IN THE SEYCHELLES COURT OF APPEAL

MICHEL PADDY SAVY — APPELLANT

versus

THE REPUBLIC — RESPONDENT

Criminal Appeal No. 14 of 1999

[Before: Ayoola, P., Pillay and Matadeen, JJ.A]

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Mr. F. Bonte for the Appellant
Mr. R. Govinden for the Respondent

REASONS FOR JUDGMENT OF THE COURT

(Delivered by Matadeen, J.A)

The appellant was prosecuted before the Supreme Court for the offence of sexual assault. He was found guilty and sentenced to ten years' imprisonment. He is now appealing against both his conviction and sentence on no less than 24 grounds which need not be reproduced here. We are grateful to counsel on either side for having conveniently grouped the grounds of appeal under separate headings in the course of their submissions on appeal before us, and we propose to deal with the several complaints levelled against the judgment of the learned trial Judge in the same order as they have been raised in the submissions of learned counsel for the appellant.

The first complaint against the judgment challenges the propriety of the information and claims that the trial Judge was wrong in rejecting a submission by learned counsel for the appellant to the effect that the information was defective in that the particulars of the offence were grossly inadequate.

The appellant was charged with the offence of "sexual assault contrary to and punishable under section 130 of the Penal Code as amended by Act No. 15 of 1996", and the particulars of offence as provided to him in the information were that

"Paddy Michel Savy on the 1st day of November 1998 at Intendance sexually assaulted Maretta Kostes".

The main thrust of the submission of counsel who appeared for the appellant before the trial court – who incidentally did not appear for the appellant on appeal before us – was that the offence of sexual assault is constituted by one of the four acts mentioned in section 130(2) of the Penal Code and that the particulars provided should have specified which of the four acts was being levelled against the appellant.

The learned trial Judge held that the offence of sexual assault was created by section 130(1) whereas section 130(2) gave but four instances in which the offence may be committed. Section 130(1) and (2) of the Penal Code provides as follows –

> (1) A person who sexually assaults another person is guilty of an offence and liable to imprisonment for 20 years.
>
> (2) For the purposes of this section "sexual assault" includes –
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> (a) an indecent assault;
> (b) the non-accidental touching of the sexual organ of another;
> (c) the non-accidental touching of another with one's sexual organ; or
> (d) the penetration of a body orifice of another for a sexual purpose.

The learned Judge went on to say that section 130(2) was not exhaustive and that the offence of sexual assault was not limited only to the four acts mentioned in section 130(2), but could include numerous other specific acts. He concluded that the charge of sexual assault did sufficiently convey to the appellant the nature of the offence according to law.

Now it is not disputed that an information should follow the language of the statute: vide ***Archbold 36º Ed. para. 122***. In that respect the information did adopt the language of section 130(1) of the Penal Code which is the provision creating the offence. It is not disputed that the purpose of particulars in an information is to give the accused person reasonable information as to the nature of the charge he has to meet. It is interesting to note that the appellant was assisted by

learned counsel as from the very first day he appeared in court. No particulars were asked for and the appellant who on his arraignment on 05 November 1998 was equally assisted by counsel, was content to plead to the information as it stood and which charged him with the offence of sexually assaulting Maretta Kostes.

Nor was any request made on the following day when the trial proper started and the prosecution called the complainant in support of its case. It was only after all the evidence had been heard that counsel for the appellant submitted that the information was defective as it did not contain detailed particulars of the offence. Particulars of the offence, if they are to have any purpose, should be asked and provided at the beginning of the case and not after all the evidence has been heard. Nor can defence counsel claim at the end of a case that the accused party has been prejudiced in his defence by the insufficiency of particulars. Consequently we find no substance in that complaint.

We would, however, venture to suggest that it would be desirable for the prosecution to furnish outright in the information itself concise particulars, as distinct from matters of evidence, relating to the offence of sexual assault. Thus both the accused person and the trial Court will know precisely and on the face of the information itself the exact nature of the prosecution case while the prosecution itself will be prevented from shifting its ground without the leave of the Court and the making of an amendment – vide ***R. v. Landy (1984) 72 Cr. App. R 237*** as applied in ***Police v. Kuderbux & Ors (1994) SCJ 424***.

The second complaint levelled against the judgment of the trial Judge was essentially to the effect that the appellant has been denied a fair hearing due to the non-communication or untimely communication of the statements of the prosecution witnesses. For a proper understanding of the issues raised in this ground of appeal, it is appropriate that the facts be set in their chronological order.

The appellant was charged with having sexually assaulted a German tourist at about 10.00 a.m. on Sunday 01 November 1998. He was arrested on the same day at about 3.00 p.m. He was formally charged on the following day and his statement in answer to the charge was duly recorded. The information was lodged on 05 November 1998 and his plea taken on the same day in the presence of his counsel.

As the complainant was to leave the jurisdiction on 10 November 1998, counsel for the prosecution moved for an early hearing as well as for the remand of the appellant to jail pending the completion of the complainant's testimony. It was then that counsel for the appellant himself suggested that the case should start on the following day, that is on 06 November 1998. On that day before the trial started counsel for the appellant asked for communication of the list of prosecution witnesses and their relevant statements "not necessarily this morning" in order to adequately prepare the defence and he was happy with the undertaking given by counsel for the prosecution that he would be provided with all that he was entitled to. The complainant and her daughter deponed on that day. Counsel for the appellant had no difficulty in cross-examining them on that very day and did not deem it necessary to move for a postponement by reason of the non-availability of their statements.

The matter was then adjourned to 18 and 19 November 1998. On 18 November counsel for the appellant moved for an adjournment, not because he did not know the case against the appellant or did not have time to prepare his defence – although he had two days earlier made a request to the prosecution by letter for communication of the statements of the prosecution witnesses – but because counsel was unwell. The matter was then adjourned to 25 November 1998 when defence counsel made a formal application to the court for communication of the statements – presumably as the Constitutional Court had by then delivered judgment in the case of ***Rep. v. B. Georges Case No. 2 of 1998***. However, by that time, all statements had already been communicated to defence counsel except for one which prosecuting counsel undertook to provide "in the course of the day".

In the circumstances, we take the view that the trial Judge was right in holding that the appellant's right to a fair hearing had not been breached, the more so as there was no motion by counsel for the appellant either for a postponement by reason of the non-communication or untimely communication of the statements of the prosecution witnesses or for a prosecution witness who had already deponed to be tendered anew for further cross-examination.

The finding of guilt of the trial Judge is also being challenged on the ground that it was unsafe to act on the evidence of the complainant as she had not

complained of the sexual assault at the first available opportunity. The evidence shows that less than five hours after the sexual assault the complainant did complain to her German lady friend who reported the matter to the police immediately. The trial Judge took into consideration the fact that the complainant was a foreigner who was alone with her child on the beach, that she was aware that her German friends would be meeting her later in the afternoon, and that she chose to confide to the German lady when she came although in the meantime there were other people who were moving about on the beach, including beach wardens in civilian clothings. The learned Judge also took into consideration the fact that the complainant was in a state of shock and concluded that she did complain of the offence at the first available opportunity. We consider that the learned Judge was entitled and right to come to the conclusion he did on the evidence before him.

Another set of grounds on which the conviction of the appellant is challenged raises the issue of the identification of the appellant. It was submitted both before the trial Judge and on appeal before us that (a) the identification of the appellant by the complainant was unsatisfactory and rendered her evidence unsafe; (b) an identification parade should have been held, and (c) the identification of the appellant in court was improper.

Now, the evidence of the complainant reveals that the appellant came on the beach on two occasions. The appellant came towards her on the first occasion and talked to her before going swimming and even told her that he was a French language teacher. She did notice his clothings during that time. In his evidence, the appellant confirmed that he did talk to the complainant. When the appellant came on the second occasion she did recognise his face as he grabbed her from behind. She equally noticed at the time of the sexual assault that the zip fastener of the appellant's trousers was open and that he did not have any underwear. That part of her evidence was confirmed by P.C. Octobre who arrested the appellant a few hours after the sexual assault and who noticed that the appellant was not wearing any underpant and that his zip fastener was open. In fact the appellant himself had confirmed that the zip was broken and could not be fastened. Moreover, there was evidence from P.C. Octobre and P.C. Esther to the effect that both the complainant and her daughter pointed to the appellant when he was being arrested a few metres away from the scene of the offence at Intendance Beach on 01 November 1998.

We have reviewed the identification evidence in the light of the submissions of learned counsel for the appellant but are unable to say that the quality of the identification evidence was poor. This was obviously not a case of a fleeting glance or fleeting encounter as the complainant had ample opportunity to observe the appellant when he first came to talk to her in broad daylight on the beach. She later saw his face and recognised him when he sexually assaulted her and subsequently she pointed to him when he was arrested at the site of the offence itself. In the circumstances it cannot be said that the identification of the appellant by the complainant was unsatisfactory. Indeed these circumstances rendered an identification parade otiose. Moreover, it is in the light of such circumstances that the identification of the appellant in court must be viewed. It is significant that the appellant was not being identified for the first time by the complainant. She was merely confirming that the man in the dock was the one who sexually assaulted her.

Consequently we take the view the trial Judge has properly assessed the identification evidence and that his findings of fact on that score cannot be disturbed, the more so as the defence of the appellant from the start was not one of mistaken identity but one of alibi, and it is to the rejection of that defence by the learned Judge that we shall now turn.

The evidence of alibi put forward on behalf of the appellant was also properly considered and rejected by the learned trial Judge. The learned Judge who had the advantage of seeing and hearing all the witnesses called by the defence in support of the alibi concluded, after reviewing their evidence, that most of those witnesses were relatives or friends of the appellant and had even at times contradicted themselves and could not be believed. We find no fault with the reasoning of the learned Judge or with his appreciation of the evidence of the defence witnesses. The trial court was justified in rejecting the defence of alibi, as it did, the more so in the light of the acceptance not only of the evidence of the complainant but also of the testimony of witnesses Suzette and Adeline which clearly connected the appellant with the scene of the crime at the relevant time.

Another complaint made against the conviction of the appellant by the trial Judge was the absence of corroborative evidence. It was submitted in that behalf

that the learned Judge was wrong to have found corroboration in the testimony of the complainant's four and a half-year-old child.

It is trite law that in cases of sexual offence corroboration is not required as a matter of law, but the judge of fact is required to be alive to the danger of convicting on the uncorroborated evidence of the complainant. The judgment of the learned Judge shows in no uncertain terms that he was alive to such danger but he felt that he could act on the uncorroborated evidence of the complainant in view of the very good quality of the identification evidence. The learned Judge went on, however, to add that in the present case the complainant's testimony was corroborated by the evidence of her daughter as well as by the lies of the appellant in court.

True it is that the complainant's daughter was of very tender age; but the learned Judge found that she could give intelligible evidence. She was able to identify the appellant in court in the same way as she identified the taxi driver who took her to the beach on the day of the incident. And she explained in her own child's language her appreciation of the assault on her mother. Her evidence on that issue had remained uncontradicted. The learned Judge also found corroboration in the deliberate lies by the appellant in court when he related how the complainant, all naked, approached him and engaged in a conversation with him about thieves. In the circumstances, we take the view that the approach adopted by the learned Judge cannot be impeached.

Likewise, we consider that his appreciation of the medical evidence placed before him cannot be faulted. After reviewing the evidence of the doctor called by the prosecution and that called by the defence, the learned Judge concluded that the medical evidence alone neither proved nor disproved the sexual assault. Such a conclusion was fully warranted in view of (a) the evidence of Dr. Hajarnis that the washing of the complainant's genitalia with sea water, the want of resistance at the time of the assault so as not to frighten the young child, partial penetration and premature ejaculation could explain the absence of spermatozoa and injuries on the complainant, and (b) the evidence of Dr Tenzin that partial penetration or premature ejaculation could be the cause of the continued presence of smegma under the appellant's prepuce.

Finally, it was contended on behalf of the appellant that the visit to the locus was held in a manner prejudicial to the appellant in that it was held prematurely and material witnesses were not present. The least said about this ground of appeal the better as the record shows that the visit was carried out at a time and in a manner agreed upon by both prosecution and defence counsel, and in the presence of the appellant and several witnesses.

The appellant has also appealed against the sentence of ten years' imprisonment on the ground that it is manifestly harsh and excessive. The trial court was alive to the fact that the appellant was at his first offence but could not overlook the gravity of the offence and the circumstances in which it was committed on a foreign tourist in the presence of her child of tender age. We are of the view that the sentence passed was fully warranted in the circumstances.

Consequently, for all the reasons given, we dismiss the appeal.

E. O. AYOOLA	**A. G. PILLAY**	**K. P. MATADEEN**
PRESIDENT	**JUSTICE OF APPEAL**	**JUSTICE OF APPEAL**

Dated at Victoria, Mahé, this 10th day of *April* 2000.