

IN THE INTEREST OF
PLEAS

OWEN ARTHUR,

A MINOR

: IN THE COURT OF COMMON
:
:**OF ERIE COUNTY, PENNSYLVANIA**
:**JUVENILE DIVISION**
:
:**Docket No. 922 of 1999**

**RESPONSE IN OPPOSITION TO THE COMMONWEALTH'S
EXCEPTIONS TO THE RECOMMENDATION OF THE MASTER**

AND NOW, this 24th day of April, 2002, comes the above-named juvenile, Owen Arthur, by and through his attorney, Ines M. Massella, Assistant Public Defender, and files the within response to the Commonwealth's Exceptions to the Recommendation of the Master, and in support thereof states as follows:

PROCEDURAL BACKGROUND

1. The above-named juvenile, Owen Arthur, is a minor, 17 years of age, with a date of birth of January 3, 1985.
2. The juvenile was detained at the Edmund L. Thomas Adolescent Center on January 17, 2002, pending allegations of rape and indecent assault. His detention was continued after hearing on January 18, 2002. He remains in detention.
3. on January 23, 2002, the juvenile was charged with one allegation of rape and one allegation of indecent assault.
4. The Juvenile Court Master conducted a hearing on the allegations on March 4 and 13, 2002.

5. On March 25, 2002, the Master issued his Report in which he recommended that the rape allegation be dismissed and the indecent assault allegation be sustained. The Master, while believing that penetration occurred, could not conclude whether the penetration was penile or digital. He, therefore, found that the rape allegation had not been proven beyond a reasonable doubt.

6. On that same date, this Honorable Court confirmed the Findings and Recommendations of the Master.

7. This matter was scheduled for a dispositional hearing on April 16, 2002.

8. On April 15, 2002, the Commonwealth filed the Exceptions which are the subject of the instant Response in Opposition.

THE COMMONWEALTH'S POSITION

9. The Commonwealth contends that the Master's Report is contrary to the weight of the evidence as the Master, while finding penetration, stated he could not determine whether the penetration was penile or digital because of a lack of medical evidence.

10. The Commonwealth appears to argue that the Master was constrained to accept that a rape had occurred because the uncorroborated testimony of a victim is sufficient to establish that a rape occurred.

11. On the basis of this argument, the Commonwealth asks this Honorable Court to set aside the Master's Report and sustain the rape allegation.

12. In the alternative, the Commonwealth argues that, based on the evidence presented, the Master should have sustained the lesser included offense of aggravated indecent assault. This contention is based on the fact that rape is defined as sexual intercourse and aggravated indecent assault is defined as penetration of the genitals or anus.

13. On behalf of the juvenile, the undersigned must disagree with both arguments.

ARGUMENT FOR JUVENILE – WEIGHT OF THE EVIDENCE

13. It is axiomatic that due process requires, that before a defendant may be convicted of a crime, each and every element of the crime charged must be proven beyond a reasonable doubt. *See, e.g., In re Winship*, 397 U.S. 358 (1970).

14. It is equally well settled that a weight of the evidence challenge will result in a new trial only if the findings are so contrary to the evidence as to shock one's sense of justice, and the award of a new trial is imperative so that right may be given another opportunity to prevail. *See, e.g., Commonwealth v. Ragan*, 653 A.2d 1286, 1287 (Pa.Super. 1995).

15. The Commonwealth relies on *Commonwealth v. Flynn*, 460 A.2d 815 (Pa.Super. 1983) and *Commonwealth v. Gabrielson*, 536 A.2d 401 (Pa.Super. 1988) for the proposition that no medical evidence is necessary to prove rape but rather that the uncorroborated testimony of the victim is sufficient.

16. The Commonwealth argues that these cases required the Master to find that a rape occurred once Holly Pulling testified that it did. This is, if not an oversimplification of the dictates of *Flynn* and *Gabrielson*, then, at the least, a case of putting the cart before the horse.

17. Each of these cases presents a caveat, or prerequisite, to relying on the uncorroborated testimony of a victim and that is that the trier of fact must first believe that testimony. The undersigned argues that there is a vast difference in not requiring corroboration of a witness' testimony and in believing that testimony in the first instance. Therefore, before determining that a rape has occurred based on the uncorroborated testimony of a victim/witness, the trier of fact must necessarily determine whether the witness is credible.

18. The trier of fact, in passing upon the credibility of the witness and in determining what weight should be accorded to the evidence, is free to believe all, part, or none of the evidence. *Commonwealth v. Wescott*, 362 Pa.Super. 176, 206, 523 A.2d 1140, ____ (1987).

19. Reading *Flynn*, *Gabrielson*, and *Wescott* together, the undersigned believes and avers that this Honorable Court could, and should, conclude that the Master did not err in believing that penetration occurred and in not believing that the penetration was penile.

20. The testimony of Holly Pulling is riddled with examples of lapses of memory. It further shows that she was drinking that evening and vomitted and passed out more than once. She was unconscious to the point of having to be

carried to bed and later went into convulsions requiring attention by paramedics. She did not, after that evening, continue with any symptoms of any illness. The fact that she became ill, passed out and vomited was corroborated by other Commonwealth and defense witnesses.

21. Given these circumstances the undersigned believes and avers that the Master could quite appropriately question the credibility of her testimony based on her state of inebriation that evening as evidenced by the physical manifestation of that condition. In that regard, he was free to believe part of her testimony – that penetration occurred – and equally free not to believe part of her testimony – that the penetration was penile.

22. At the end of the redirect of Holly Pulling the Master asked: "During the period of time in the attic when you came to and felt the sensation of pain, do you have any way of knowing where the person that was on top of you, where his hands were?" Answer: "No, I don't." Given this question, it was incumbent upon the Commonwealth at that time to try to establish more clearly that it was contending the penetration was penile and not digital.

23. Thus, concluding that the Master did not err in dismissing the allegation of rape, the undersigned also argues that his conclusion should not shock this court's sense of justice and the juvenile requests that the court deny the Commonwealth's exceptions.

ARGUMENT FOR JUVENILE – LESSER INCLUDED OFFENSE

24. The Commonwealth contends that the Master, having dismissed the rape allegation, and based on the evidence, erred in not sustaining an allegation of aggravated indecent assault.

25. Again, on behalf of the juvenile, the undersigned must disagree.

26. Upon indictment for a particular crime, a defendant **may** be convicted of a lesser included offense. An offense is lesser and included if the greater offense necessarily involves the lesser, *i.e.*, all the essential elements of the lesser offense are included in the greater. ***Commonwealth v. Pemberth***, 339 Pa.Super. 428, 429, 489 A.2d 235 (1985). (emphasis supplied).

27. Relying on ***Pemberth***, the Superior Court in ***Commonwealth v. Sewell***, reiterated that a lesser included offense has elements that are necessary subcomponents of elements of the greater offense, that is, the elements of the lesser included offense are all contained in the greater offense, but "the greater offense contains one or more elements not contained in the lesser-included offense." 702 A.2d 570, 571 (Pa.Super. 1997).

28. Thus, the undersigned would argue that the Master did not err in sustaining the allegation of indecent assault and in not sustaining *sua sponte* an allegation of aggravated indecent assault.

29. First, the use of the permissive "may" indicates that whether to convict of a lesser included offense is discretionary and not mandatory with the trier of fact. The undersigned argues that the Master, in exercising his discretion not to convict on the lesser included offense of aggravated indecent assault, did

not abuse that discretion. This, is particularly so where the Master was able to conclude that the Commonwealth had proven its case with regard to the second allegation of indecent assault.

30. Moreover, the undersigned argues that indecent assault fits the definition of a lesser included offense as set forth in *Sewell*.

31. Rape, under 18 Pa.C.S.A. § 3121, is defined as sexual intercourse, which in turn is defined under 18 Pa.C.S.A. § 3101 as having its normal meaning as well as oral and anal intercourse, with some penetration however slight.

32. Indecent assault is defined as indecent contact, under 18 Pa.C.S.A. § 126. Indecent contact is defined in 18 Pa.C.S.A. § 3101 as any touching of the sexual or other intimate parts of the person for the purpose of arousal or gratification.

33. The elements of the lesser included offense of indecent assault are all contained in the greater offense of rape. That is, both rape and indecent assault involve the touching of the sexual or other intimate body parts for the purpose of arousal or gratification. However, the greater offense of rape contains an element not contained in the lesser-included offense, that being penetration.

34. Thus, the undersigned contends that this court could, and should, conclude that the Master neither erred nor abused his discretion in sustaining an indecent assault allegation rather than an aggravated indecent assault allegation.

CONCLUSION

35. Based on the foregoing the above-named juvenile and his counsel believe and aver that the Commonwealth fails in its assignment or error to the Report of the Juvenile Court Master and that, therefore, its exceptions should be dismissed on the basis of the pleading.

36. This court, however, also has the option to have the Master's hearing transcribed and rule on the basis of her review of the testimony, with or without argument by counsel. Lastly, the court may order a hearing *de novo*.

37. Should this court determine that it would hear oral argument or would convene a hearing *de novo*, the undersigned would advise the court that she will be on vacation from April 24, 2002, up to and including May 7, 2002, and would further request that any proceeding be scheduled after her return.

WHEREFORE, for the reasons set forth above, the juvenile, Owen Arthur, respectfully requests that this Honorable Court issue an Order dismissing the Commonwealth's exceptions.

Respectfully submitted,

Ines M. Massella
Assistant Public Defender