IN THE COURT OF APPEAL OF SEYCHELLES

[redacted] LUCAS (APPELLANT)

VS

THE REPUBLIC (RESPONDENT)

Case No: SCA 17/09

Before: Domah, Fernando, Twomey JJA

Counsel: Ms. K Domingue, for the APPELANT

Ms. A Madeleine, Senior State Counsel, for the RESPONDENT

Date of Hearing: 23rd August 2011

Date of Judgment: 02nd September 2011

JUDGMENT

A.F.T.FERNANDO JA.

1. This is an appeal against the conviction of the Appellant for sexual assault of [redacted] a child under the age of 15 years, contrary to and punishable under section 130 of the Penal Code and the sentence of 7 ½ years of imprisonment imposed on the Appellant upon such conviction.

2. The four grounds of appeal ultimately boil down to one ground of appeal, namely as regards the identity of the offender. The defence has not seriously contested the act of sexual assault nor the place and time it took place. In fact Counsel for the Defence in cross examination of the victim had stated "I am not saying that it did not happen, just that you do not know who that person was." The main contention of the defence at the trial before the Supreme Court had been to the effect that there were two others, namely the grand father and Renault, a cousin of [redacted] mother, who were staying in the same house where the victim slept that night and any one of them could have committed the act of sexual assault and the victim made a mistake as to the identity of the offender as there were no lights and it was dark at the place where the act of sexual assault took place.

3. The victim who was 17 years at the time she testified before the trial court, had been 13 years of age at the time of the incident. She was in the habit of staying at her maternal grand mother's house, which was about 10-15 minutes

walk from her house, whenever her parents had work at night. On the night of the incident she had watched a telenovela and had gone to sleep late into the night, in the corridor leading to the bath room. Her 12 year old cousin [redacted] had slept on another bed close to her. She had been awoken from her sleep when she felt someone pulling her bed sheet. According to her "I woke up from my sleep a bit dazed. I just opened my eyes, my heart was beating fast and I turned around just a little bit to try to see who or what was that was pulling on my bed sheet.....and just as I was adjusting my eyes to see who was standing there then flashed a flashlight in his face and I saw him face to face and it was [redacted] the Appellant." She could not see what he was wearing as it was very dark. The Appellant had told her "Shh be quiet do not be scared", when the victim said "[redacted] you are scaring me". The victim had tried to prevent the Appellant from removing the bed sheet but failed. The Appellant had then removed her panty and placed his finger in her private part and licked her private part for "several minutes". The Appellant had asked her whether "it was fun" to which she had not said anything. The Appellant had then got on top of her and put his penis into her private part. She had felt it was very painful. He had placed his hand on her mouth to prevent her from shouting. After about 10 to 15 minutes he had got off her body and gone into his room where his wife and child were sleeping. In the morning when she went to the toilet to pass urine she found some traces of blood on the tissue she wiped herself with. Before the Appellant left for work the following morning he had touched her on her feet and smiled.

4. One of the points urged by the Appellant in this appeal is to the effect that despite having the opportunity to scream the victim had not done so. The victim had said that when the Appellant took advantage of her she "did not do anything to stop him nor shout" and does not know what got into her that she did not scream nor prevent the Appellant from having sex with her. She had also said that she "felt scared and did not know how to react." She had tried to shout only when he was having sex with her and that is because it was very painful, but was unable to do so as the Appellant had covered her mouth.

5. The following morning she had told her little cousin who was even younger than her that the Appellant had done something to her. She who could not understand the gravity of the complaint had smiled and asked the victim to tell her mother about what had happened. Around noon the next day the victim had reported the incident to her parents and the Appellant's girlfriend, who was her [redacted]. Her father had then taken her to the police station where she made a statement and from there to the Victoria hospital where she was examined by a Dr. Michel.

6. Under cross examination the victim had said that she does not know what type of a light the Appellant had flashed onto his face. On being questioned "How can someone flash a flashlight in his own face?' the victim's answer had been "He was trying to let me know that he was the one there, he flashed the light on purpose". She had also stated that it was when she saw the shape of his body and was trying to recognize the person that he flashed the light onto his face. When asked by Defence Counsel whether it is possible that she could have made a mistake her answer was "No I did not make a mistake. I know his voice. If he has told you that it could have been another person like Renault I know those two persons very well and they are not similar." When asked again by Defence Counsel "Could it have been Renault?" her answer had been "I know the difference in their voices, their height and the build of their body." And later in more emphatic terms she in answer to the Counsel for the Defence had said "You are saying that I have made a big mistake but only God knows and he will judge him but as for me I know perfectly well who it was because I saw his face and I heard his voice. As for the three men that you are referring to, my grandfather does not walk and of course I would have known if it was Renault because there is such a big difference between [redacted] and Renault." The victim had also stated that Renault's voice is much deeper than that of the Appellant and is of a different pitch. When questioned as to why she did not call her grandma the victim had said. "I also ask myself that same question all the time but I myself I do not know the reason why?" It had come out during the cross examination that the other male in the house, namely the grandfather of the victim is "very very old and actually he is not capable of walking." Under cross examination the victim had stated that there was penetration.

7. PW 2 the mother of the victim had corroborated the victim as regards her reporting to them what had happened on the night of the incident and that it was the Appellant who had sexually assaulted her. The victim had been in a distressed state and PW 2 had stated that "She looked afraid and she was shaking a bit when she was telling me about the incident, she sounded like she wanted to cry." This evidence could be 'supportive' when the distress is observed shortly after the offence and there is nothing to suggest that it is simulated. The cases of Redpath (1962) 46 Cr. App R 319, Chauhan(1981) 73 Cr App R 323 and Dowley (1983) Crim L R 168 are of relevance. Under cross examination as to the issue whether PW 2 found it strange that the victim had not screamed her answer had been ".....perhaps she was scared because even when she was talking to me I could see the fear."

8. PW 4 Dr. R. Michel who examined the victim some hours after the incident had stated that there was a fresh laceration on the hymen at 12 and 6 o'clock positions and there was slight bleeding due to the laceration indicative of penetration.

9. The Appellant giving evidence before the trial Court has denied the incident. He had admitted that he was on good terms with the victim and had not attributed any reason for the victim to falsely implicate him.

10. Since the victim was below 15 years at the time of the incident her failure to put up a resistance or her silence at the time of the sexual assault even if indicative of consent is not of relevance in determining the guilt of the Appellant.

11. The only question for determination in this appeal is as regards the identity of the Appellant. This is a case of recognition of a person well known to the victim and not that of identification of a stranger in a fleeting glance. The Appellant had been recognized by his face, the build of his body, his height and his voice. The victim was in a position to distinguish clearly the particular physical features of the Appellant and that of his voice from that of Renault, whom the defence had tried to point the finger at. It is clear from the victim's evidence that she had unhesitatingly recognized the Appellant no sooner he flashed the light onto his face to make the victim aware that it was he who was beside her. The Appellant had spoken to her on two occasions during the incident. The entire episode starting with the Appellant putting his finger into the private part of the victim up to the time he left her having had sexual intercourse with her had lasted over 20 minutes. The victim had seen the Appellant going to the room in which his wife and child were sleeping after she was sexually assaulted by him. In such circumstances it is difficult to doubt the veracity of the victim's evidence as regards the identity of her assailant. How can this Court impose its own views, even if it had any, and cast doubts on the identification by the victim of her assailant when the victim has not left any reason to doubt the accuracy of her evidence or the circumstances does not permit it? Here is a case where the victim knew her assailant very well, saw his face, felt his body on top of her body for almost 20 minutes, clearly heard his voice which was familiar to her, and saw him go towards his room after she was sexually assaulted in a premises she was very much accustomed to. It is not unusual for a person to recognize a known person in the dark and his movements, in a place familiar to such person. This is totally different to identification of a stranger in a fleeting glance in dark and unfamiliar surroundings. Further the Trial Judge who had the opportunity of seeing the victim testify and having warned himself of acting on the uncorroborated testimony of the victim had said "It is evidence of a single identifying witness which this court believes without any doubt. I say this bearing in mind the circumstances under which the identification was done.....The accused was not a stranger, they spoke, she called out his name, it lasted a reasonable period of time etc. Such uninterrupted identification cannot be faulted.....Having observed [redacted] while testifying, I found her to be a young intelligent and confident girl who seemed to be very sure of and therefore coherent in what she was saying. This even became apparent during cross examination. She was truthful and her credibility therefore could not be questioned." We are not prepared to disturb such a finding of fact by the Trial Judge.

12. We do not find any merit in the defence argument that the younger sister of the victim and 12 year old [redacted] who were sleeping near the victim had not testified at the trial or given statements to the police for it is clear from the

victim's evidence that the victim had not shouted or made a commotion when the Appellant sexually assaulted her. We do not find any material inconsistency in the evidence of the victim and that of her mother. We also do not find any merit in the defence argument that it is improbable that the Appellant would have taken the risk to sexually assault the victim in a house where there were several other inmates in view of the non denial of the incident and the position taken up by the Counsel for the Defence as stated at paragraph 2 above. This was a position that the grandfather and Renault, a cousin of [redacted]s mother, against whom doubts were cast, could also have taken, had they been charged. The victim in her evidence had clearly stated that the latter two were not responsible. The fact that the Appellant respected the victim, had been shocked when his girlfriend told him what the victim had related to her, and that he had consistently denied that he had sexually assaulted the victim from the time of his arrest up to the time he testified in court does not impress us at all. We also do not find any shortcomings in the police investigation of this case that could have led to discrediting the evidence of the victim as submitted by the Appellant's Counsel.

13. In the circumstances we have no hesitation in dismissing the appeal.

14. The Appellant has also submitted that in this case the Court had a duty to exercise caution because at the time that the offence was committed the complainant was a child of 13 years and because the evidence of the complainant, being a complainant in a sexual case was uncorroborated. What is to be noted was that the victim was 17 years old at the time she testified before the court and was not a child witness before the court. It is also to be noted that in England, the requirement under the common law and Children and Young Persons Act 1933, that evidence of a child witness needs corroboration has now been abrogated by the Criminal Justice Act of 1988. Even under the common law of England where the commission of the offence was not in issue but only the identity of the offender, as in this case, there was no need for a corroboration warning. See the case of R V Chance (1988) 3 AER 225, CA.

14. It has become necessary to examine the necessity for a corroboration warning which was a requirement under the common law of England in sexual offence cases and followed by our courts for a long period of time and even after, the promulgation of our 1993 Constitution and the enactment of the Criminal Justice and Public Order Act of 1994 in England, which came into force on the 3rd February 1995 and which abrogated the requirement for the corroboration warning.

15. Section 12 of the Evidence Act (CAP 74) states:

"Except where it is otherwise provided in this Act or by special laws now in force in Seychelles or hereafter enacted, the English law of evidence for the time being shall prevail."

Interpreting section 12 of the Seychelles Evidence Ordinance (Cap 81) as amended by section 3 of the Seychelles Judicature Ordinance, 1962 which had an almost identical provision to what is contained in section 12 of the Evidence Act (CAP 74) referred to above save for the words 'Colony' instead of the word 'Seychelles', the Court of Appeal in the case of Kim Koon & Co. LTD VS R (1969 S.C.A.R. at page 64) said in 1969:

"We have no doubt that it is not competent for the Seychelles Legislature to delegate the power to legislate, and that so far as section 12 of the Evidence Ordinance as amended may purport to apply to Seychelles future amendments of the English law of evidence, it is inoperative. In our judgment the effect of the section is to apply to Seychelles the English law of evidence as it stood on the 15th October, 1962, the date of enactment of the Seychelles Judicature Ordinance, 1962. Accordingly, the Criminal Evidence Act 1965, does not apply in Seychelles."

16. In interpreting section 3A of the Courts Act (CAP 43), a provision similar to section 12 of the Evidence Act (CAP 74), the Supreme Court held in 1981, in the case of S. G. Finesse VS M. L. Banane (1981 SLR at page 108)

that:

"By virtue of that new section the Supreme Court was given all the powers, authorities and jurisdiction of the High Court in England as at the date of enactment of Ordinance No 13 of 1976, that is, the 22nd June 1976. Such powers, authorities and jurisdiction would be of the High Court as at 22nd June 1976; but later statutes extending such powers and jurisdiction would not apply. Section 3A should be given its full meaning and thus should not be construed to apply to the inherent powers of jurisdiction of the High Court stemming from the Common Law."

Section 3A of the Courts Act (CAP 43) read as follows:

"The Supreme Court shall be a Superior Court of Record and in addition to any other jurisdiction conferred by this Act or any other law, shall have and may exercise the powers, authorities and jurisdiction possessed and exercised by the High Court of Justice in England."

17. The words 'for the time being' are capable of different interpretations, according to the context; for example, they may be used with a context showing that they were intended to point one single period of time or to a succession of periods. In the case of Dakhina Mohan Roy Vs Saroda Mohan Roy (1896) ILR 23 Cal 357 reported in Bindra's Interpretation of Statutes, 2007 edition, it was held that a common case of a petition for payment of dividends to the rector of a certain parish 'for the time being' would point, not to a single period but a succession of periods.

18. The cases of Kim Koon & Co. LTD VS R and S. G. Finesse VS M. L. Banane were both decided prior to the coming into force of the 1993 Constitution.

19. Paragraph 2(1) of Schedule 7 of the 1993 Constitution states:

"Except where it is otherwise inconsistent with this Constitution and subject to subparagraph (2), an existing law shall continue in force on and after the date of coming into force of this Constitution."

The word "law" has been interpreted in the 1993 Constitution when applicable to the Constitution as including "any instrument that has the force of law and any unwritten rule of law".

20. It is correct as stated in the Kim Koon case that it is not competent for the Seychelles Legislature to delegate the power to legislate to the British Parliament but to also think that we are bogged down with and have to blindly follow the English law of evidence as it stood on the 15th October, 1962, that is almost 50 years ago is an affront to our sovereignty as a Nation and retards our jurisprudential development. We have in adopting the 1993 Constitution solemnly declared our unswaying commitment to maintain Seychelles as an independent State politically and to safeguard its sovereignty. We have vested our legislative power which springs from the will of the people in our National Assembly. Therefore the principle enunciated in the Kim Koon judgment as regard the applicability of the English law of evidence in the Seychelles should be only if it is not otherwise inconsistent with the 1993 Constitution and if considered relevant and keeping in line with the modern notions of the law of evidence acceptable in other democratic counties. Paragraph 2(1) of Schedule 7 of the 1993 Constitution should be given a fair and liberal meaning and the continuation in force of existing law should not be understood as making applicable to the Seychelles the English law of evidence which has now been abrogated.

21. The requirement for the court to give the jury a warning about convicting an accused on the uncorroborated evidence of a victim in a sexual offence case was abrogated in England by section 32 of the Criminal Justice and Public Order Act of 1994, which came into force on February 3 1995. In R Vs Makanjuola 1995 1 WLR 1348 and R Vs Easton 1995 2 Cr. App. R. 469 CA it was argued on behalf of the appellants that the judge should in his discretion have given the full corroboration warning notwithstanding the abolition of the requirement on the basis

that the underlying rationale of the common law rules could not disappear overnight. That argument was roundly dismissed by the court on the basis that any attempt to reimpose the "straightjacket" of the old common law rules was to be deprecated. It was held, however, that the judge does have a discretion to warn the jury if he thinks it necessary. Lord Taylor C.J. giving the judgment of the court, said that they had been invited to give guidance as to the circumstances in which, as a matter of discretion, a judge, in summing up, ought to urge caution in regard to particular witness and the terms in which that should be done. His Lordship said:

"The circumstances and evidence in criminal cases are infinitely variable and it is impossible to categorise how a judge should deal with them. But it is clear that to carry on giving 'discretionary' warnings generally and in the same terms as were previously obligatory would be contrary to the policy and purpose of the 1994 Act. Whether as a matter of discretion, a judge should give any warning and if so its strength and terms must depend upon the content and manner of the witness's evidence, the circumstances of the case and the issues raised. The judge will often consider that no special warning is required at all. Where, however, the witness has been shown to be unreliable, he or she may consider it necessary to urge caution. In a more extreme case, if the witness is shown to have lied, to have made previous false complaints, or to bear the defendant some grudge, a stronger warning may be thought appropriate and the judge may suggest it would be wise to look for some supporting material before acting on the impugned witness's evidence. We stress that these observations are merely illustrative of some, not all, of the factors which judges may take into account in measuring where a witness stands in the scale of reliability and what response they should make at the level in their directions to the jury. We also stress that judges are not required to conform to any formula and this court will also be slow to interfere with the exercise of discretion by a trial judge who has the advantage of assessing the manner of a witness's evidence as well as its content".

22. Thus it is clear that as per the English law of evidence presently, it is a matter for the judge's discretion whether any corroboration warning is appropriate in respect of a complainant of a sexual offence case as indeed in respect of any other witness in whatever type of case. There would need to be an evidential basis for suggesting that the evidence of the witness might be unreliable. Such a basis does not include mere suggestions in cross-examination by counsel. Where some warning is required, it is for the judge to decide the strength and terms of the warning. An appellate court should be disinclined to interfere with the judge's exercise of his discretion save in a case where the exercise of discretion had been wholly unreasonable.

23. Australia, Canada and Ireland have also done away with the need for the corroboration warning.

24. The question of the need for corroboration in sexual cases was reviewed in a judgement of the Supreme Court of Namibia in State v K [2000] 4 LRC 129 in the context of a constitutional requirement of a fair trial in conjunction with the complainant's right to be protected. The judgement expressly endorsed and adopted Lord Taylor's analysis in Makanjuola. In effect, the Court of Namibia concluded that the rule requiring a corroboration warning in sex cases on the basis that more false charges are laid in this category of case than any other was discredited and misconceived. The Court was of the view that the rule had "outlived its usefulness".

25. The corroboration warning is viewed by many as misogynistic in conception. In Conoway v State , 156 S.E. 664, 666 (Ga. 1931), Russell C.J. speaking of the corroboration warning stated that it was "expounded in a remote age when woman was considered but little more than a chattel, and presumed, unless she was corroborated, to have been willing to engage in sexual intercourse almost upon suggestion." It perpetuates an archaic and unjustified stereotype of women and is highly insulting because it is based on "the folkloric assumption that women are by nature peculiarly prone to malice and mendacity and particularly adept at concealing it."

26. In the Preamble to our Constitution we have recognized the inherent dignity and the equal and inalienable rights of all members of the human family as the foundation for freedom and justice and declared to uphold the rule of law based on the recognition of the fundamental human rights and freedoms enshrined in the Constitution and on respect

for the equality and dignity of human beings. Article 27 of the Constitution states:

"27(1) Every person has a right to equal protection of the law including the enjoyment of the rights and freedoms set out in this Charter without discrimination on any ground except as is necessary in a democratic society.

(2) Clause (1) shall not preclude any law, programme or activity which has as its object the amelioration of the conditions of disadvantaged persons or groups.

To say that every complainant in a sexual offence case is less worthy of belief than another witness is an affront to their dignity and violates the right guaranteed under article 27(1) of the Constitution. The Corroboration Rule in sexual offence cases certainly does not have as its object the amelioration of the conditions of disadvantaged persons or groups. An accused in a sexual offence case cannot be viewed as a disadvantaged person although a victim can. In fact it worsens the conditions of sexual offence victims when they are the only ones thus targeted without an evidential basis.

27. In a number of Canadian decisions, it has been held that requiring corroboration of the evidence of the mother in a paternity suit breaches the guarantee of equality contained in s.15(1) of the Canadian Charter of Rights and Freedoms (G.(T.L) v L.(D.) (1988) 50 D.L.R. 4th 758 (Sask C.A.); Bomboir v Harlow (1987) Sask R. 213, [1987] 5 W.W.R. 55 (U.F.C.); K.(L.) v L.(T.W.) (1988) 31 B.C.L.R. (2d) 41 (Prov. Ct.).

28. We therefore hold that it is not obligatory on the courts to give a corroboration warning in cases involving sexual offences and we leave it at the discretion of judges to look for corroboration when there is an evidential basis for it as stated earlier.

A.F.T.FERNANDO
JUSTICE OF APPEAL

I concur:

S.DOMAH
JUSTICE OF APPEAL

I concur:

M.TWOMEY
JUSTICE OF APPEAL

Dated this 02nd day of September 2011, Victoria, Seychelles