

April 19, 2005  
Criminal

19/4/05

IN THE GRAND COURT OF THE CAYMAN ISLANDS

HOLDEN IN GEORGE TOWN, GRAND CAYMAN

IND. NO. 46 OF 2002

REGINA

- VS -

SANDY BUSH

\*\*\*\*\*

RULING delivered by THE HONOURABLE  
JUSTICE HENDERSON on the 19th  
day of April 2005, George Town, Grand Cayman.

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CHARGES: ATTEMPTED RAPE, INDECENT ASSAULT,  
ASSAULT OCCASIONING ACTUAL BODILY HARM

APPEARANCES:

For the CROWN: MR. A. ROBERTS

For the DEFENDANT: MR. J. AUSTIN-SMITH

## (RULING BY THE COURT)

1 THE COURT: The defendant, Sandy Anthony  
2 Bush, answers to an indictment containing three  
3 counts. The first is a count of attempted  
4 rape, the second a count of indecent assault,  
5 the third a charge of assault occasioning  
6 actual bodily harm.

7 The three counts refer to a single  
8 incident in which Mr. Bush is said to have  
9 sexually assaulted his then wife Jewel Eleanor  
10 Bush. At the time of the alleged offences, the  
11 parties were living separate and apart and  
12 divorce proceedings had been commenced. There  
13 was, however, no decree of dissolution in  
14 effect, so they remained lawfully married.

15 On this submission of no case to answer on  
16 counts one and two, Mr. Austin-Smith argues  
17 that the traditional view held by the common  
18 law; that a husband cannot commit rape upon his  
19 wife, is still the law today in the Cayman  
20 Islands. It is therefore argued that Mr. Bush  
21 cannot be convicted of the first two counts.

22 We are fortunate to have a very thorough  
23 and authoritative decision on the subject from  
24 the United Kingdom in *Regina v R*, a decision of  
25 the House of Lords reported at [1992] 1 A.C.

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1           599 (H.L.) Lord Keith gave judgment for the  
2           Court. He was there addressing the very same  
3           issue in circumstances where the defendant  
4           husband and his wife were living separate and  
5           apart but not yet divorced.

6           His Lordship began by pointing out that  
7           what may be called the "traditional view" on  
8           this question derives from *History of the Pleas*  
9           *of the Crown* by Sir Matthew Hale, published in  
10          1736. That very learned jurist wrote there:

11  
12           "But the husband cannot be guilty of  
13           a rape committed by himself upon his  
14           lawful wife, for by their mutual  
15           matrimonial consent and contract the  
16           wife hath given up herself in this  
17           kind unto her husband which she  
18           cannot retract."

19  
20          That passage represents the opinion of the  
21          learned author, but one that was at that time,  
22          and for some 150 years subsequently,  
23          unsupported by judicial authority.

24          Lord Keith said at page 616:

25

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1 "It may be taken that the proposition  
2 was generally regarded as an accurate  
3 statement of the common law of  
4 England. The common law is, however,  
5 capable of evolving in the light of  
6 changing social, economic and  
7 cultural developments. Hale's  
8 proposition reflected the state of  
9 affairs in these respects at the time  
10 it was enunciated. Since then the  
11 status of women, and particularly of  
12 married women, has changed out of all  
13 recognition in various ways which are  
14 very familiar and upon which it is  
15 unnecessary to go into detail. Apart  
16 from property matters and the  
17 availability of matrimonial remedies,  
18 one of the most important changes is  
19 that marriage is in modern times  
20 regarded as a partnership of equals,  
21 and no longer one in which the wife  
22 must be the subservient chattel of  
23 the husband. Hale's proposition  
24 involves that by marriage the wife  
25 gives her irrevocable consent to

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1           sexual intercourse by her husband in  
2           all circumstances and irrespective of  
3           the state of her health or how she  
4           happens to be feeling at the time.

5           In modern time any reasonable person  
6           must regard that conception as quite  
7           unacceptable."

8  
9           That passage, which undoubtedly  
10          represented the universal opinion held in the  
11          United Kingdom in 1992, is equally applicable  
12          to the Cayman Islands in the year 2005.

13          The Court went on to consider exhaustively  
14          all of the reported decisions on the question.  
15          In a number of these decisions the proposition  
16          was accepted that, although there is an implied  
17          consent to sexual intercourse given by a wife  
18          upon marriage, the implied consent can be  
19          revoked by circumstances where the parties are  
20          living separate and apart or have obtained a  
21          decree of judicial separation from a Court.  
22          Courts have found that the implied consent  
23          alluded to by Sir Matthew Hale had been revoked  
24          and a husband could indeed commit rape upon his  
25          wife.

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1           The Court, after reviewing these various  
2 authorities, said this at page 621:

3  
4           "The position then is that that part  
5 of Hale's proposition which asserts  
6 that a wife cannot retract the  
7 consent to sexual intercourse which  
8 she gives on marriage has been  
9 departed from in a series of decided  
10 cases. On grounds of principle,  
11 there is no good reason why the whole  
12 proposition should not be held  
13 inapplicable in modern times."

14  
15           At that juncture, Lord Keith addressed a  
16 particular argument having to do with the word  
17 "unlawful" which was found in the statutory  
18 definition of rape in effect at that time. The  
19 argument, which appears to have been accepted  
20 in some of the previous authorities, is that  
21 the word "unlawful" is intended to mean  
22 "outside the bonds of marriage"; in other  
23 words, the presence of the word "unlawful" in  
24 the statute, so it was argued, signals that a  
25 husband cannot be guilty of the rape of his

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1 wife. That argument was rejected unanimously  
2 by the House of Lords with these words:

3  
4 "The fact is that it is clearly  
5 unlawful to have sexual intercourse  
6 with any women without her consent,  
7 and that the use of the word in the  
8 subsection adds nothing. In my  
9 opinion, there are no rational  
10 grounds for putting the suggested  
11 gloss on the word and it should be  
12 treated as being mere surplusage in  
13 this enactment, as it clearly fell to  
14 be in those referred to by Lord  
15 Justice Donovan."

16  
17 That latter reference is to a number of  
18 other statutory definitions of crimes which  
19 include the word "unlawfully". In at least  
20 some of those, the word adds no real meaning.  
21 For example, the traditional definition of  
22 carnal knowledge with a girl under the age of  
23 12 found in the Penal Code (1995 revision) is  
24 this:

25

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1 "Whoever unlawfully and carnally  
2 knows any girl under the age of 12  
3 years is guilty of an offence."  
4

5 What would be gained or lost if the word  
6 "unlawfully" were removed from that definition?  
7 I say nothing. There are no circumstances  
8 known to the law in which it is permissible to  
9 have carnal knowledge with a girl under the age  
10 of 12. It was examples of this sort that Lord  
11 Justice Donovan had in mind.

12 In the Cayman Islands, the statutory  
13 definition of "rape" has always included the  
14 word "unlawfully".

15 Mr. Austin-Smith's argument is constructed  
16 around the fact that in 1998 the Legislature  
17 here took the opportunity to review and revise  
18 the statutory definition of the crime of rape.  
19 Its purpose in doing so appears to have been to  
20 provide expressly for the case of homosexual  
21 rape. However, in formulating a new definition  
22 of the crime, the word "unlawful" was retained.  
23 The Penal Code Amendment Law (1998), repeals  
24 the former definition (found at section 125 of  
25 the Penal Code) and substitutes for it the

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1 following:

2 " (1) A man who rapes a woman or  
3 another man commits an offence.  
4 (2) A man commits rape if (a) he has  
5 unlawful sexual intercourse, whether  
6 vaginal or anal, with another person  
7 who at the time of intercourse did  
8 not consent to it; and,  
9 (b) at the time he knows that the  
10 other person does not consent to the  
11 intercourse, or he is reckless as to  
12 whether the other person consents to  
13 it."

14  
15 Thus, the Legislature, which must be taken  
16 to have have been fully aware of the decision  
17 of the House of Lords in *R*, chose to retain the  
18 word "unlawful".

19 Mr. Austin-Smith argues that that signals  
20 an intention on the part of the Cayman Islands  
21 Legislature that the traditional view of  
22 Sir Matthew Hale should continue to inform and  
23 govern the law of rape in this jurisdiction.

24 The defendant also points to the fact that  
25 in the United Kingdom in 1994 the statutory

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1 definition of "rape" was amended. The word  
2 "unlawful" was removed.

3 The editor of Archbold, 2003 edition,  
4 expresses the following opinion at paragraph  
5 20-4:

6  
7 "The omission of the word unlawful  
8 makes clear Parliament's adoption of  
9 the decision of the House of Lords in  
10 *R v R*, 1992 AC 599, that a man may  
11 rape his wife."

12  
13 Again, at paragraph 20-23, the learned  
14 editor says:

15  
16 "A man may be convicted of raping his  
17 wife: *R v R*, 1992, 1 AC 599 House of  
18 Lords (confirmed by the revised  
19 definition of rape introduced by the  
20 Criminal Justice and Public Order Act  
21 1994)."

22  
23 I respectfully disagree with the learned  
24 author's opinion. In my view, the word  
25 "unlawful" found in this context is, as the

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1 House of Lords clearly said, mere surplusage.  
2 It adds no meaning. For that reason, it was  
3 unnecessary for Parliament to remove the word  
4 in order to make clear that a husband may rape  
5 his wife.

6 The old definition of indecent assault, at  
7 least in this jurisdiction, included the word  
8 "unlawfully". The Penal Code (1995 revision),  
9 section 130 subsection (1) provides:

10

11 "Whoever unlawfully and indecently  
12 assaults any woman or girl is guilty  
13 of an offence."

14

15 In 1998, the Penal Code Amendment Law of  
16 that year changed that definition to the  
17 following:

18

19 "It is an offence for a person to  
20 make an indecent assault on a woman."

21

22 So, the word "unlawfully" was removed from  
23 the definition of indecent assault in 1998, but  
24 not from the definition of rape. What can be  
25 inferred from that? Following

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1 Mr. Austin-Smith's submission to its logical  
2 end, one would have to conclude that the  
3 intention of the Cayman Islands Legislature in  
4 1998 was to retain the traditional rule that a  
5 husband cannot rape his wife, but yet to change  
6 that traditional rule with respect to indecent  
7 assault and provide, through the revised  
8 definition, that a husband may commit an  
9 indecent assault upon the person of his wife.  
10 Why would the Legislature come to such a  
11 conclusion? In my view, there is no reasonable  
12 answer to that hypothetical question. I think  
13 the word "unlawfully" in the Penal Code  
14 Amendment Law, 1998 is indeed mere surplusage.  
15 The Legislature must be taken to have been  
16 aware of the decision in *R*, and to have  
17 accepted the House of Lords' view of the  
18 superfluity of that word.

19 In conclusion, I do not think it can be  
20 said, as a matter of statutory interpretation,  
21 that the Legislature in this jurisdiction has  
22 spoken on the question one way or the other.

23 I am not bound to follow a decision of the  
24 House of Lords. They are, of course, strongly  
25 persuasive. As I indicated earlier, the

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1           evolving social conditions and mores, of which  
2           the House of Lords took notice, and which led  
3           it to conclude as it did that a husband may  
4           commit rape upon his wife, are equally apparent  
5           in this jurisdiction. I see no reason in law  
6           or in principle not to follow the decision  
7           in R.

8           In my view, the law of the Cayman Islands  
9           today provides that a husband may commit rape  
10          upon his wife. That possibility is not  
11          excluded by the definition of "rape" found in  
12          the Penal Code.

13          All of what I have said is equally  
14          applicable to the offence of indecent assault.  
15          For the same reasons, it is my view that the  
16          law of the Cayman Islands today admits of the  
17          proposition that a husband may commit an  
18          indecent assault upon his wife.

19          For these reasons, the no case submission  
20          is dismissed.

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23  
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25