

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

BEFORE THE HON. THE CHIEF JUSTICE

ON THE 15TH 16 AND 19TH NOVEMBER, 1990

IND. 28/90

REGINA V ANTONIO MACHADO EBANKS

Mr. Sheehan and Miss Wong for the Crown
Mr. G. Hampson for the Defence

MALONE C. J.

JUDGMENT

The accused is charged with burglary. The particulars of the offence are that he:

"on the 8th day of March 1990 at West Bay Grand Cayman entered as a trespasser the dwelling of Tweetsie Fay Kelly and Carolyn Bush with intent to rape a woman therein."

The woman in question is Carolyn Bush who, from childhood, has been a defective person and at the time was 59 years of age. She was examined on the 28th March by Dr. Franklyn La Hee who concluded his report as follows:

"Miss Carolyn Bush is severely mentally handicapped and mute. From the foregoing account she is not competent to give evidence in court. It is my opinion that Miss Bush is incapable of giving consent for sexual favours."

Dr. La Hee's opinion on the incapability of Miss Bush to give evidence and to give consent for sexual intercourse was not opposed by the defence. I accept the opinion. I accept also that Miss Bush cannot walk but can crawl and by clinging to an object, such as a bed, can hoist herself into an upright position. She is capable also, from that position to get into bed. P.C. Myles saw her on the night of the 8th March in bed.

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His impression of her was that she looked retarded. He was struck by the fact that her head kept moving from side to side. Veneta Blair works for a son of Mrs. Kelly. The latter is the good samaritan in Miss Bush's life who has taken Miss Bush into her care. Veneta Blair's description of Miss Bush was as follows:

"Carolyn is fair with wrinkles and she has grey hair. Just looking at her you can tell she is handicapped. She is a cripple."

Whilst accepting that Miss Bush is a cripple, and cannot talk, Mrs. Kelly drew a picture of Miss Bush that was closer to the normal person. She said that Carolyn:

"...can feed herself and put on her clothes. She crawls a little on the floor of the room. She tries to talk. She is happy. When seated and not talking she looks like a woman".

When called, Miss Bush can give an answer by making a noise and in reply to the question put in cross-examination:

"Can Carolyn beckon with her hands?"

Mrs. Kelly demonstrated that Carolyn cannot beckon by a wave of the arm and hand but can beckon by moving a thumb across her first two fingers without making the clicking sound that often accompanies that gesture. In cross-examination, also, she said:

"Carolyn can just open the door."

Mrs. Kelly, obviously, knows Miss Bush better than any other witness but I think that Mr. Sheehan made a valid point when he said that, Mrs. Kelly, because of her closeness to Miss Bush, and, I would add, the frequency with which she is in the company of Miss Bush, sees her as less retarded than others would. I accept all of the evidence given by the witnesses save in one particular. The particular is that I think P.C. Myles' description of Miss Bush as someone who looks retarded is to be preferred to the inference of normality to be drawn from Mrs

Kelly's evidence that when seated and not talking Miss Bush looks like a woman.

Miss Bush lives on the property of the Kellys in a building no more than a few feet from the back of the Kellys' residence. The building might be described as an efficiency apartment save that it has no kitchen. It is about 8' x 12' and there is a rudimentary partition which gives a small measure of privacy to the toilet from the view of anyone standing by the front door as should the viewer put his head through the doorway and look to his right he would see it. The bed which is to the left of the front door is clearly visible from that door. The building has two doors. The front door where it was the habit of Miss Bush to sit on the floor and see the world outside and a side door close by the toilet. On the outside of that door is a hose pipe arrangement which Miss Bush used when washing herself. So close is the building to the residence of the Kellys that by means of a cord from the washroom of her home to the light bulb in Miss Bush's room, that light can be turned on or off.

Mrs. Kelly's evidence is that she was on her way that night of the 8th of March 1990 to the home of one of her sons which is located on what might be described as the Kellys' compound when she noticed that the light in Miss Bush's room was off. She was immediately concerned and called two or three times but got no answer. Mrs. Kelly gives no precise time for that observation. However, Cindy Owens who at that time was living with a son of Mrs. Kelly in the Kelly compound heard a screaming at about 9 p.m. Mrs. Kelly says that she screamed when she discovered a man in Miss Bush's building. That discovery would have taken place, if Mrs. Kelly's evidence is accepted, within a minute or two of her noticing the light was off. Consequently the evidence of Mrs. Kelly and of Cindy Owens taken together suggests that Mrs. Kelly noticed the light was off at about 9 p.m. 9 p.m. is not accepted by either Mr. Kelly or Veneta Blair as the time in question. The evidence of Veneta Blair is that she closed the shop where she works at about 9 p.m. and heard a shouting at around 9:25 p.m. to 9:30 p.m. when at her

home which is across the road from Miss Bush's building. Veneta Blair was then with Mrs. Kelly's grandson, Lennox. Together they went to Mrs. Kelly who she saw on the opposite side of the road. Lennox was directed by Mrs. Kelly to summon Mr. Kelly. The latter confirms that he was summoned by Lennox and the time was about 9:15 p.m. As Kelly's bar where Mr. Kelly says he was when summoned by Lennox almost adjoins the Kellys' residence, and as Mr. Kelly says he responded promptly to the summons, Mr. Kelly would have been at the scene by 9:20 p.m. About 20 minutes after the time at which Cindy Owens puts him there as it is her evidence that he was there when she arrived on the scene after hearing the screaming at about 9 p.m. Consequently if the time is taken from Mr. Kelly, Mrs. Kelly would have noticed that the light was off in Mrs. Bush's building shortly before 9:15 p.m. If taken from Veneta Blair, it might be a little after 9:20 p.m. The differences in time estimates of the several witnesses are not, I think, of any significance. They are differences that, in fact, inspire respect for the integrity of the witnesses. The difference in time, however, appears to be greater when the evidence of the police is taken into account. P.C. Myers got to the scene at 10:20 p.m. So also did Sergeant Bodden from George Town. Whether they came together or separately is not known. According to Sergeant Bodden the report was received at the Central Police Station at 10 p.m. As it is the evidence of Mrs. Kelly and Cindy Owens that they left the scene to telephone the police after Cindy Owens got to the scene, 10 p.m. is rather later than one would expect for the receipt of the report. The difference, if it exists, is no reflection, in my view, on the reliability of the several witnesses. I say if it exists as it is not known how long Mrs. Kelly and Cindy Owens were at the scene before they left to make the phone call or from where it was that the call was made. The times have been carefully considered, not only for the purpose of assessing the general credibility of the witnesses, but also for the purpose of determining the order in which they came to the scene. All are agreed that the first to arrive was Mrs. Kelly. Next on the scene were Veneta Blair and Lennox. They were joined by Mr. Kelly and after him came Cindy Owens. After the arrival of

Cindy Owens, but precisely how long after her arrival, is not known, she left with Mrs. Kelly to summon the Police. Mrs. Kelly and Cindy then returned to the scene before the police arrived in the person of P.C. Myles at 10:20 p.m.

Accepting shortly before 9.20 p.m. as the time at which Mrs. Kelly noticed that the light was off in Miss Bush's building, she would last have been in Mrs. Bush's company at about 9 p.m. as her evidence is that she had visited Miss Bush earlier and after leaving her with the intention of returning had been away for about 15 minutes. When she left Miss Bush with the intention of returning, Miss Bush was sitting on the floor dressed. The side door was latched and the light was on. The bed had been prepared by Mrs. Kelly for Miss Bush's use and the duster coat she uses as a night dress was on the bed. Mrs. Kelly, on leaving, pulled the front door to, but not 'solidly' as she described it. When she returned a little over 15 minutes later, the front door was pushed in tightly. Mrs. Kelly described it as 'jammed'. Miss Bush was on the bed dressed in her duster coat and the building was without light. The bulb has been slackened. I accept that evidence of Mrs. Kelly and with it her evidence that when she entered the building she found the accused within it. Indeed if his presence there at that time is not accepted, the subsequent behaviour of Mrs. Kelly is wholly irrational and inexplicable. The screaming and the shouting to which she admits and which others corroborate become incomprehensible. To carry the farce, as that is what it would be, to the extent of summoning the police is past belief.

At his interview with the police the accused is recorded as saying that whilst relieving himself at the back of Mr. Kelly's bar he saw Miss Bush whom he described as "this woman" because he does not know her name beckon to him with her hand. At the time Miss Bush was, he said, sitting inside the door on the floor and he thought she had beckoned because she was getting wet from rain and wanted him to close the door. He says he ran in the rain to the room but did not enter it. What he did he did not say. The record of the interview is not signed by him

but the record was not challenged and I feel sure not only that it is an accurate record but that the accused voluntarily gave the information that is recorded. To my mind the evidence is clear beyond a doubt that the accused who, I have found, was within the room tightly shut the door by pulling it to behind him. It would have to be him as whilst it is possible that Miss Bush might have been able to push open the door which Mrs. Kelly had closed but not solidly, it seems most unlikely by reference to Mrs. Kelly's description of how the door was jammed on her return that Miss Bush could have pulled the door to so tightly. On those findings it is possible that Miss Bush did beckon to the accused in the manner in which Mrs. Kelly explained she beckons. If she did, the accused, whether he was seeing her for the first time or not when he ran to her building, could not have failed to have noticed that she was a cripple. For Miss Bush who had been left seated at the front door by Mrs. Kelly was in her bed when Mrs. Kelly returned. To get into bed she would, in those circumstances, either have crawled there in the presence of the accused or have been lifted there by him. In either event he must have become aware of her mental condition at that time even if he had not known of it before. Those circumstances would make Miss Bush's condition plainly obvious to the accused even without giving consideration to the evidence of :

1. Veneta Blair that:

"Just looking at her (Carolyn) you can tell she is a handicapped. She is crippled";

2. P.C. Myles that Carolyn looks retarded;

3. Mrs. Kelly to the effect that it is only when seated and not talking that Carolyn looks normal;

4. Dr. La Hee that Carolyn is severely mentally handicapped and mute.

When account is taken of those four facts there can be no doubt that

if the accused went to Miss Bush in response to being beckoned he must, within seconds of getting to her, have become aware of her condition if he was not aware of it before. The fact that Miss Bush, when Mrs. Kelly discovered the accused in the room was in bed wearing the duster coat Mrs. Kelly had laid out for her does not detract from that belief as Miss Bush can dress herself and could have done so before beckoning to the accused. It is possible that just as the accused failed to tell the police the truth when he denied having entered Miss Bush's room so also he lied when he said she beckoned to him. If she did not beckon he might have entered the room when she was already in bed. Supposing that to be the case and that he did not know or know of Miss Bush before entering the room, he must, I think, because of the evidence of P.C. Myles, Veneta Blair, Mrs. Kelly and Dr. La Hee cited above have become aware of Miss Bush's condition within moments of his entering. For on the basis of that supposition those facts must be considered in the context of a man intruding as a stranger at night into the lit bedroom of a woman. That the room was lit at the time cannot, I think be in question. The light was on when Mrs. Kelly left the room after attending to Miss Bush. No one else, Mrs. Kelly said, was at her home when she was there before leaving for her son's home and she had not turned off the light as when later she discovered the light to be off her comment was:

"I had no idea how the light had been turned off"

Bearing in mind that Miss Bush cannot stand on her own without holding on to something, that the light in her room hangs from a hook and is turned off within the room by slackening it, the only reasonable conclusion is that it was on when the accused entered the room, as Miss Bush was alone and she could not have turned it off. It is then inconceivable, I think, that by a sound or movement Miss Bush would not have betrayed her condition to him had he entered without having been beckoned by her and without knowing of her condition. There is however, evidence that the accused knew of Carolyn's condition before he entered the room. That evidence is the following:

1. Miss Bush has lived on the Kellys' compound in her building for the past 12 years;
2. The accused has been known to Mrs. Kelly since boyhood;
3. The accused is a friend of Dave who is one of Mrs. Kelly's sons;
4. The accused has off and on over the years

patronized Kelly's bar;

5. The area behind the Kellys' home is open ground and is used by male patrons on occasions to relieve themselves even though the bar has a toilet;

6. The following statements made by the accused at his interview by the police that:

- (a) he thought he was beckoned to by Miss Bush because she was being rained on and wanted him to close the door;
- (b) "I am not sure (i.e. that he had seen Carolyn before) because is a lot of afflicted people in the area."

The significance of the accused's statement to explain why he was beckoned by Miss Bush is that it gives rise to the inference that he knew her to be a person who, because she was so incapacitated, even needed help to protect her from rain. Its significance is not lost were it in fact not raining at the time for he says it was his thought. Being his thought at the time it cannot be said of it, as Mr. Hampson said of his statement relative to not being sure whether he knew Miss Bush, that it was influenced at the time it was made by the knowledge that the police inquiries concerned an afflicted person. Standing on its own the statement of his thought shows his knowledge of Miss Bush's affliction. Consequently the evidence of Mrs. Kelly that she did not think that the accused knew Miss Bush and was not:

"conscious of his going round to the back of my house" is not evidence that raises in my mind a doubt as to whether the accused knew of Miss Bush. Indeed because of the first five of the six facts cited above, it would be the more reasonable to conclude that the accused did know of Miss Bush even if he did not know her. Against that background it seems likely to me that in stating that he was not sure that he had seen Miss Bush before, because there are a lot of afflicted people in the area, the accused was saying in effect that he knew of Miss Bush as one of the afflicted people. However it is not necessary to pursue further the meaning of that statement as there is an abundance of evidence which clearly shows the accused knew of Miss Bush before and at the time he entered her room. To put it another way he knew when he was entering Miss Bush's room that within it was a mentally retarded cripple. The question then is with what

intention did he enter the room?

The thought which the accused advances to explain why he went to the building of Miss Bush does not explain why he entered the room. Further knowing that he was within the Kellys' compound and knowing the physical and mental condition of Miss Bush, he must have known that any beckoning gesture by her could not be accepted as authority to enter the building. He would, in those circumstances be a trespasser entering the property without the lawful permission of the owner. In this instance Mrs. Kelly. If he entered the building without being beckoned by Miss Bush he clearly was a trespasser. The fact that he told an untruth when he said more than once to the police that he had not entered the building and gave no explanation for being within it, are not matters of which, in my view, account should be taken in determining his intention. However, the absence of any explanation from him for his presence there and his denial that he was not there when undoubtedly he was, leaves it open to me to determine his intention, if it is determinable, from all the facts that are in evidence and from the inferences to be drawn therefrom. In doing so I bear in mind that as Lord Denning M.R. said in Ke Bramblevale Ltd (1969) 3 A.E.R. 1062 at page 1064:

"When there are two equally consistent possibilities open to the Court, it is not right to hold that the offence is proved beyond a reasonable doubt"

A fact of very great significance is that having entered the room, the accused turned off the light. Only he could have turned off the light as only he and Miss Bush were in the room at the time and as has been found, Miss Bush could not turn off the light. There was nothing to steal as should have been apparent to him on entering the room. If, however, he thought that there might be something to steal, he could not have thought he would find it by turning off the light. That cannot then have been his intention. He inflicted no harm on Miss Bush. Had that been his intention the benefit of a light rather than the dark might better have served his purpose. In any event there is not a scrap of evidence from

which to infer an intention to cause harm. He cannot have entered to use the toilet as he told the police he had just relieved himself by a truck outside. Further had he intended to use the toilet, it is to be expected he would keep the light on to see what he was about. It has been suggested by Mr. Hampson that the accused may be a pervert who will expose himself to another or even engage in self abuse in the presence of another. There is, of course, no evidence that the accused is that kind of person but even if there was some such evidence the act of turning off the light does not accord with such behaviour as it is an act that hides when the circumstances demand an act that spotlights. On the other hand, the turning off of the light is in keeping with an intention to have sexual intercourse and his knowledge that Miss Bush is retarded discloses on his part an intention "willy nilly" to have sexual intercourse with her. For as to his knowledge she cannot give consent to the act of sexual intercourse it is obvious that to him her consent is not a pre-requisite to the act. To my mind an intention to rape is established by the Crown. And that intention existed at the time of the entry, whether or not the accused was beckoned by Miss Bush and explains why he denied at his interview with the police that he had entered Miss Bush's room.

When Mrs. Kelly found the accused in Miss Bush's room, his back was towards her, and in her words he :

"was doing something to the front of his pants"

Tests taken of Miss Bush and the accused after the incident showed no signs of sexual intercourse. Of course it is something remarkable that at that moment he should be doing something to the front of his pants as I, in fact, believe he was, but as it is not known what he was doing it would be idle to speculate. Likewise the absence of any signs of intercourse is not helpful one way or the other as in this case it is not alleged that there was sexual intercourse. The allegation is that there was an intention to rape. The evidence therefore neither supports the finding of an intention to rape nor does it detract from that finding.

Is there evidence that puts in question the finding that he entered the room with intent to rape? The only evidence that can

possibly fall into that category is the evidence that when he came out of the room he stayed at the scene until the police arrived and the evidence of Mrs. Kelly that at the scene he made certain statements. In that latter regard three statements made by him are reported by Mrs. Kelly. One is that when she first screamed on finding a man in Miss Bush's building he said:

"Tweetsie don't do this to me. It's not what you think." Outside the room when she said she would call the police she reports him as saying:

"Don't call the police."

On departing from the scene in the custody of the police Mrs. Kelly quotes him as saying:

"Carolyn had called him to lock her door".

For the reasons given for finding an intention to rape neither the first nor the third of the statements cited casts doubt on that finding. The more so in the case of the first of those statements as he does not explain why it was that Mrs. Kelly should not think what he believed her to be thinking. As regards his request not to call the police that is capable of more than one interpretation. Accordingly to my mind his reported statements do not put in question the finding that he entered the room with intent to rape. What then of his action in remaining on the scene until the police arrived? The short answer to that question is that it was not to his advantage to do anything else. He had been caught in the room of Miss Bush and had been recognised by many. Articles of his, namely, his sun shades and the drink he had with him had been seen in the room by Mrs. Kelly, Mr. Kelly, Veneta Blair and Cindy Owens. To have left the scene before the Police arrived could only have further compromised him.

In the category of evidence on the record of which no account was taken in determining the intention of the accused are the following five extracts from the evidence:

1. Veneta Blair's statement that:

"She (i.e. Mrs. Kelly) told me Machado was trying to rape or assault Carolyn";

2. P.C. Myles' statement that he was told by Mrs. Kelly that:

"As she (i.e. Mrs. Kelly) got it (i.e. the door)

released she saw the accused pulling up his pants";

3. Mr. Kelly's statement that he was told by Mrs. Kelly that:

"Machado was in the room. When I (i.e. Mrs. Kelly) get there he was pulling up his pants.";

4. P.C. Myles' statement that Mrs. Kelly told him in the presence of the accused that:
 "When she (Mrs. Kelly) was about 5' from the room she heard a shout."

5. Veneta Blair's statement in explanation of her evidence that she told the accused she did not want to see him when shortly before she heard Mrs. Kelly shouting he had come to her house wanting to speak with her. That statement was:

"I did not want to talk to him in a friendly way. By friendly way I mean looking for a woman or girl friend."

The common features of the first three of those extracts are that they are statements reportedly made by Mrs. Kelly and they have a sexual content. Whilst I have no doubt that the statements were made as I do not question the integrity of the witnesses, I have not taken them into account in determining this matter as there is no evidence from Mrs. Kelly that she made those statements. Her evidence is at a more restrained level. Namely that the accused was doing something to the front of his pants. That restraint does not lead me to question her veracity. Rather it enhances my respect for her integrity as a witness. The position, I think, is simply this. At the time of the incident, Mrs. Kelly in the excitement of the moment, made statements more highly pitched than on mature reflection she considers to be warranted by what she saw. She has made no attempt to take advantage of her position to mislead the Court. Instead she exercised restraint to present as accurate a picture as she can. The fourth extract also shares the first common feature of the first three, but has no sexual content. P.C. Myles' evidence is that the statement was not recorded when it was purportedly made. It was recorded, he said, when he had returned to West Bay Police Station later that night. That is a circumstance which could result in error and an error, I think, resulted. For I believe Mrs. Kelly that there was no noise whether a shout or otherwise that night from Miss Bush's room. I do not on that account consider P.C. Myles an unreliable witness. His error

is, I think, the product of a misunderstanding of what he had heard that night. Veneta Blair's explanatory statement is based on an impression she appears to have formed. For that very reason it would have to be most carefully considered as the impression formed of the accused might be quite wrong. Further, if even Veneta Blair correctly thought that the accused was attempting to "chat her up" to infer that on being rebuffed by her he would immediately go in search of another woman is wildly speculative. For those reasons I declined to make use of Veneta Blair's explanatory statement in determining the intention of the accused on entering the house of Miss Bush.

In the result I am satisfied for the foregoing reasons that the Crown has established the charge laid beyond a reasonable doubt. To that standard it has proved that the accused entered the building of Miss Bush as a trespasser with intent to rape her. I therefore find him guilty as charged.

Denis J. Malone

Sir Denis Malone

30th November, 1990