IN THE SEYCHELLES COURT OF APPEAL

PASCAL FOSTEL
APPELLANT

VERSUS

THE REPUBLIC
RESPONDENT

CR SCA NO. 19 OF 2012

Counsel for the Appellant – Mr. Elvis Chetty

Counsel for the Respondent – Mr. Jayaraj Chinnasamy

JUDGMENT

MSOFFE, J.A.

1. The Appellant appeared before the Supreme Court of Seychelles to answer a charge of sexual assault contrary to section 130(1) of the Penal Code. It was alleged that on Friday 15th April, 2005 he sexually assaulted Claudia Lucas in a computer laboratory at the Pointe Larue Secondary School by inserting his penis into the vagina of the said Claudia Lucas, a girl of 17 years of age at the material time. He pleaded not guilty. After a full trial he was convicted as

charged and sentenced to ten years in prison. He is aggrieved, hence this appeal.

2. Briefly, the prosecution led evidence to the effect that on 15th April 2005 at around 9.30 a.m. Claudia Lucas went to the computer room to do an assessment on the instructions of the Appellant who was her Mathematics teacher. While there, the Appellant came in. Another teacher referred to as Sir Ned was also in the room. The Appellant spoke to Claudia Lucas and then to Sir Ned who left the room thereafter. The Appellant came to Claudia Lucas and began to touch her. He held her and put her on a table on which there were computers, removed her panties and then inserted his penis into her vagina. After some time, someone knocked on the door. She could not scream because the Appellant had pressed her mouth. After the person who knocked the door had left the Appellant got up, unlocked the door and left the room. Thereafter, Claudia Lucas continued with her assessment and later went back to her class. After classes, she went back home but did not reveal the incident to her parents or anyone until the following day when while in church she confided to her friend Sabrina. On the following Monday, Sabrina told Mrs. Hermitte, the Head teacher, about the incident. The latter informed Irene Lucas, the complainant's mother. In her testimony, Irene Lucas stated that she too had noticed that

normally when her daughter went back home from school she would talk to anyone and do her normal chores as usual but on that date of incident she did not talk to anyone. Instead, she went straight to her room. It is also in evidence that Irene Lucas accompanied the complainant to the police and later to the hospital where on 20th April 2005 upon examination Dr. Michel noted that Claudia Lucas was sexually active already, there were no bruises in the vagina, and hymen had an old laceration and was not intact. In the meantime, on that same date, that is on 26th April 2005, between 14.02 hours and 14.50 hours, Agnes Fanchette, recorded the Appellant's pre-trial statement (exh. P1) under caution in Creole and its English translation appears as Exh. P1a. ASP Christel Marie witnessed Agnes Fanchette *"interviewing and cautioning"* the Appellant.

3. In defence, the Appellant exercised his right to remain silent for which under Article 19(2) (h) of the Constitution of the Republic of Seychelles no adverse inference should be drawn against him for deciding to exercise that right. He called Ned Louis as his witness, whose evidence was that he was the computer teacher at the school. On that particular day, the complainant came to the room and showed him a note from the Appellant that he had allowed her to come to the said room. He continued doing his work while the complainant was also doing her work. After some time the Appellant came in, talked to the complainant, and then

requested him to go out and look after his class. He obliged. He returned after 3 to 5 minutes. When he returned, the complainant was still there doing her work but the Appellant had already left. He further stated that the key to the computer room was in his custody and that the room could not be locked from the inside, and also that he noticed nothing unusual. The complainant left the room a short while later.

4. It is discerned from the evidence on record that the following matters are not in dispute:-

(i) That the Appellant and Claudia Lucas were a teacher and student, respectively, at Pointe Larue Secondary School at the material time.

(ii) Both the Appellant and Claudia Lucas went to the computer room on that day.

(iii) Ned Louise was in the computer room where at some point he left leaving the Appellant and Claudia Lucas alone and together in the room.

(iv) Since Ned Louise did not witness the incident as he was out of the room at the time, the determination of the case depended, and still depends, on whether or not the version given by Claudia Lucas could, and can, be believed.

5. The crucial issue at the trial was, and indeed still is, whether the Appellant committed the alleged offence at the time when Ned Louise was absent from the computer room.

6. At this juncture, it is instructive to state the law on sexual assault with the ultimate aim of seeing how it can be applied to the facts of this case. It is trite law that sexual assault generally refers to any crime in which the offender subjects the victim to sexual touching that is unwanted and offensive. Rape is a common form of sexual assault which can be committed in many situations – on a date, by a friend or an acquaintance, or when you think you are alone, etc. Rape and sexual assault are never the victim's fault – no matter where or how it happens. Consent is the crucial concept in sexual assault. This means that the *actus reus*, or "physical act", in sexual assault is engaging in a defined sexual act without the consent of the other person. This is why in **BLACK'S LAW DICTIONARY**, Eight Edition, at page 123, Bryan A. Garner defines it, *inter alia*, as sexual intercourse with another person who does not consent. In similar vein, at page 1288 thereto, **Garner** states that at common law rape was defined as unlawful sexual intercourse committed by a man with a woman not his wife and against her will and that the common-law crime of rape required at least a slight penetration of the penis into the vagina.

7. In this appeal the Appellant has canvassed four grounds of appeal. In substance, however, they all crystallize on two major grounds. The first one seeks to impeach the weight credibility attached to the evidence of Claudia Lucas by the Supreme Court while in the second one the Appellant is of the view that his constitutional right to be tried within a reasonable time was violated.

8. The credibility of Claudia Lucas is challenged on a number of fronts, notably in relation to her past sexual history and her conduct after the alleged incident.

9. Regarding the complainant's sexual history the Appellant is of the view that this was a factor that ought to have been taken into account by the trial Judge, in that having been so sexually active the complainant would not have been so affected as to be unwilling to complain about the sexual assault. Apparently, this complaint arises from that portion of the Judgment where the Judge reasoned as follows:-

> *Considering her young age and the fact that the accused was holding a position of authority over her I accept her reasons as to why she delayed in complaining about the incident and I am satisfied this could not be considered to be a reason to establish that she had consented to the*

acts done by the accused, especially when she states that the accused had covered her mouth at the time someone knocked on the computer room.

10. With respect, we are unable to fault the Judge in the above reasoning. We accept that in an appropriate case an accused person may construct his defence on the basis of his knowledge of the complainant's sexual history, and consequently his belief that she was consenting to having intercourse with him also. But in fairness to the complainant in this case, as correctly opined by the Judge, the incident happened in a situation or context of a teacher-student relationship. Under those circumstances, we do not think that the complainant had consented to the acts done by the Appellant. At any rate, she stated that at the time of incident the Appellant pressed her mouth. The fact that the Appellant pressed her mouth would appear to show that there was some sort of force and threat in subjecting the complainant to sexual intercourse. And as this Court held in **Lespoir v Republic**, SCA 3/1989 CA 9/1989, consent to a sexual act obtained by threat or force is not consent. If so, her sexual history notwithstanding, we do not think that conditions were ideal for her to complain immediately after the incident. Indeed, she was positive that she did not trust anyone at the school. This suggests that she could not

complain and tell anyone at the school about the incident. Under those circumstances, it is our considered view that it would be demanding too much from her to expect that she ought to have complained or reported the incident immediately after it had happened. Nevertheless, as pointed out by the State counsel, past history and the failure to report immediately after the incident were side issues which did not go to the root of the case against the Appellant. What was in the trial was whether the Appellant committed the offence in question on the material day and time, without more or less.

11. Regarding the complainant's conduct after the incident in that she continued with her assessment as if nothing happened, yet again, we do not see merit in this complaint. In our view, the Judge dealt with this point adequately. Our reasoning in paragraph 10 above, also applies here, that is, she did not trust anyone, etc. At any rate, there was evidence by her mother that when she went back home she behaved in a manner that was not normal with her usual ways of doing things. Nevertheless, as already pointed out, whether or not she behaved differently was not the issue of the moment. What was at stake in the case was whether or not she was raped by the Appellant on the fateful day and time.

12. In conclusion on the above point, we wish to observe that the Judge believed Claudia Lucas. On the available evidence, we see no reason for faulting the Judge in this respect, all the more so when the Appellant in his statement accepted that he had sent her to the computer lab, had visited her, had sent away Sir Ned after which he had made consensual advances to her, down to inserting his fingers in her private part.

13. In order to appreciate the point being made in the second major ground of appeal it is instructive, first and foremost, to put the facts in their proper perspective and context. A look at annexures B1, B2 and B3 will show that the charge against the Appellant was preferred on 13/10/2005 and he was required to appear in court on 15/11/2005 to answer the charge. On 15/11/2005 he appeared in court. Thereafter, there were a number of adjournments until 21/7/2006 when his plea was taken. Yet again, this was followed by several adjournments until 21/11/2007 when the trial commenced before V. Alleear, Chief Justice. Claudia Lucas and her mother testified on that date. On 30/5/2008 an order was made for a trial *de novo* because “the Chief Justice is no more here”. The second trial commenced on 6/7/2009 and the Judgment was delivered on 17/10/2012.

14. It is evident from the above chronology of events that the Appellant's trial before the Supreme Court took a period of over seven years. So, by the time the Judgment in this appeal is delivered on 14/8/2014 this matter will have been in court for over nine years!

15. Article 19(1) of the Constitution of the Republic of Seychelles provides as follows:-

> *Every person charged with an offence has the right, unless the charge is withdrawn, to a fair hearing* ***within a reasonable time*** *by an independent and impartial court established by law.*
>
> [Emphasis added.]

16. It will be observed that Article 19(1) contains three separate guarantees, that is (a) a right to a fair hearing; (b) within a reasonable time; (c) by an independent and impartial court established by law. In our view, item (b) above is of particular concern and relevance to this case .

17. Admittedly, it is not always easy to determine the reasonableness of the duration of proceedings. However, this Court's reasoning in **Harold Ah-Wan v Republic**, Criminal Appeal No. 1 of 2002 provides a useful guidance

particularly where at page 7 of the said Judgment it quoted with approval a decision of the Privy Council in **Procurator Fiscal, Linlithgow v Watson and Borrowers**, on an appeal from Scotland, that *"this will be so only if the period which has elapsed is one in which, on its face and without more, gives ground for real concern ....."* Then, further down on the same page this Court also endorsed their Lordships principle stated in **Koming v Federal Republic of Germany** [1978] 2 EHRR 170 where the European Court on Human Rights stated at page 197:-

> *The reasonableness of the duration of proceedings covered by Article 6(1) of the Convention must be assessed in each case according to its circumstances. When enquiring into the reasonableness of the duration of criminal proceedings, the court has had regard, inter alia, to the complexity of the case, to the applicant's conduct and* ***the manner in which the matter was dealt with by the administrative and judicial authorities.***
>
> [Emphasis added.]

18. In applying the Constitution, and the above authorities to the facts of this case, we hasten to say the following:-

(i) The period of over seven years spent in the trial of the Appellant was one which gives ground for real concern. By any stretch of imagination this was, no doubt, a long period of time.

(ii) In our own appreciation of the record, we do not get the impression that this was a complex case requiring such a long period of time to be completed. If anything, this was a simple case of sexual assault which need not have taken all that period of time to be completed.

(iii) Generally speaking, the Appellant did not contribute to the delay. The record is clear that he always appeared before the court as and when he was required to do so.

(iv) The prosecution were, again generally speaking, not to blame either. Our appreciation of the record also shows that they were always ready to proceed with the case, save for a number of factors that were beyond their control.

(v) The bottleneck appears to have been with the manner in which the matter was dealt with by the administrative and judicial authorities. The case was dealt with by different Judges and at different times. To cap it all, the absence of Chief Justice Alleear was the main cause for the delay in that a fresh trial had to be ordered with the attendant consequence of having to call witnesses afresh, etc.

19. The immediate question that arises is this:- In the midst of the above state of affairs, and given the fact that both the Appellant and the prosecution were generally speaking not to blame for the delay, what is the remedy open to the Appellant?

20. In answer to the above question, the decision of the Privy Council in **Melanie Tapper v Director of Public Prosecutions**, an appeal from Jamaica, in which under paragraph 26 their Lordships considered the case of **Attorney General's Reference Case** [2004] 2 AC 71 in the context of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, provides useful guidance. In that case, Lord Bingham summarised some of the principles and stated, *inter alia*, that:-

> *…….. If the breach of the reasonable time requirement is established retrospectively, after there has been a hearing, the appropriate remedy may be a public acknowledgement of the breach,* ***a reduction in the penalty imposed on a convicted defendant*** *or the payment of compensation to an acquitted defendant …….*
>
> [Emphasis added.]

21. In applying one of the above principles enunciated by their Lordships to the facts of this case, we think, the Appellant is entitled to *"a reduction in the penalty imposed"*, in the manner we will order hereunder.

22. In conclusion, we are satisfied that the prosecution proved the case against the Appellant beyond reasonable doubt. His appeal against conviction is, therefore, dismissed. We acknowledge, however, that there was a delay in completing the trial for which he is entitled to a reduction in the sentence imposed on him. We will, and we hereby, reduce by two years the sentence imposed on him on account of the constitutional breach.

23. The sentence of 10 years imposed by the learned Judge is hereby quashed and is substituted by a sentence of eight years.

S. Domah	A. F. T. Fernando	J. H. Msoffe
Justice of Appeal	Justice of Appeal	Justice of Appeal

Dated this 14th day of August 2014, at Palais de Justice, Ile Du Port, Mahé, Seychelles