IN THE SEYCHELLES COURTOF APPEAL

Yves Banane — Appellant

v/s

The Republic — Respondent

Criminal Appeal No. 14 of 1984

Mr. J. Lucas for the appellant

Miss N. Tirant for the Republic

JUDGMENT

The appellant was charged before the Supreme Court with having carnal knowledge of a person against the order of nature contrary to section 151(a) of the Penal Code on Counts 1 and 2 and with committing an act of gross indecency with another male person in private contrary to section 154 of the Penal Code on Count 3. The offences were alleged to have been committed on a date unknown between 1st January 1983 and 17th May 1984 and the complainants under the respective counts were his three sons Yvon, Roland and Jean aged 16, 12 and 8 respectively.

The accused was found guilty of the three offences charged and sentenced to a term of 5 years imprisonment on counts 1 and 2 and 3 years imprisonment on count 3, all sentences to run concurrently. He now appeals against conviction and sentence on the following grounds -

1. The Learned Judge failed to properly consider in his judgment that the mental state of Mrs. Banane and her behaviour could make her an unreliable witness.
2. There was insufficient evidence adduced by the Prosecution to show that accused had committed the offences beyond a reasonable doubt.
3. In considering the similar fact evidence in the case, the Learned Judge erred on the application of the principles to the facts of the case adduced by the prosecution.
4. The Prosecution evidence was so inconsistent that no tribunal properly directed would have convicted on it.

5. The verdict was in all the circumstances of the case unsafe and unsatisfactory.

The ground against sentence is as follows:

1. The sentence was in all the circumstances of the case manifestly excessive.

We shall deal with the appeal against conviction on all the grounds together and then with the appeal against sentence.

There was no application made at the trial that the counts be severed and a separate trial held on each count. Neither was there objection during the trial of evidence being given against the appellant of several other unnatural offences alleged to have been committed by him and indecent behaviour on his part not necessarily connected with the offences charged. However, it is our duty in this appeal to consider each count separately with a view to consider which part of the evidence relates to it and whether there was sufficient evidence to support a conviction on each count.

Before entering upon a review of the evidence it is necessary to set out a few legal principles which find application in this case.

(a) Similar fact evidence

(i) No special rule or principle of admissibility applies to sexual, and particularly to homosexual, offences. Suggestions to the contrary in Thompson v. R. (1918) A C 221, 235 and R. v. Sims (1946) K.B. 531, 540 should be ignored.

(ii) The principlesfor determining the admissibility of similar fact evidence in those types of offences is whether such evidence has positive probative value. The principle is correctly stated in R. v. Sims (1946) K.B. 531, 539 and 540 as follows:-

" The evidence of each man was that the accused invited him into the house and there committed the acts charged. The acts they describe bear a striking similarity. That is a special feature sufficient in itself to justify the admissibility of the evidence ... ...

The probative force of all the acts together is much greater than one alone; for, whereas the jury might think that one man might be telling an untruth, three or four are hardly likely to tell the same untruth unless they were conspiring together. If there is nothing to suggest a conspiracy, their evidence would seem to be overwhelming."

(iii) Similar fact evidence has probative value if there is such a striking similarity between the various facts as to show an underlying unity to provide a connecting link between them so that each confirms another, renders the other more probable. (Vide the speech of Lord Simon of Glaisdale in Reg. v. Kilbourne (1973) A.C. 729, 758 (and the judgment of Scarman L.J. in R. v. Scarrott (1978) Q.B. 1016, 1022).

(iv) Similar fact evidence once admissible may provide corroboration. Its corroborative capability is a consequence of its probative value and not vice versa.

(b) Corroboration

(i) A trial Judge or Magistrate may in his discretion give himself a warning that it is dangerous to convict an accused person on the evidence of a witness unless such evidence is corroborated although in law or practice the evidence of such a witness does not require corroboration. Jeffrey Tirant v. R. (1965-1976) SCAR 137, 140). Having given himself such a warning there must in fact be corroboration before a conviction based solely on the evidence of such witness may stand.

(ii) The evidence of an unsworn child ~~admitted in pursuance of section 38(1) of the Children and Young Persons Act 1933~~ can amount to corroboration of evidence given on oath by another child (a complainant),

or by an adult, provided that the unsworn evidence is corroborated as required by the proviso to that section. (Reg. v. Hester 1973 A.C. 296, 316). The evidence of the sworn child or adult can itself amount to corroboration of the unsworn evidence.

We shall now consider the evidence under the different counts.

Count 1

The young man, Yvon Banane, against whom the offence is alleged to have been committed is a deaf mute. He could not and did not give evidence at the trial. Evidence supporting the charge under count 1 was given by Marie Banane the wife of the appellant who was a competent witness for the prosecution in this case by virtue of section 130(2)(b) of the Criminal Procedure Code (Cap. 45). The learned Judge accepted her evidence but warned himself of the dangers of convicting the appellant on her uncorroborated evidence. He found that although she appeared to be neurotic in her behaviour, she did not show in any way that she was mentally disturbed when she gave evidence in the witness box.

The learned Judge found corroboration of Marie Banane's evidence in the unsworn evidence of her son Jean, a boy of 8. Jean spoke of an act of buggery between the appellant and Yvon when the appellant was playing the active part. This incident was witnessed by Jean at home one night. He said that at the time he was standing behind a door.

There was a visit by the learned Judge to the house of the appellant after Counsel for the defence had applied for such visit. The purpose of such visit was to test the veracity of Jean's evidence. Unfortunately no memorandum was made of what took place at the locus in quo. No point was raised in this appeal with regard to the conduct of proceedings on such visit and it must be

presumed that the learned Judge was satisfied that Jean was in a position to see what he said he saw as he accepted Jean's evidence and acted upon it.

The incident witnessed by Jean must be taken to have occurred on a different night from the incident witnessed by Marie Banane. Both incidents bear a striking similarity in that they occurred at home during the night whilst the rest of the family were sleeping. The appellant was playing the active part and Yvon the passive role. Under the principles which we have outlined above, relating to similar fact evidence, the testimony of Marie Banane and that of Jean as to the two distinct incidents were admissible in support of the charge under count 1. The evidence of Marie Banane corroborated that of Jean and in turn, his evidence corroborated that of Marie Banane.

The medical evidence of Dr. Padayachi was in favour of the appellant. However, as it is not possible to determine with precision when the two acts of buggery by the appellant on the person of Yvon testified to by Marie Banane and Jean actually took place, the evidence of the doctor does not contradict or nullify their testimony.

We are satisfied that there was evidence upon which the learned Judge could properly and reasonably find the appellant guilty of the offence charged under Count 1. We therefore uphold the appellant's conviction under that count.

Count 2

Under that count the appellant is charged with an offence of buggery on the person of his son Roland, aged 12.

Roland gave sworn evidence to the effect that there were two incidents of buggery by his father on his person. One is alleged by him to have occurred at home during the night on his father's bed and the other, one afternoon inside a neighbour's house. There were no witnesses to support such allegations. On the other hand the defence called the occupiers of the house in which the second alleged incident

is supposed to have taken place to give evidence. Such evidence is to the effect that the appellant never comes to their house and that there is always someone around at the house or in the yard.

The learned Judge did not admit the similar fact evidence given by Marie Banane or Jean as to the other acts of baggery of the appellant on the person of Yvon to support the charge on Count 2. He did not give any reason for excluding such evidence. This was within the learned Judge's discretion and we cannot say that it was wrongly exercised in the circumstances of this case. In the end the learned Judge convicted the appellant on the uncorroborated evidence of Roland after having warned himself of the dangers of doing so.

The learned Judge failed to deal with the defence evidence which tended to negative Roland's evidence as to the act of buggery alleged to have taken place at the neighbour's house. He should also have considered the evidence of Roland in some detail as such evidence was not satisfactory in certain respects.

In the circumstances we are of opinion that the learned Judge was wrong to have convicted the appellant on count 2 on the uncorroborated evidence of Roland. We therefore set aside his conviction on that count.

Count 3

The evidence on count 3 consists only of the unsworn evidence of Jean to the effect that one night the appellant, his father, took him to the appellant's bed and removed all his clothes. The appellant then took hold of his penis and placed it in the appellant's anus.

There was no direct evidence to corroborate the evidence of Jean relating to that incident. The learned Judge said the following in his judgment:

> "Marie Banane's evidence only corroborates Jean's evidence on the facts alleged in Count 1 but that evidence of Marie Banane's corroborates Jean's evidence and there is therefore corroboration of his evidence relating to Count 3."

With respect, this was a misdirection. Before evidence may be used as corroboration it must be admissible to the charge to which it relates. Marie Banane's evidence was relevant and admissible in relation to the charge under count 1. It was not admissible as similar fact evidence under count 3 as it lacked the necessary striking similarity to show the underlying unity between the facts. The evidence of Marie Banane could only corroborate Jean's evidence as to the facts alleged in Count 1. Jean's evidence as to the offence against himself was uncorroborated and since it was unsworn evidence it could not support the conviction of the appellant under count 3. ~~That is so in terms of the proviso to section 38(1) of the Children and Young Persons Act 1933.~~ We therefore set aside the conviction of the appellant under Count 3.

Sentence

The appellant may be treated as a first offender. Although the offence under count 1 is grave in that it would have the effect of corrupting the morals of a son under age, we are of opinion that, in the circumstances, a sentence of five years imprisonment is manifestly excessive. Taking into account the social standing of the appellant and the poor conditions in which the appellant and his family lived, we set aside the sentence of 5 years imprisonment under count 1 and substitute therefor a sentence of 3 years imprisonment. We allow the appeal against sentence to this limited extent.

Delivered on the day of April 1985.

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A. Mustafa President

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Sir Eric Law Justice of Appeal

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A. Sauzier Justice of Appeal