BARBADOS
[Unreported]

IN THE SUPREME COURT OF JUDICATURE
HIGH COURT

CRIMINAL DIVISION

No. 152 of 2011

BETWEEN:

THE QUEEN

V

DINERO ROHILAH ROBERTS

BEFORE: The Hon. Madam Justice Margaret Reifer, Judge of the High Court

2011: September 12; October 4; November 15 & 22
2012: March 16
2013: January 9 & 11

Mr. Lancelot Applewhaite for Crown
Mr. Steve Gollop, Attorney at law for the Accused

DECISION

[1] This is the ruling being delivered at the conclusion of a Newton Hearing held in the matter of the Q v Dinero Roberts.

[2] Dinero Roberts was charged with rape, contrary to section 3(1) of the Sexual Offences Act, Chapter 154.

[3] The particulars to be found on his Indictment No. 152 of 2011 are that on the 9th day of April 2011, in the parish of St. John in this island, he had sexual intercourse with the Virtual Complainant without her consent knowing that she did not consent or being reckless as to whether she so consented.

[4] Those are the facts contained in the witness statements; those are the facts forming the basis of the evidence of the Virtual Complainant in the Newton hearing; and at all times that remained the basis on which the Crown was asking the Court to pass sentence on this Defendant.

[5] This chronology of events is also relevant.

[6] On the 12th day of September 2011 this matter was called in this Court by the Director of Public Prosecutions acting in association with Mr. Anthony Blackman. He indicated to this court that the then Accused was desirous of pleading guilty to the charge on this indictment. The charge was read to the Accused and he pleaded Guilty.

[7] When questioned by this Judge, the then Accused indicated that he was represented by counsel and the court adjourned the matter to enable his counsel to be present.

[8] The matter was next brought up on 4th October, 2011 when appearances were made by Mr. Blackman for the Crown and counsel Mr. Gollop for the then accused man indicated to the Court "that the Guilty Plea still stands", but the parties could not agree on the facts.

[9] The matter was adjourned with the consent of all parties to afford counsel for the Crown and counsel for Dinero Roberts an opportunity to agree the facts in this matter. The Allocutus was put to the Accused and a Pre-Sentencing Report ordered in the meantime.

[10] The matter was next called on the 15th November, 2011 and an appearance was made by counsel Mr. Applewhaite for the Crown. The parties were unable to agree on the facts and this court subsequently fixed March 15th, 2012 for the conduct of a Newton hearing in this matter.

THE LAW

[11] The law is quite clear that where there are conflicting versions of the facts and/circumstances of the offence that the judge should hear the evidence on one side and another and come to a conclusion: **see R v Newton, 77 Cr. App. R.13**; **Archbold 2011 at 5-72 to 5-75; Commonwealth Caribbean Criminal Practice and Procedure 3rd ed page 323.**

[12] The conflict here is as fundamental as it can be, the now convicted man is saying paradoxically that there was a rape, yet he is submitting that the parties had consensual sex. This is in direct conflict with the prosecution case and an attempt was made to resolve this by a Newton hearing.

[13] In a Newton hearing relevant evidence is called by the prosecution and the defence. Implicit in this exercise, is for "the Judge to hear the evidence of one side and another" and have that evidence tested by cross-examination: see Archbold above at 5 – 19.

[14] This matter proved particularly challenging because the only evidence advanced by the defence was the unsworn statement of the now convicted man, untested in cross-examination. No other witnesses were called by the defence to bolster this evidence.

[15] Rape, as we know, is a crime of consent, more specifically lack of consent. Consent is a defence to this charge: **see Jippy Doyle v R. Criminal Appeal No. 22 of 2008.**

[16] In **Jippy Doyle v Q. Williams JA** (as he then was) had this to say about sections 3, 4 and 5 of the Sexual Offences Act:

> "Section 3 provides that the statutory definition of rape is sexual intercourse by a person with another person without the consent of that other person and is punishable with life imprisonment. There is no reference to the age of the complainant. Section 4 outlines

what is referred to as “statutory rape” , that is, sexual intercourse by a person with another person who is under the age of 14. Under this Section, whether or not, that person consents is an offence punishable with life imprisonment. Section 5 provides that sexual intercourse by a person with another person aged between 14 and 16 is an offence punishable with imprisonment for ten years even where that person has given consent.

In summary, therefore, consent is a defence to a charge of rape under Section 3 of a person of any age…”

[17] A conviction under section 3(1) is a very serious one indeed, as it carries the penalty of imprisonment for life.

[18] The Virtual Complainant having been 14 years of age at the time, had the Crown been of the view that the evidence supported a finding of consensual sexual intercourse, it was within its judgement to charge this Defendant under section 5 of the Sexual Offences Act. This is a lesser offence; consent is NOT a constituent element of that offence. The upper limit of the penalty under section 5 is imprisonment for a term of 10 years.

[19] The Crown has steadfastly stood by its case.

[20] The Virtual Complainant gave good evidence in this case. She was tested in cross-examination and she stood up to that cross-examination.

[21] The Defendant gave an unsworn statement from the dock outlining circumstances of consensual sex. There was no evidential basis on which the Court could draw any inferences as suggested by counsel for the Defendant.

[22] This matter has posed a considerable challenge and I have carefully considered the two options open to this Court.

[23] In these particular circumstances, the evidence of the Newton Hearing did nothing to resolve this most basic of conflicts, in the result that it is the opinion of the Court that the Guilty Plea in this matter remains “equivocal”.

[24] In **Lewis v Commissioner of Police** a decision of the High Court of Justice of Grenada reported at **13 WIR 186,** after the facts had been stated by the prosecuting officer, the appellant gave his version of the facts which in effect amounted to a plea of Not Guilty, but the magistrate convicted him of his plea as entered. It was held that the explanation amounted to a plea of Not Guilty and the magistrate should have entered such a plea and proceeded to try the case. The Court found this to be wrong and the conviction was set aside and the case remitted for trial ‘de novo’.

[25] Despite the obvious differences between these two cases, it is my view that in spite of the Newton hearing, this court is in no better position than the magistrate in **Lewis v Commissioner of Police**. In other words the evidence, such as it was, in no way resolved this most fundamental of conflicts. The only basis on which this defendant can be sentenced is for Rape. Justice dictates that if he maintains a defence to that charge then he should be tried.

DISPOSAL

[26] In view of the foregoing, this Court vacates the earlier Guilty Plea and orders that this matter be tried at the earliest opportunity.

Margaret A. Reifer
Judge of the High Court