IN THE SEYCHELLES COURT OF APPEAL

GODFREY MATHIOT APPELLANT

V

THE REPUBLIC RESPONDENT

Criminal Appeal No. 9 of 1993

Mr. A. Derjacques for Appellant
Mr. S. Fernando State Counsel for the Republic

JUDGMENT OF THE COURT DELIVERED BY ADAM JA

The appellant was charged on three different counts - the first count being attempted rape contrary to section 132 of the Penal Code; the second count being robbery with violence contrary to section 281 of the Penal Code and the third count being unlawful wounding contrary to section 224(a) of the Penal Code. The Supreme Court convicted him on the first count of indecent assault and sentenced him to a term of 7 years imprisonment; on the second count of robbery with violence and sentenced him to a term of 3 years imprisonment; and on the third count of unlawful wounding and sentenced him to 1 year's imprisonment. All the sentences were to run concurrently and time spent on remand was to count towards the sentence.

In his Notice of Appeal to the Registrar of the Supreme Court of the 16th November 1993 he appealed against both conviction and sentence of indecent assault. In the Memorandum of Appeal filed on his behalf with the leave of this Court, the appeal lodged was against the sentence only for indecent assault on the grounds that the sentence of 7 years imprisonment was harsh and excessive.

The particulars of offence alleged were that on the 16th

May, 1993, at Mont Buxton, Mahe, he attempted to have unlawful carnal knowledge of the complainant without her consent.

At the trial, evidence was given by the complainant that she was a singer and dancer at a hotel and that at around 6.30 p.m. on the 16th May, 1993, the appellant accosted her and demanded to have sex with her. When she refused, he threatened her with a knife and took her to a place near a big boulder. The appellant slapped her several times on the face, pulled her hair and tried to remove her clothes. A struggle ensued and the complainant fell when the appellant tried unsuccessfully to remove the pair of trousers she was wearing. The complainant testified that the appellant threatened to kill her and that during the struggle he cut her left index finger. When she tried to run away, the appellant caught her and pulled her and sat on her, removed her belt, unslit the "jeans", pulled it down and cut the "leotard" and her panty. During this time, she observed a man and shouted for help. Jimmy Alcindor, was the man, who came and pushed the appellant down, at which time the complainant ran to a nearby home belonging to Gina Philoe. From there the complainant telephoned her mother. As a result her mother and brother in law responded and she was taken to the Police Station. The police first took her to the scene and later to the hospital where Dr. Ajewole attended to her. Due to the information provided by the complainant, Dr. Ajewole only examined the upper part of her body. He found abrasions on the left side of her face as well as the right side of the neck and a laceration on the left index finger. The medical records tendered by him confirmed the injuries sustained, that her leotard had been cut on the waist and that the laceration on the finger had been sutured. Jimmy Alcindor indicated in his testimony that at about 7 p.m., he heard someone shouting for help, that on coming down there, he observed the appellant sitting on top of the complainant close to her private part pressing her to the ground with his hands. Alcindor pushed the

appellant off and the complainant ran away. In a statement recorded by the police the appellant stated that he pulled the complainant's jeans down as well as her panty and bikini and tore it, that the complainant called Alcindor, that the appellant got off and she left and that he had a knife which he left on the ground.

Before this Court Mr. Derjacques, on behalf of the appellant, submitted that indecent assault offences were generally dealt in with the Magistrates Court and that when a comparison is made of the sentences imposed on the appellant in the Magistrates Court on the five previous occasions, they fell between 3 months to 9 months to 2 years. He emphasized that from the evidence at the trial, the injuries suffered by the complainant were not serious, that since she was first taken to the scene of the offence and was composed, it was his view that the complainant did not suffer that much trauma.

In his response, Mr. Fernando on behalf of the respondent, drew specific attention to the appellant's lengthy previous convictions which commenced in 1973 until 1993, with over 50 concerned with violence of some form. He indicated that the maximum period that the appellant had actually served for such offences was 18 months. He argued that in light of this, together with the provisions of section 135(1) of the Penal Code that has up to 14 years imprisonment, the sentence imposed could not be faulted. He further submitted that the Seychelles Court of Appeal Rules 1978, under Rule 41(2), even allowed this Court to substitute a more severe sentence if it thought a different sentence should have been passed by the trial court. He maintained that the aggravated nature of this offence was what was considered by the learned trial judge when he sentenced the appellant.

In his reasons for sentence the learned trial judge correctly took into account that the appellant had 74 previous convictions over 20 years, 5 of which were for

sexual offences, that in the past 5 years he had been convicted on 9 occasions, that his victims had undergone a terrible ordeal and his behaviour was inhuman. He considered that society had to be protected from the likes of the appellant. Due to the aggravated nature of this particular offence, he felt that the imposition of a severe sentence was essential in order for the appellant to have sufficient time to reflect on his deviant behaviour and perhaps to mend his ways.

It is true that under Rule 41(2), this Court may, if it thinks that a different sentence should have been passed, substitute such other sentence warranted in law as it thinks ought to have been passed. However, in exercising this power, the proper approach for an appellate court in sentence appeals is only to intervene where (a) the sentence was wrong in principle; (b)the sentence was either harsh, oppressive or manifestly excessive; (c) the sentence was so far outside the normal discretionary limits; (d) some matter has been improperly taken into consideration or failed to take into consideration something which should have been; (e) the sentence was not justified in law. The list is illustrative.

Thus, in R v. Gumbs (1926) 19 Cr. App. R. 74 Hewart LCJ said of the English Court of Criminal Appeal at p.75:

> "...this Court never interferes with the discretion of the Court below merely on the ground that this Court might have passed a somewhat different sentence; for this Court to revise a sentence there must be some error in principle."

Further, in R. v. Sargent (1975)60 Cr. App. R. 74 Lawton LJ observed at p.76-78:

> " The problem for this court is whether the sentence was wrong in principle.
> ...
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> What ought the proper penalty be? We have thought it necessary not only to analyse the facts, but to apply to those facts the classical principles of

> sentencing. Those classical principles are summed up in four words: retribution, deterrence, prevention and rehabilitation. Any judge who comes to sentence ought always have those four classical principles in mind ...
>
> I will start with retribution... however, another aspect of retribution which is frequently overlooked: it is that society, through the Courts, must show abhorrence of particular types of crime, and the only way in which the courts can show this is by the sentences they pass... Society, we are satisfied, expects the courts to deal with violence. The weapons which the Courts have at their disposal for doing so are few.
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> ...
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> I turn now to the element of deterrence, because it seems to us that the trial judge probably passed this sentence as a deterrent one. There are two aspects of deterrence of the offender and deterrence of likely offenders....
>
> We come now to the element of prevention. Unfortunately it is one of the facts of life that there are some offenders for whom neither deterrence nor rehabilitation works. They will go on committing crimes as long as they are able to do so. In those cases the only protection which the public has is that such persons should be locked up for a long period ...
>
> Finally, there is the principle of rehabilitation ... This young man does not want prison training. It is not going to do him any good. It is his memory of the clanging prison gates which is likely to keep him from crime in the future"

The trial Court has seen the appellant and heard his plea in mitigation of sentence. It has not been shown to us that the trial court erred in principle on the sentence that was imposed upon the appellant. After taking into account all the relevant factors the learned trial judge concluded that a lengthy period of imprisonment was called for and within the maxima provided under the statute. Applying the facts in this case to the classical principles of sentencing, the learned trial judge correctly considered that the element of prevention

was of importance since neither deterrence nor rehabilitation was of any use to the appellant. The only protection which people like the complainant will have is for the appellant to be incarcerated for a lengthy period.

Accordingly, the appeal against sentence is dismissed.

Dated this 25th day of March, 1994.

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

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

..... M.A. Adam
Justice of Appeal