence. The case against him was an entirely strong one. Held: that as in opinion of the Court representation by Counsel could not have produced a different result no miscarriage of justice had resulted despite the fact the appellant was unrepresented and the conviction was affirmed."

In the instant case independently of the statements tendered in evidence the case against the appellant was a very strong one. There was no challenge to the allegation that he had intercourse with the complainant. Except for Pierson, the common vital issue was consent. This issue was specifically raised by the co-accused, Rose, who in support urged special circumstances, including the friendly preliminary conversation on the road in front of the premises where the party was held, her willingly accompanying him into the bedroom and the removal of her clothes. The jury's verdict of guilty against the three appellants is explicable only on a finding that there was a gang rape by all who had sexual intercourse with complainant including appellant, Rose. There was no special factor or circumstance that would exempt the appellant from the general culpability of the gang. Therefore, notwithstanding the wrong decisions of the Judge and the disadvantages of not being represented by Counsel and, that, unlike the appellant in Howes' case, his defence as conducted by himself was manifestly unskilful, we were of the view that having regard to the extremely strong case presented by the prosecution and the nature of his defence, the jury would inevitably have come to the same conclusion.

The fourth ground of appeal reads:

> "THAT the Learned Chief Justice failed to direct the jury firmly and clearly upon the inconsistencies in evidence relating to the charge against the Appellant on the one hand and to the other Defendants on the other hand thereby leaving the danger that the jury consciously or unconsciously coming to the conclusion that they could pool all the evidence together and regard it in respect of each Defendant in turn as part of the whole case against the Appellant".

In support of this ground Counsel for Davis adopted such of the submissions in Pierson's case as were relevant. Our opinion and reason as expressed in Pierson's case are equally applicable to this ground. The records reveal that the Judge dealt individually with the case for and against each accused including the appellant, Davis.

Accordingly, this ground of appeal failed.

In the light of the opinion expressed in relation to grounds 1, 2 and 3, the proviso was applied and the conviction affirmed.

The main ground of complaint in relation to the appellant, Rose, reads:

> "The learned trial Judge erred in law when he failed to direct the jury adequately as respects the element of the necessary intent required to establish the charge of rape in the appellant".

On this the Learned Cheif Justice in his summing up said:

> "The second element of the offence is that the act was done (that is the act of sexual intercourse) without the consent of the girl and with knowledge that the girl was not consenting or with reckless disregard whether she consented or not. Obviously, once a person is of mature age, if they choose to have sexual intercourse with somebody else that's their private affair. The law doesn't look into that at all once there is mutual consent on the part of the parties. What the law is concerned about is where there was a lack of consent on the part of the woman and coupled with that knowledge on the part of the man that the girl was not consenting but he either had that knowledge or he was reckless and did the act with disregard whether she was consenting or not.
>
> The knowledge that the girl was not consenting can be inferred from the facts. That is to say, you are entitled to draw reasonable inferences from the facts, from the act itself and/or from circumstances surrounding the performance of that act. If those inferences are diffused and point in more than one direction so that you cannot say that that knowledge existed then, of course, the knowledge has not been proved. But if they are not diffused and they point you consider and feel sure in one given direction, and whoever did this act must have had knowledge that the girl was not consenting then you can ascribe that knowledge that you find to the accused and so conclude that he had that knowledge. That's how you go about determining whether the accused had that knowledge or not.
>
> Alternatively, a person is guilty of rape if he was reckless about it. Recklessness may also be inferred from the facts. It is a degree of negligence higher far higher than the mere failure to take due care. It exists where the person is so bent on doing what he wants to do that even though he may foresee that his act may result in consequences which he doesn't desire even if he is prepared to take a chance and press

> ahead. In terms of rape it might be said that he is determined to have sexual intercourse willy-nilly whether he girl consents or does not consent. He is not directing his mind to that at all. He is going to have it. Well that's what we mean by reckless."

In support of this ground, Mr. Harrison submitted that in a case of this nature a jury might be led to believe that once they found that the victim had not consented the verdict of guilty was unavoidable. The question was whether or not the accused had an honest belief that she was consenting to sexual intercourse and, accordingly, appropriate directions on honest belief should be given. In support he relied on the reasoning and decision in D.P.P. v. Morgan and others (1975) 61 Cr. App R. 136.

In that case, Morgan, the husband of the complainant, was convicted of aiding and abetting three other men in raping his wife. The three others were convicted of the principal offence. Morgan, who also had intercourse allegedly without the complainant's consent, was charged only with aiding and abetting on the basis of the then existing respect for the ancient common-law doctrine that a husband could not be guilty of raping his own wife.

The case for the defence was that the victim had shown some resistance at first but later was a willing participant and entirely cooperated in the act of intercourse. The complainant, on the other hand, gave evidence that she resisted throughout and never consented.

On appeal to the House of Lords, the two questions certified for consideration were first, "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 grounds".

The second question which arose on the negative answer to the first was whether in the circumstances the proviso could be applied on the basis that there was no miscarriage of justice and this question was answered in the affirmative.

The answer to the first question rested on consideration of the following passage in the trial Judge's summing up: (p. 145):

> "Further, the prosecution have to prove that each defendant intended to have sexual intercourse with this woman without her consent. Not merely that he intended to have intercourse with her but that he intended to have intercourse without her consent. Therefore if the defendant believed or may have believed that Mrs Morgan consented to him having sexual intercourse with her, then there would be no such intent in his mind and he would be not guilty of the offence of rape, but such a belief must be honestly held by the defendant in the first place. He must really believe that. And, secondly, his belief must be a reasonable belief; such a belief as a reasonable man would entertain if he applied his mind and thought about the matter. It is not enough for a defendant to rely upon a belief, even though he honestly held it, if it was completely fanciful; contrary to every indication which could be given which would carry some weight with a reasonable man."

It was the proposition in the sentences as emphasised here that met the disapproval of the majority of three of the judges. On this Lord Hailsham at p. 147 said:

> "I believe that mens rea means "guilty or criminal mind," and if it be the case, as seems to be accepted here that mental element in rape is not knowledge but intent, to insist that a belief must be reasonable to excuse, is to insist that either the accused is to be found guilty of intending to do that which in truth he did not intend to do, or that his state of mind, though innocent of evil intent, can convict him if it be honest but not rational."

In Morgan's case the complaint was that there was an express misdirection. In the instant case there was no directions on bona fide belief. On the face of it, in our view, knowledge by the accused that the complainant was not consenting or that he was reckless as defined by the Chief Justice in the passage quoted would be incompatible with a bona fide belief.

However, Mr. Harrison contended that the omission to to give directions on bona fide belief was in the circumstances of the case a non-direction amounting to a misdirection for which

the conviction should be quashed. For this he relied on the reasoning and conclusion of the Jamaican Court of Appeal in the unreported case of R v. Fitzroy Brown 154/90 delivered May 11, 1992.

The appeal in that case was allowed on two grounds; one, that the verdict was unreasonable having regard to the evidence. On the basis of the summary and comparative analysis of the credibility of the evidence for the Prosecution and for the defence the judgment on this ground seems beyond criticism.

The other ground, which is relevant to this appeal, rested on grounds and arguments similar to those advanced before us. The Court of Appeal considered, inter alis, the following passages from the directions of Smith J.:

> "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."

Notwithstanding his reference to knowledge on the part of the accused that the complainant was not consenting, the Court of Appeal said that "these later 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" but went on to say that as "the learned trial judge was dealing with the Crown's case and no fault can be found in this regard". However, the following directions when dealing with the defence were considered with disfavour:

> "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".

and later:

> "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."

On this the Court of Appeal expressed the following opinion:

> "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. (unreported C.C.A. 9 & 11/86 - 27 April 1987). has not been expressed in clear and unequivocal terms."

In expressing this opinion no reference was made to the adequacy of practical directions which may be given when the case for the prosecution was diametrically different from the defence as was expressed by Hord Hailsham in the Morgan case at p. 145:

> "The choice before the jury was thus between two stories each wholly incompatible with the other, and in my opinion it would have been quite sufficient for the judge, after suitable warnings about the burden of proof, corroboration, separate verdicts and the admissibility of the statements only against the makers, to tell the jury that they must really choose between the two versions, the one of a violent and unmistakable rape of a singularly unpleasant kind, and the other of active cooperation in a sexual orgy, always remembering that if in reasonable doubt as

> to which was true they must give the defendants the benefit of it. In spite of the valiant attempts of counsel to suggest some way in which the stories could be taken apart in sections and give rise in some way to a situation which might concievably have been accpetable to a reasonable jury in which, while the victim was found not to have consented, the appellants, or any of them could conceivably either reasonably or unreasonably have thought she did consent, I am utterly unable to see any conceivable half-way house."

On directing the jury as he did in R. v. Brown, Smith J apparently was influenced by the approach considered as sufficient by Lord Hailsham in such cases.

In the instant case, the case for the prosecution was that against the complainant's oral objections and physical resistance, the appellant not only had the first round of intercourse, but thereafter actively assisted others in having intercourse and, in between, he, himself, returned for an encore. It was his case that he had but one round with complainant's consent and in response to his love-making and thereafter, took no part in any further acts of intercourse with her nor did he see anyone else having intercourse with her. There were but two clear-cut choices before the jury. There was, therefore, no media via for the existence of a bona fide belief that she was consenting to the series of intercourse.

Accordingly, we considered that, having regard to the nature of the case for the prosecution and the nature and conduct of the case for the defendant, the directions of the Chief Justice were fair and adequate.

The other two grounds argued were that the Judge failed to assist the jury in assessing the credit worthiness of the accomplice witnesses and that the verdict was unsafe and unsatsifactory.

It is enough to say that the reasoning and opinion in dealing with similar grounds of appeal in Pierson's case apply equally to these grounds.

For these reasons the conviction of Rose was affirmed.

The appellant, Pierson, was sentenced to four years imprisonment, six months of which was suspended. Mr. Murray drew our attention that the law did not permit the suspension of six months in a custodial sentence of that duration and that the Chief Justice apparently intended that his actual imprisonment should be three years and six months.

Accordingly, the sentence was varied by setting aside the period of suspension.

As regards the appeals of suspension against sentences by Davis and rose, we are of the opinion that the sentences for this type of offence were not manifestly excessive and their appeals against sentence were dismissed.