R versus John Matthews

The ruling which confirmed that vaginal rape of a transsexual woman may be prosecuted as rape

October 1996

This important and under-reported ruling confirmed that non-consentual penile penetration of the surgically-constructed vagina of a transsexual woman *can*, in law, be rape if the other ingredients of the offence are satisfied.

In this case, the defendant was acquitted, but an important precedent was set.

It allows the alleged assailant of a transsexual woman to be charged with the more serious offence of rape, rather than the lesser charge of sexual assault, which carries lighter penalties.

Reading Crown Court
RCC NO. T960397

Artillery House Tilehurst Road Reading, Berks

Monday, 28th October, 1996

Before: MR JUSTICE HOOPER

Regina -v- John Matthews

Counsels names not supplied

Ruling

Monday, 28th October, 1996

MR. JUSTICE HOOPER: I now give my reasons for the ruling which I made at the outset of the trial. Count One of the indictment charges the defendant with having raped “C” on the 25th of December 1995.

Count Two charges him with indecent assault on a male person, the particulars of the offence being that on the same day he indecently assaulted “C”, a male person.

The following admissions have been made:

“The complainant was born a biological male on the 18th of November 1958.

On the 24th of November 1994 the complainant underwent gender reassignment surgery, which surgery produced a well-constructed, cosmetically acceptable artificial vagina, to enable her to live in the female role.

There are anatomical differences between the artificial and natural vagina, namely:

1. The artificial vagina is made from colon, not from vaginal tissue.

2. Being made from colon, the artificial vagina is lined by columnar epithelium, whereas a natural vagina is lined by squamous epithelium.

3. During sexual arousal the lining of the natural vagina undergoes a sweating-like reaction, known as transudation, the result of which is the production of lubricating fluid. An artificial vagina may produce mucus from the glands in the columnar epithelium, but his is a different process from transudation.

4. The natural vagina terminates at the cervix at its inner end, whereas the artificial vagina has no cervix.

5. At or just within the opening of a natural vagina are the two openings of the Bartholin’s Glands (which produce a small quantity of a highly lubricious fluid); the artificial vagina does not have these openings.

6. A natural vagina opens on the vestibule of the vulva, between the labia minora. “C” does not have a labia minora.

7. A natural vagina has the physiological capacity for enormous expansion, such a during childbirth. An artificial vagina does not have this capacity.
   A natural vagina has a normal female clitoris which consists of some erodible tissue and is covered with sensitive glands and a hood of tissue. The artificial vagina has a clitoris constructed of penile tissue.”

As to the words in the second paragraph of those admissions, “in the female role”, counsel for the prosecution, Mr. Charles Byers, asked me to assume for the purposes of the ruling that the complainant had had the artificial vagina constructed to enable her to have sexual intercourse. I make that assumption in fact. That assumption was later supported by the evidence.

The authorities establish that “C” is, for legal purposes, a male in those circumstances. In those circumstances no submission is made about Count Two.

As to Count One, it is submitted by Mr. Peter Cooper, Queen’s Counsel for the defendant that, given the admitted facts, the defendant cannot as a matter of law be convicted of rape. He submits that the non-consentual penile penetration of the artificial vagina of a biological male cannot, in law, be rape.

Section 1 of the Sexual Offences Act 1956, as substituted by the Criminal Justice and Public Order Act 1994, provides as follows:

1. "It is an offence for a man to commit a rape; to rape a woman or another man.

2. A man commits rape if (a), he has sexual intercourse with a person, whether vaginal or anal, who C at the time of the intercourse does not consent to it, and (b) at the time he knows the person does not consent to the intercourse or is reckless as to whether that person consents to it."

Mr. Cooper submits first that penile penetration of the "vagina" of a biological male does not constitute "sexual intercourse" within the meaning of Section 1.

To resolve that issue it is necessary to examine the Sexual Offences Act as originally drafted and as amended by the Sexual Offences (Amendment) Act 1976. Section 1 of the 1956 Act provided:

"It is a felony for a man to rape a woman. Rape required vaginal penetration of a woman. Anal penetration could not constitute rape. See the Queen v. Gaston (1981) 73 Criminal Appeal Reports 164 (Court of Appeal).

Throughout the act there are references to sexual intercourse (for example, with a girl under 13 or with a defective.) Section 12(1) provided:

"It is a felony for a person to commit buggery with another person or with an animal.

Section 44, which remains unamended today, provides:

"Where on the trial of any offence under this act, it is necessary to prove sexual intercourse, whether natural or unnatural. It shall not be necessary to prove the completion of the intercourse by the emission of seed. That the intercourse shall be deemed complete upon proof of penetration only."

The word "natural" in that section was being used to describe heterosexual intercourse. The word "unnatural" to describe heterosexual and homosexual anal intercourse and bestiality. See Gaston at 167. Bestiality requires vaginal or anal intercourse with an animal or by an animal. See: R.v. Bourne (1952) 36 Criminal Appeal Reports 125. The 1976 Act defined the offence of rape. Included within the definition were to be found the words:

"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".

Section 7(2) of the 1970 Act provided:

"References to sexual intercourse shall be construed in accordance with Section 44 of the Sexual Offences Act 1956, so far as it relates to natural intercourse. (Under which such intercourse is deemed complete on proof of penetration only)".

By virtue of paragraph 35 (4) Schedule 10 of the Criminal Justice and Public Order Act 1994, these words "shall be omitted" from Section 7(2).

In my judgment there is no reason to limit the expression "sexual intercourse" in the way being submitted by Mr. Cooper. "Sexual intercourse" means penile penetration of the vagina or anus. The fact that the vagina might be that of a biological male does not prevent it from being "sexual intercourse".

He further submits that the words "vaginal intercourse" in Section 1 does not include penetration of a male's artificial vagina.

If a woman has a natural vagina which is anatomically irregular as a result of a birth defect, an operation or an accident, it would in my judgment be rape to penetrate it. (See S.v.S. (otherwise W) (No 2) [1962] All E.R. 55, at page 63).

If a woman had an artificial vagina constructed because of a birth defect or an accident, could it be rape to penetrate it? I have been referred to no authority directly on point.

In S.v.S, as Mr. Justice Ormerod said in Corbett v. Corbett, [1970] 2 All E.R 33, at 49:

"There are passages in the judgment which seemed to go as far as holding that a [woman], born without a vagina at all, could be capable of consummating a marriage by the construction of an entirely artificial one". In Corbett, Mr. Justice Ormerod said that "he was prepared to hold that" a person with a completely artificial vagina would be incapable of consummating a marriage.

In that case the respondent to a petition for a decree of nullity, was born a biological male who, like the complainant, had undergone gender reassignment surgery involving the construction of an artificial vagina. The decree was granted on the basis that the respondent was a male and, in any event, incapable of consummating the marriage because of the artificial vagina.

In my judgment, whether or not a woman with an artificial vagina can consummate a marriage is of little help in resolving the issue whether penetration of it would constitute rape. In my judgment, it could.

I turn then to the question whether penetration of a male's artificial vagina can constitute rape in the circumstances reflected by the admissions. Section 1 uses the word "person". The words "whether vaginal or anal" relate to the intercourse. Indeed, the section might more happily read:

"A man commits rape if (a) he has sexual intercourse (whether vaginal or anal) with a person".

[Passage omitted.]

Mr. Byers submits that the wording of the section is clear and that it includes penile penetration of a male, of a biological male's artificial vagina. I accept that submission, notwithstanding that during the use of the offence in rape, in those circumstances it was apparently not-a matter which was mentioned during the debates other than this amendment.

Furthermore, rape being the non-consensual penile penetration of either of the two intimate orifices, I see no reason why, as a matter of public policy, that the offence is not committed.

In conclusion, therefore, in my judgment, penile penetration of a male's biological artificial vagina can, in law, constitute rape. There is no dispute that, having resolved the matter in this way, I should direct the jury that, as a matter of law, the penile penetration of this complainant's vagina is rape if the other ingredients of the offence are satisfied.