JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS: 206 & 207/88

COR: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.

R. v. ERROL MUSSENDEN
MICHAEL KELLAR

Delroy Chuck for Kellar

Brian Clarke for Crown

10th October, 1990

CAREY, J.A.

In the Home Circuit Court on 24th October, 1988 before Courtenay Orr J, the applicant Mussenden was convicted on two counts of an indictment charging rape while Kellar was convicted on one count. They were sentenced to 15 years imprisonment at hard labour in respect of these counts. These allegations relate to the same young woman and the offences were committed on 25th May, 1987.

The matter comes before the Court by leave of the single judge on the question of sentence only.

Mr. Chuck who appeared for one of the applicants accepted that there was nothing he could urge in respect of conviction and we entirely agree with that view. In the circumstances, the facts need only be outlined and are as follows:

The victim Paulette McNab and another young woman accepted a lift from these applicants. They all had drinks together at a club - "On the Rocks" and ended up on the beach at Mosquito Cove. Later they all returned to Lucea where the other young woman parted from the others. There was some evidence that this party was continued to enable the applicants to be alone with

Paulette McNab. She was driven by Mussenden despite her protests along the road to Jericho. She threatened to break the windscreen and that brought the car to a halt. She was hit on her leg with a piece of bamboo by one of the applicants and threatened by the other with a machete. The trial judge's review of th of the evidence is not altogether clear on this. Thereafter, she was physically assaulted by Kellar. She was forced to perform acts of oral sex with each of the applicants while being raped by the other. She was compelled after that ordeal to again have sexual intercourse with Mussenden. At the time, she was having her period and had been compelled to remove her sanitary pad which the police later recovered in the course of investigations. She drove towards Lucea with the applicants and after Kellar had been dropped off she was able to jump from the car and escape. When Mussenden was interviewed, he told the police officer that "[Kellar] force me to do it. If mi no do it him a go chop up mi and the gal b.... c..... .

So far as Mussenden's defence went, he gave sworn evidence denying intercourse. He acknowledged that he was with her for some time on the day of the offence having drinks together with the other young woman and Kellar.

As regards Kellar, he admitted having consented sexual intercourse on the beach but not in the circumstances detailed by Paulette McNab.

The trial judge left all the issues which fairly arose on the facts for the jury's consideration. We can find no fault with his directions.

On the question of sentence however, we are of opinion that the sentence is somewhat out of line with the range for offences of this nature. It is true the offence has humiliating and degrading features but no firearm was used. If such weapons are used to compel compliance and in the circumstances as

outlined in this case, we would consider the sentence imposed appropriate. In our judgment justice will be met by substituting a sentence of 12 years hard labour.

Accordingly, the application for leave to appeal conviction is refused. The sentence is varied to the extent stated and is to run from 24th January, 1989.