IN THE CAYMAN ISLANDS COURT OF APPEAL

HOLDEN AT GEORGE TOWN, GRAND CAYMAN

C.I.C.A. NO. 38 OF 1990

BEFORE: THE HONOURABLE MR. JUSTICE ZACCA, PRESIDENT
THE HONOURABLE MR. JUSTICE GEORGES, J.A.
THE HONOURABLE MR. JUSTICE HENRY, J.A.

ANTONIO MACHADO EBANKS VS. REGINA

MR. G. HAMPSON FOR APPLICANT

MR. R. SHEEHAN FOR THE CROWN.

MARCH 20, 22, AND NOVEMBER 26, 1991

ZACCA, P. :

On March 22, 1991 we allowed this appeal, quashed the conviction, set aside the sentence and directed that a verdict of acquittal be entered. We promised to put our reasons into writing. This we now do.

The appellant was convicted for the offence of burglary with intent to rape. Trial was by Judge alone. He was sentenced to one year imprisonment. From this conviction he has appealed.

The Crown's case was that on Thursday, 8th March, 1990 the appellant entered the dwelling house of Carolyn Bush as a trespasser with intent to rape her. Carolyn Bush is severely mentally handicapped and mute. She lived in a room on the premises of Berkley Kelly at West Bay in Grand Cayman. She is able to feed herself and put on her clothes but she is unable to walk. She is however able to crawl on the floor and pull herself up.

The Crown called several witnesses. One of these, Tweetsie Kelly stated that on the 8th March, 1990 she went to Carolyn Bush's room at about 8.00 p.m. to give her something

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to eat. There was a light in Carolyn's room. It is controlled by a cord which runs from the room to the wash room of Tweetsie Kelly which is in a separate building.

The bulb can also be slackened. Tweetsie Kelly left the room after Carolyn had finished eating. She intended to return. The light was on in the room. When Tweetsie Kelly left the room, Carolyn was on the floor by the bed. The door to the room was not completely closed.

Subsequently Kelly noticed that the light in Carolyn's room was off. She called to her but received no answer. She then went to the room, entered the room and saw the appellant by the toilet with his back to her. She stated that he was doing something to the front of his pants. She turned on the light and called out to the man saying: "What are you doing here ?" The appellant replied: "Tweetsie, don't do this to me. It's not what you think". She replied that she was going to call the police and the appellant asked her not to call the police. Carolyn Bush was at this time on the bed lying on her side wearing a duster which Tweetsie Kelly had given her before leaving the room.

A pair of sun glasses and a glass containing some form of drink was seen on the toilet seat. Appellant picked up the sun glasses and the glass and went outside.

Cindy Owens also gave evidence. She said that on the 8th March, 1990 at about 9.00 p.m. she heard a scream. She went to Carolyn Bush's room. She also saw a pair of sun shades and a glass on the toilet seat cover.

Berkley Kelly, the husband of Tweetsie Kelly also went to Carolyn Bush's room. He stated in evidence that he saw the appellant take up the sun shade and a glass from the top of the tank of the toilet and he thought that the seat cover was up. There was therefore contradictory evidence as to where the sun shades and glass containing the drink was seen and whether the toilet seat was up.

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Police Constable Myles received a report at about 10.15 p.m. and proceeded to Mr. Kelly's premises. In the presence of the appellant Tweetsie Kelly reported that she had heard a shout, ran to Carolyn Bush's room and saw the appellant pulling up his pants. It is to be observed that in her evidence Tweetsie Kelly did not state that she saw the appellant putting on his pants nor did she say that such a report was made by her to the police. This evidence was not taken into consideration by the trial Judge.

Police Sergeant MacArthur Bodden also gave evidence for the Crown. He stated that he received a report and went to Kelly's premises at about 10.20 p.m. On the morning of the 9th March, 1990 at about 2.15 a.m. he cautioned the accused and interviewed him by asking questions which were answered by the appellant. These were recorded in writing but the appellant refused to read or sign the interview. This interview was admitted in evidence by consent.

The significance of the interview is that the appellant denied entering Carolyn Bush's room. The appellant however told Sergeant Bodden that Carolyn Bush had beckoned to him whilst he was urinating by a truck. She was sitting on the floor inside the door.

Sergeant Bodden stated that one could stand in the doorway and see the toilet which was to the right of the room. In cross examination, Sergeant Bodden said that the report was one of rape, that initially the appellant was arrested for rape. Carolyn Bush was medically examined. Scrapings were taken from the appellant's fingernails. A sample taken of his saliva, anal and penis swabs taken, hair samples from the pubic area and hair from his head were also taken. All these samples were sent for analysis and tests returned negative. It was the opinion of Sergeant Bodden from his investigation that appellant appeared to have been urinating.

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The appellant did not give evidence or call any witnesses in his defence.

The learned Chief Justice found as a fact that the appellant did enter the room of Carolyn Bush and that the light which was on when Tweetsie Kelly left the room was subsequently turned off when the appellant entered the room. The learned Chief Justice then posed the question: "With what intention did he enter the room ?" In considering this question, the learned Chief Justice stated that in determining the intention of the appellant, he would not take into account the fact that the appellant had denied to the police in the interview that he had entered the room.

The learned Chief Justice referred to the case of Re Bramblevale Ltd. [1969] 2 A.E.R. 1062 where Lord Denning, M.R. said :

> " 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. "

In his findings the learned Chief Justice laid great stress on the fact that the accused had turned off the light. In determining intention, the learned Chief Justice approached the matter in this way. He first ruled out a number of intentions as a result of the light being turned off. In his judgment at page 10, he stated :

> " 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. "

In finally determining the intention of the appellant, the learned Chief Justice said at p. 10 of his judgment :

> " 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. "

Having found that an intention to rape was established by the Crown, the learned Chief Justice at page 10 went on to state :

> " 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.

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> "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. "

In his judgment at page 12, he also referred to evidence in which no account was taken in determining the intention of the appellant. These were :

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) get 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. "

It appears therefore that the learned Chief Justice determined the intention to rape mainly on the evidence that the appellant had turned off the light on entering the room of Carolyn Bush.

We are of the view that having regard to the evidence, a finding of an intention to rape was not the only reasonable inference to be drawn from the facts. Turning the light off by itself is not proof beyond a reasonable doubt that rape was intended. The learned Chief Justice regarded the evidence of "the appellant doing something to the front of his pants" as speculative. The appellant may very well have been urinating. The learned Chief Justice was therefore in error in holding that the offence was proved beyond a reasonable doubt.

It is for these reasons that we allowed the appeal.