

**BARBADOS:**

**[Unreported]**

**IN THE SUPREME COURT OF JUDICATURE  
COURT OF APPEAL**

**Criminal Appeal No: 26 of 1998**

**BETWEEN:**

**MARK LENMAN HOYTE**

**Appellant**

**AND**

**THE QUEEN**

**Respondent**

**Before: The Honourable Sir Denys Williams, Chief Justice, The Honourable Mr. Justice Errol Chase, and the Honourable Mr. Justice Colin Williams, Justices of Appeal.**

**2000: March, 10th & 13th & April, 6th.**

**Mr. L. Kissoon in association with Mr. M. Lashley for Appellant.**

**Mr. D. Taylor for Respondent.**

**DECISION**

On May 14, 1998 the appellant Mark Hoyte was convicted of the rape of Grace Hall and sentenced to imprisonment for 10 years.

The evidence of the complainant was that she, an unemployed woman, left her home in St. Joseph on the morning of August 19, 1997 and went to Bridgetown where she arrived at minutes to ten. The appellant came up to her as she walked towards the Nelson statue, told her that he had won the Lotto, that he had an old people's place at Waterford Bottom and that he had to catch a Bush Hall pick-up to get there. He offered her a job and she caught the pick-up with him. They got off by Combermere and walked until they came to a lonely place with trees and a white building where she began to pray to God. He came up to her, grabbed her hand tightly, carried her to the bushes, pushed her down on the ground where she fell on her back, held up her clothes, took off her panties and had sexual intercourse with her. All this time she was praying. She thought that if she fought back he would kill her and she told him not to kill her, that she had two children. When he was finished he got up and she was going with her bag when he unzipped it, took her purse from it and then left. She went to the white building, cried out for help and was told by a man who came outside to go to the lady inside. She went inside, complained to a lady that she had been raped and asked her to call the police. The police came and took her to a doctor who examined her. The complainant testified that she had in her purse an ATM card and over two hundred dollars, that she was going to the supermarket that day, that she was left without any money and that Welfare had to give her children food.

The complainant further testified that six days later she saw the appellant while she was going to the Hospital and shouted "that is the man that raped me". She got into a police car and was driven around the bus stand looking for him but not find him. Next day she was called to District A Police Station where she pointed out the appellant from among some men, and identified her ATM card and her purse.

When cross-examined, she denied that she had given her consent to sexual intercourse with the appellant.

A witness, Hazel Sealy, testified that she was a secretary at TND Rentals at Waterford and that on August 19 about 11 o'clock two of her co-workers came to her with a lady who looked scared, was crying, had her underwear in her hand and complained that she had been raped by a man whom she had seen in town, who had promised her a job, and whom she could recognise. This witness testified that she called the police emergency number and the police came eventually. She also testified that she knew of no Old People's Home up there, that if you don't know up there it is very lonely - just two houses - and there are lots of trees and bushes.

The Police gave evidence of oral statements and a written statement which they testified were made by the appellant:

first, when held on August 25 and told he could consult an attorney-at-law at any stage:

"I don't want none cause I ain't do nothing".

then, when told of the complainant's report and cautioned:

"I ain't rape nobody". and

then, when asked if he wanted to give a written statement concerning the matter and cautioned:

"Last week Tuesday I meet she in town and she tell me that she want a job and I tell she I got a job I can give she. We catch a mini van and we come down Waterford. We come right up in Waterfords and she tell me how far the place is. We walk and we come up and she tell me up there too far. So I hold she the same time and pull she in the bush and I take off she panties and I had sex with her. She get up and went long. I pull the bag and she pull back the bag and run and went long".

Objection to the admission in evidence of the written statement was heard in the presence of the jury at the request of counsel for the appellant and it was admitted as Exhibit D.

The police also testified that after he made the written statement he directed them to a cart road at Waterford, pointed to a bushy area on the right side and said:

"I rape she up in there and I give the purse to Yvonne in the Garden Land".

The police further testified that Yvonne Waithe, in the presence of the appellant, handed over a purse to them and said that she had seen him in town with the purse, had asked him for it and had been told by him that she could have it because he got it from the dump at work. According to the police, the appellant said, under caution, that he gave her the purse.

The police also testified that after the appellant made the statement: "I ain't rape nobody" he was searched and a wallet was found on him which contained a Royal Bank of Canada ATM Card bearing the complainant's name. According to the police the appellant, when asked to account for it being in his possession and cautioned, said "she gave me that after we had sex last Tuesday".

The record shows that the complainant identified the purse and the ATM as hers in the presence of the appellant.

The appellant, when informed of his rights, made the following unsworn statement:-

"Live at Westbury Road, St. Michael. I am a gardener. On 19th August I met Grace Hill by Nelson and I talk to her. I did know her for about a year. So we accustom meeting on Tuesdays. On that Tuesday I meet she and she told me let we go up to Waterford Plantation. I told her that I going in at Collins to come back. When I get back she ask me what I went for, I tell she I went for a rubber. We walk up by the Cathedral Road, get a ZR van and went up to Waterford Plantation. She pay the bus fare out of \$20 and we get off by the Stadium Road and we walk and went long by Combermere School up to Waterfords Plantation we sit down up underneath a tree. She ask me is I ain't ready yet. I tell her well when I ready I will let she know. She had two drinks in her bag and she gave me one and she had one. I start pulling at her, I start playing with her breast and she told me she ain't ready yet. I kiss her, put my tongue in her mouth and so forth. I start sucking her ears and so forth. Then she lay down and she take off her panties. I take out the rubber and she told me that she don't like no rubbers. I take off my pants and then I lay down on her, take out my penis and we start having fun from there.

We last about fifteen minutes and then I get up and she give me some napkins and I start wiping off and she start to wipe off. Then I see she did acting strange, then she told me that her boyfriend gave her \$200. Then she ask me if I had anything for her. I told her that she in tell me that she want anything. I ask she if she think that I win the Lotto. She said that her boyfriend gave her \$200 and what would I give her. Me and she walk down to the gap and she start quarreling and tell me go my way, I will go ahead and I went long and leave her. On the 25th August I went to town by the bus terminal and see her and she said "I gine send the police for you". I said "I in do anything". And I walk and went long. That is all."

## The Grounds of Appeal

The grounds of appeal are that the learned trial judge:-

1. misdirected the jury and erred in law in that

(1A) he failed to direct the jury adequately on the ingredients of the law of rape;

(1B) he failed to direct the jury in accordance with section 24(1) of the Sexual Offences Act Cap. 154;

(1C) he failed to define the offence of rape in accordance with section 3(1) of the Sexual Offences Act Cap. 154;

2. inadequately directed the jury on the ingredient of consent;

3. failed to put the defence of the appellant adequately to the jury and marshalled the evidence in favour of the prosecution; and

5. gave to the jury a confused direction as to the verdict they could reach.

The complaint is also made that the verdict of the jury is unsafe and unsatisfactory.

The statutory provisions

Section 3(1) and (2) of the Sexual Offences Act defines rape:-

"3(1) Any person who has sexual intercourse with another person without the consent of the other person and who knows that the other person does not consent to the intercourse or is reckless as to whether the other person consents to the intercourse is guilty of the offence of rape and is liable on conviction on indictment to imprisonment for life.

(2) For the purposes of subsection (1), no consent is obtained where the complainant submits or does not resist by reason of

(a) the application of force to the complainant or to a person other than the complainant;

(b) threats or fear of the application of force to the complainant or to a person other than the complainant;

(c) to (e) ....

(f) intimidation of any kind.

Section 24 enacts:-

"24(1) Where at a trial for an offence under this Act the jury has to consider whether a person believed that another was consenting to sexual intercourse or to any other sexual act, the judge shall direct the jury that the presence or absence of reasonable grounds for such a belief is a matter to which the jury is to have regard, in conjunction with any other relevant matters, in considering whether that person so believed.

(2) For the purposes of section 3, a person who does not offer actual physical resistance to sexual intercourse, shall not, by that fact alone, be regarded as consenting to the sexual intercourse".

Section 3(2) (c) to (e) are not pertinent to the facts of this case and section 28, which relates to corroboration, and section 29 which relates to recent complaint, do not arise for consideration because no specific complaint is made as to the manner in which the judge dealt with those questions.

How the trial judge defined rape

The judge defined rape in the following terms (p.1 of the record):

"...rape is the unlawful sexual intercourse with a woman without her consent by force, fear or fraud".

He went on to comment:

"So you don't have to find torn panties nor scratches nor bruises. Further, it does not matter how long or how short it lasts. The slightest penetration of the vagina without the woman's consent is sufficient".

Grounds 1 and 2 constitute the main grounds of appeal. Complaint is made that the learned judge failed to define rape in accordance with its statutory definition. The Sexual Offences Act which came into operation on February 13, 1992 was an Act to revise and reform the law relating to sexual crimes. It created the statutory offence of rape and trial judges should now use the statutory definition in their directions to juries.

One of the issues is as to the consequences of a direction in which the common law definition of rape is given to the jury. We have derived much assistance from the judgment of the Court of Appeal of England, Criminal Division, in *R v Olugboza* [1981] 3 All E.R. 443. In England the offence of rape was defined for the first time by statute in 1976, section 1(1) of the Sexual Offences (Amendment) Act 1976 amending section 1 of the Sexual Offences Act 1956 by the following provision.

"For the purposes of section 1 of the Sexual Offences Act 1956 (which relates to rape) a man commits rape if (a) he has unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it; and (b) at that time he knows that she does not consent to the intercourse or he is reckless as to whether she consents to it, and references to rape in other enactments (including the following provisions of this Act) shall be construed accordingly".

This definition made no mention of force, fear or fraud. Dunn L.J. giving the judgment of the Court in *R v Olugboza* said (at pp.446 et seq.):

"The 1976 Act by its long title is described as 'An Act to amend the law relating to rape.' Is it a true amending Act or is it merely declaratory of the common law? To answer that question it is necessary to look at the history of the legislation.

*Director of Public Prosecutions v Morgan* [1975] 2 All ER 347 stated the law of rape as it then stood. Their Lordships were primarily concerned with the necessary mens rea of the offence. They were not concerned with, nor did they consider, the actus reus. But there is a passage in the speech of Lord Hailsham which appears to indicate that he was accepting the common law definition of rape, that is to say sexual intercourse by force, fear or fraud (see [1975] 2 All ER 347 at 348).

Following the decision in *Morgan* an advisory group on the law of rape was set up under Heilbrunn J. The group reported to the Home Secretary on 14th November 1975. Like the House of Lords they were principally concerned in the material part of the report with the mens rea of the offence. However in a section headed 'The Crime of Rape' there appear the following paragraphs:

'18. There is no modern definition of the crime of rape and although it is an offence under s.1 of the Sexual Offences Act 1956, the statute

contains no attempt at a definition. The traditional common law definition, derived from a 17th Century writer (1 Hale 627 ff. 1 East PC 434) and still in use, is that rape consists in having unlawful sexual intercourse with a woman without her consent, by force, fear or fraud.

19. This definition can be misleading, since the essence of the crime consists in having sexual intercourse with a woman without her consent and it is, therefore, rape to have intercourse with a woman who is asleep or with one who unwillingly submits without a struggle.

20. As Smith and Hogan points out in their text book on the Criminal Law (3rd Edn; 1973, p 326): "Earlier authorities emphasised the use of force, but it is now clear that lack of consent is the crux of the matter and this may exist though no force is used. The test is not 'was the act against her will?' but 'was it without her consent'"

21. It is, therefore wrong to assume that the woman must show signs of injury or that she must always physically resist before there can be a conviction for rape. We have found this erroneous assumption held by some and therefore hope that our recommendations will go some way to dispel it.

22. The actus reus in rape which the prosecution must establish for a conviction consists of (a) unlawful sexual intercourse and (b) absence of the woman's consent.'

Paragraph 84 of the report is in these terms:

"Finally, as rape is a crime which is still without statutory definition, the lack of which has caused certain difficulties, we think that this legislation should contain a comprehensive definition of the offence which would emphasise that lack of consent (and not violence) is the crux of the matter.

That paragraph was incorporated into a recommendation for what was described as 'declaratory legislation'.

In its working paper on sexual offences of October, 1980, the Criminal Law Revision Committee, under the heading "Consent in Rape" stated:

"20. Until the second half of the nineteenth century, the courts seem to have had no problems about what amounted to consent. If a woman was made by the use of force to have sexual intercourse or submitted in fear or under a threat of force, she was adjudged to have been raped. She had not consented to the intercourse. This is still the law and, in our opinion, should continue to be the law. In the ordinary case of rape there has been force or the threat of force. Where sexual intercourse is procured by fraud, there is under section 3 of the Act of 1956 a special offence which we propose should continue. The judges and Parliament have intervened, in a few situations, to interpret the notion of absence of consent so as to extend the law of rape to what are basically cases of fraud. In paragraphs 21 to 25 we consider whether the law in this respect shall be altered ...."

These paragraphs indicate that the committee were of the opinion that under the law as it now stands consent may not only be vitiated by force or threats of force but that inducing sexual intercourse by fraud or threats (other than threats of force) or other intimidation may be sufficient to negative consent and constitute rape.

We have not been persuaded by counsel for the appellant that the position at common law before 1976 was different from that stated in the report of the advisory group, but whatever it may have been we think that Parliament must have accepted the group's recommendation in para 84 of their report and incorporated it in the 1976 Act. Accordingly in so far as the actus reus is concerned, the question now is simply: at the time of the sexual intercourse did the woman consent to it? It is not necessary for the prosecution to prove that what might otherwise appear to have been consent was in reality merely submission induced by force, fear or fraud although one or more of these factors will no doubt be present in the majority of cases of rape.

We do not agree, as was suggested by counsel for the appellant, that once this is fully realised there will be a large increase in prosecutions for rape. Nor, on the other hand, do we agree with the submission of counsel for the Crown that it is sufficient for a trial judge merely to leave the issue of consent to a jury in a similar way to that in which the issue of dishonesty is left in trials for offences under the Theft Act 1968. In such cases it is sufficient to direct the jury that "dishonest" is an easily understood English word and it is for them to say whether a particular transaction is properly so described or not. Although "consent" is an equally common word, it covers a wide range of states of mind in the context of intercourse between a man and a woman, ranging from actual desire on the one hand to reluctant acquiescence on the other. We do not think that the issue of consent should be left to the jury without some further direction. What this should be will depend on the circumstances of each case. The jury will have been reminded of the burden and standard of proof required to establish each ingredient, including lack of consent, of the offence. They should be directed that consent, or the absence of it, is to be given its ordinary meaning and if need be, by way of example, that there is a difference between consent and submission; every consent involves a submission but it by no means follows that a mere submission involves consent. see *R v Day* 173 ER 1026 at 1027 per Coleridge J. In the majority of cases, where the allegation is that the intercourse was had by force or fear of force, such a direction coupled with specific references to and comments on the evidence relevance to the absence of real consent will clearly suffice. In the less common type of case where intercourse takes place after threats not involving violence or fear of it ... we think that an appropriate direction to the jury will have to be fuller. They should be directed to concentrate on the state of mind of the victim immediately before the act of sexual intercourse, having regard to all the relevant circumstances, and in particular the events leading up to the act, and her reaction to them showing their impact on her mind. Apparent acquiescence after penetration does not necessarily involve consent, which must have occurred before the act take place. In addition to the general direction about consent which we have outlined, the jury will probably be helped in such cases by being reminded that in this context consent does comprehend the wide spectrum of states of mind to which we earlier referred, and that the dividing line in such circumstances between real consent on the one hand and mere submission may not be easy to draw. Where it is to be drawn in a given case is for the jury to decide, applying their combined good sense, experience and knowledge of human nature and modern behaviour to all the relevant facts of the case".

Turning to the local scene rape was a common law offence until February 13, 1992 when the Sexual Offences Act came into operation and section 3 made it a statutory offence. This Act was, according to its long title, an Act to revise and reform the law relating to sexual crimes and it does effect changes in the law relating to rape.

One change is the provision in subsection (3) of section 6 that for the purposes of the section "rape" includes the introduction to any extent, in circumstances where the introduction of the penis of a person into the vagina of another would be rape, (a) of the penis of a person into the anus or mouth of another person or (b) an object, not being part of the human body, manipulated by a persons into the vagina or anus of another. So that the Act enlarges the category of potential rapists as well as the category of potential victims. A woman as well as a man can now commit rape and a man as well as a woman can now be a victim of rape.

Another change is that there is in the statutory definition no mention of the words "by force, fear or fraud". Conscious that the revision and reform of the law relating to sexual crimes would have taken account of the changes made in other Commonwealth jurisdictions and taking into account the quotations above from the judgment in the Olugboza case, our view is that in the new statutory definition of rape the actus reus which the prosecution must establish for a conviction consists of (a) sexual intercourse that is unlawful in terms of section 3 and (b) absence of the person's consent. In other words so far as the actus reus is concerned, the question is simply: at the time of the unlawful sexual intercourse, did the person consent to it?

#### Mens rea

The Judges in the Olugboza case did not think that the issue of consent should be left to the jury without some further direction and that what this should be will depend on the circumstances of each case. They thought that the jury should be directed that consent is to be given its ordinary meaning and be told, if need be, that there is a difference between consent and submission. In the majority of cases, they said, where the allegation is that the intercourse was had by force or fear of force, such a direction coupled with specific references to and comments on the evidence relevant to the absence of real consent will be enough.

In this case there was no direction that consent should be given its ordinary meaning or that there a difference between consent and submission. But in assessing the effect of alleged deficiencies in the directions regard must be had to all the circumstances.

The appellant in his unsworn statement said that he had known the complainant for about a year and they used to meet on Tuesdays. He went on to tell of their going to Waterford on the material date and having consensual sex. The learned judge told the jury (at p.14 of the record) that if they believed what he said, they must find him not guilty; and that if they were left in reasonable doubt, they must likewise find him not guilty.

The complainant's evidence was that she had not known the appellant before, that August 19 was the first time she had seen him. She denied that they used to meet on Tuesdays. Her story, therefore, was that they were strangers and in the context of a woman being sexually assaulted by a complete stranger, it would seem to us that a jury would know what is meant by consent without the need to be told that it is to be given its ordinary meaning. It is our further opinion that in the ordinary case of a woman who complains of rape by a stranger who, she says, put her in fear, it is unnecessary to give directions on the fine distinctions between consent and submission.

In the Olugboza case the complainant was one of four persons, two young men and two female teenagers, who had been dancing at a discotheque and who afterwards went by car to a bungalow. The complainant went to the lavatory and returned from there to find one of the young men dragging the other girl into the bedroom. The appellant switched the sitting room lights off and told the complainant that he was going to fuck her. She told him that Lawall, the other young man, had had her in the car and asked why could the appellant not leave her alone. He told her to take her trousers off and she did. She said she was frightened. She was crying and the room was in darkness. The appellant pushed her on the settee and had intercourse with her. She did not struggle, she made no resistance, she did not scream or cry for help. She said that she told him she was going to call the police and he replied that if she opened her big mouth he would not take her home. He later took her home where she complained to her mother about what Lawall had done to her in the car but not about the appellant. After her complaint to her mother about Lawall, she saw the police and a doctor with whom she spent a total of eight hours. During that time she made no complaint against the appellant; indeed she said that he had not touched her. It was against this evidential background that the question arose as to whether she had consented or had submitted out of fear or constraint or duress.

In the present case the evidence of the complainant and the appellant were diametrically opposed. She told of submission out of fear that he would kill her if she fought back. He spoke of her lying down and taking off her panties, of her telling him that she don't like rubbers and of her giving him some napkins afterwards to wipe himself. No question arose as to his believing that she was consenting to sexual intercourse. His defence was that she did in fact consent and the trial judge told the jury that if they accepted his story, they should acquit and that they should likewise acquit if his story left them in reasonable doubt.

Section 24(2) of the Act enacts that for the purposes of section 3, a person who does not offer actual physical resistance to sexual intercourse, shall not by that fact alone, be regarded as consenting to the sexual intercourse.

This was an exceptionally strong case against the appellant. The complainant may not have physically resisted - she testified that she thought that, if she did, he would kill her - but immediately afterwards she raised the alarm and the secretary at the business place nearby told the jury of her condition when she made the complaint, crying, looking scared and with her underwear in her hand. The police testified that he confessed to the crime and that they traced the purse which the complainant said the appellant had taken from her back to the appellant.

There is no merit in the grounds that the judge failed to put the defence adequately, that the verdict of the jury was unsafe or unsatisfactory or that the jury was given a confused direction as to the verdict they could reach.

The appeal is dismissed and the conviction and sentence are affirmed, the sentence to run from June 27, 1998.

Chief Justice.

Justice of Appeal. Justice of Appeal.

