IN THE SEYCHELLES COURT OF APPEAL

CRIMINAL APPEAL NO. 8 OF 1993

YVON MARIE APPELLANT

V

THE REPUBLIC RESPONDENT

Before: Goburdhun, P., A.M. Silungwe and E.O. Ayoola, JJA

Mr. A. Derjacques for the appellant
Mr. S. Fernando for the respondent

REASONS FOR JUDGMENT OF THE COURT

On March 25, 1994, we dismissed the appeal against conviction but allowed the appeal against sentence and indicated then that reasons for our decision would be given at a later date. We now give those reasons.

On September 1, 1993, the appellant was, after trial, convicted by the Supreme Court of rape contrary to section 130, as read with section 131 of the Penal Code; and of manslaughter, contrary to section 192, as read with section 195 of the Penal Code. At the request of the appellant's learned counsel, the matter was adjourned to October 1 for the production of a social welfare report on the convict. On the adjourned date, and after the production of the social welfare report, the appellant, a first offender, received 6 years imprisonment on the rape count; and 8 years imprisonment on the manslaughter count, both of which were ordered to run concurrently.

Put in a nutshell, the facts of the case revealed that, prior to the incident that gave rise to this case, the appellant had lived in concubinage with one Marina Joubert,

the deceased victim, for about 20 years. The appellant and Marina lived in the former's three bedroomed house at Rochon, together with their five children: Antoine - a 19 year old mentally handicapped son, Lina - a 15 year old daughter, Alex - a 13 year old son, Mary-May - an 11 year old daughter and Dave - a 5 year old son. Also living there were Marina's niece, Marie-Ange Joubert, together with her concubine, Jimmy Dufrene and their two young children. Marina stayed at home to look after the eldest but mentally ill son. She had a history of frequent indulgence in alcohol which was a source of friction between her and the appellant and, as a result of this, they were not on the best of terms on or around May 5, 1993, the date of the fatal incident.

It is not in dispute that in the evening of May 5, the appellant had an argument with Marina and also with the mentally handicapped son whose (i.e. Antoine's) hands and feet he then tied - a form of punishment that he often inflicted upon Antoine as a matter of course whenever the son misbehaved. The appellant declined to take food prepared for him by Marina but later ate food prepared by himself.

The learned Chief Justice accepted the prosecution evidence which, inter alia, showed that Marina had retired to bed at about 20.00 hours, followed shortly thereafter by the four young children with whom she and the appellant shared one bedroom. The second bedroom was occupied by Antoine alone while the other one was occupied by Marie-Ange and her family. During the night, Alex heard a woman's voice coming from the direction of his mother's bed shouting "oooh" about six times but, being too frightened, he did not open his eyes and he soon afterwards fell asleep again.

In an extra judicial confession, which though retracted, was nevertheless admitted after a voire dire had

been conducted, the appellant said that he had joined Marina in bed at about 22.00 hours and that when he woke her up and announced his desire to have sex with her, she said nothing but pushed him away and turned her face towards the wall. Since he did not relent, she struggled with him even as he was having sex with her. He pressed her hand and face hard on the bed; he "pressed her everywhere on her body" because she did not want to have sex with him and she was trying to get up. He then succeeded in completing the sexual act.

After the appellant had gone to work early in the morning of the following day, Alex and Marie-Ange discovered that Marina was dead and a report to that effect was promptly made to the police.

Dr. Thanikachalam who conducted a postmortem examination found that Marina had died of asphyxia; that prior to her death, she had been engaged in vigorous and forceful sexual activity; that spermatozoa was present in her private part; that there was a swelling of the vulva; that her left eyelid was swollen as were her lips and the left cheek; that she had minute finger nail abrasions on her chest, face and left shoulder; and that she had other abrasions on her upper thighs.

On May 8, 1993, Dr. Elgebay Hossan examined the appellant at Victoria Hospital and found on his chest three-day old infected abrasions, about seven in all. These abrasions appeared to be nail marks.

At the close of the case for the prosecution and, in the exercise of his rights under the law, the appellant elected to remain silent and called no witnesses on his behalf.

Having considered the evidence adduced in the matter and the law applicable thereto, the learned Chief Justice found that the prosecution witnesses were credible and that the elements of the offences charged had been proved beyond a reasonable doubt, hence the appellant's conviction and sentence aforesaid.

Mr. Derjacques argued five grounds of appeal against conviction. Firstly, he submitted that the learned Chief Justice had erred in admitting the appellant's confessionary statement after the voire dire had been conducted. It was contended that the confession should not have been admitted in evidence since it had been taken in contravention of Article 18(5) of the 1993 Constitution which requires the production of an accused or a detained person, if unreleased, before a court of law within twenty-four hours of the arrest or detention. The appellant, though charged, had been kept in police custody for some two days without being taken to court when he made the confession, the subject of this ground.

On the other hand, Mr. Fernando argued that the constitutional provision relied upon was inapplicable to this case because, consequent upon the commission of the offences on May 5, 1993, the appellant was arrested on May 6 and the confession was made on May 8, long before the constitution came into force on June 21, 1993.

We agree with Mr. Fernando that, as the events material to this ground occurred long before the 1993 constitution came into force, Article 18(5) of that constitution cannot be invoked in this case.

Mr. Derjacques further argued under this ground that the confession was inadmissible as it had been unfairly obtained by means of a trick, namely, that the appellant had

been told by the police that unless he made a confessionary statement, he would not be released.

It is pertinent to draw attention to the following extract from the record on appeal:

> "Q. So you knew that if you make the statement you will be released. Isn't it?
>
> A. At no time did I believe that if I made the statement I would be released."

In his ruling, at the end of the voire dire, the learned Chief Justice did not believe that the appellant had been forced or induced to make the confession. He was satisfied beyond a reasonable doubt that the appellant (who had on May 7, 1993 made a statement to the police, denying the offences) had wanted, perhaps out of remorse, to speak to Inspector Quatre to tell him what had happened. He then ruled that the confession had been made voluntarily and accordingly admitted it in evidence.

As the issue raised here was essentially one of credibility, and the learned Chief Justice had had the opportunity to see and hear witnesses in the voire dire, including the appellant, he was better placed to deal with, and to resolve, the issue. He believed the prosecution witnesses, rejected the defence and ruled that the confession had been made voluntarily and that it was admissible. In our view, that ruling cannot be impugned.

The second ground to be argued was that the learned Chief Justice had erred in determining that what is required to corroborate a retracted and repudiated statement is "evidence which tends to show that what is said in the confession is probably true". The criticism here was that the expression:

> "evidence which tends to show that what is said in the confession is probably true".

was a lesser standard of proof and that the learned Chief Justice had fallen into error by allowing himself to be influenced by such a standard.

It seems to us that the criticism is an attempt to use the expression outside its context which is as follows:

> "The court can only act upon a statement made freely and voluntarily but subsequently retracted, if there is independent evidence corroborating the statement in material particulars. To corroborate a retracted confession all that is required is some evidence aliunde which implicates the accused in some material particular and which tends to show that what is said in the confession is probably true".

The authority for the quotation above is R.v. M. & Another No. 4 of 1966. The Seychelles Law reports, Vol. III, 1963 - 1968, p. 218 (see also The Seychelles Digest under the heading "Criminal Law and Procedure", paragraph 140, at pp. 98 and 990). This authority requires corroboration of a retracted confession as a matter of practice. The authority does not impose, and should not be seen as imposing, a lesser standard of proof on the prosecution. In any event, there is nothing on record to suggest that the trial court in the present case was ever influenced by a lesser standard of proof.

In our judgment, there was no misdirection as alleged on the part of the learned Chief Justice. There was some independent corroborative evidence of the appellant's confession given by Dr. Thanikachalam. His testimony revealed that Marina had been engaged in vigorous and forceful sexual activity; what the appellant had said in his confession was to the effect, inter alia, that he had had sexual intercourse with Marina against her will. The Doctor found evidence of spermatozoa in Marina's private part; the

appellant said that he had had sexual intercourse with Marina and that he had ejaculated into her private part. The Doctor found that Marina had died of asphyxia; the appellant said that he had, inter alia, pressed Marina's face hard on the bed because she did not want to have sex with him and she was trying to get up.

In the third ground, Mr. Derjacques contended that the learned Chief Justice had erred in principle by utilising the appellant's out-of-court statements as falling within the ambit of lies capable of amounting to corroboration. It was stressed that the statement must clearly be shown to be a lie by evidence from an independent source. It was pointed out that the confessionary statement apart, there was no independent evidence which pointed a finger at the appellant in relation to the two counts and that, although circumstantial evidence was present, it was not sufficient.

Obviously, reference to the appellant's lies in this case can only relate to his first statement to the police, which was a denial. This must be so because the second statement to the police was a confession. It is not easy to discern why it was felt necessary to turn to the appellant's lies in his first statement to the police for use as evidence of corroboration. Those lies could certainly not have been used for the purpose of corroborating the appellant's retracted confession because, for evidence to be regarded as corroborative, it must be independent of the evidence sought to be corroborated. In other words, a person cannot corroborate himself or herself as such evidence would be self serving. Indeed, the appellant's lies could not have been used to corroborate any evidence in the case. Consequently, the purported use of the lies was not only an error but also otiose. Although our decision on this ground is in favour of the appellant, his appeal based thereon cannot, however,

succeed per se as we consider that no miscarriage of justice actually occurred in that the professed use of the appellant's lies was superflous since there existed independent evidence corroborative of the appellant's retracted confession.

The remaining two grounds may conveniently be considered together. These were that the learned Chief Justice had erred in principle by failing to properly analyse the possibility that the deceased's assailant may have been some other third party; and that there was an error in principle in finding that there had been sufficient evidence to prove the appellant's guilt beyond a reasonable doubt.

In the first place, Mr. Derjacques' argument was that a third party could have been involved in Marina's death especially that there was no finding to the effect that the appellant's house doors had not been locked on that fatal night.

According to evidence accepted by the trial court, there are three doors that give access to the appellant's house. By the time that Lina and Alex retired to bed, two of the doors were closed but the kitchen door, which was normally closed by the appellant himself, was open when the appellant remained in the kitchen alone. Police witnesses had testified that there was no evidence of a breaking in and the learned Chief Justice made a finding to that effect. The appellant's confession apart, and through a process of elimination, the only other adult male in the appellant's house, besides the appellant himself, was Jimmy Dufrene, (Mary-Ange's concubine), but his possible involvement in the crimes was "excluded completely". The learned Chief Justice found that the only adult male who could have committed the crimes was the appellant himself. He ruled out the appellant's eldest but mentally retarded son whose feet and

hands had remained bound during the material period from evening until the next morning. This left Alex, the appellant's thirteen year old son; but his possible involvement in the crimes was excluded as he was considered to lack superior strength necessary to subdue the deceased and to inflict the physical injuries that she sustained.

In all the circumstances of this case, we cannot interfere with the trial court's finding in which he excluded the criminal involvement of a third party as we consider he was justified in so doing.

Mr. Derjacques' further argument was that what is required to prove manslaughter is the commission of an unlawful act. He went on to say that the appellant had lived with the deceased for 20 years and that, together, they had five children. He then urged us to consider whether what had occurred was an unlawful act or an accident.

It is common ground that, although the appellant and Marina had lived together for about 20 years at the time of Marina's death, they were an unmarried couple. On the evidence adduced in the case, there can be no doubt that the appellant had been engaged in an unlawful act, namely, the commission of the offence of rape during which Marina died of asphyxia. The pathologist's testimony was that death from asphyxia could have occurred between 30 seconds and a maximum of 5 minutes by means of bare hands, soft cloth, or even a pillow. The appellant had confessed to having pressed Marina everywhere on her body, including her face, "because she did not want to have sex" with him; he had pressed her "hard because she was trying to get up." The learned Chief Justice came to the conclusion that the appellant unlawfully caused Marina's death during the commission of rape, a conclusion he was entitled to reach on the evidence before him. The fact

that the appellant and Marina had lived together for 20 years is immaterial in so far as the commission of rape is concerned since, in our opinion, a man is capable of committing rape on his concubine, as was done in this case. Having thus found that the appellant had unlawfully caused Marina's death, the question whether his action in the matter could have been accidental does not arise.

Turning our attention to the last ground of appeal against conviction, we were satisfied, as had been the learned Chief Justice, that there was adequate evidence on record to warrant the appellant's conviction.

As regards sentence, it was urged that this was manifestly excessive. In considering this ground, we were alive to the fact that, although the appellant's children had naturally been traumatised by the death of their mother, this was nevertheless a young family for which he had been the sole bread winner and over which he still retained parental responsibilities. At 42 years of age, the appellant had had a clean record and, as Mrs L. Mathiot, a Probation Officer, had put it in her social welfare report, "his sordid act (was) troubling his conscience."

This was obviously evidence of penitence on the appellant's part. In the circumstances, we felt that it was germane not to have the appellant kept away from his young family for too long in an effort to accord him an opportunity to be reconciled to, and reunited with, the family. This was in the interests of preserving a cohessive family unit which is the foundation of this, let alone any other, nation.

In our opinion, the concurrent custodial sentence of 8 years and 6 years on the manslaughter and rape counts, respectively, was manifestly excessive and was thus reduced to concurrent imprisonment for 5 and 3 years.

It was for the reasons given above that this court dismissed the appeal against conviction and allowed the appeal against sentence.

..... H.Goburdhun, President

.....A.M. Silungwe, Justice of Appeal

..... E.O. Ayoola, Justice of Appeal

Delivered on .....

Read at delivered 25-08-94

Judge