

IN THE SEYCHELLES COURT OF APPEAL

[Coram: F. MacGregor (PCA) , A.Fernando (J.A) , J. Msoffe (J.A)]

Civil Appeal SCA 28/2013

(Appeal from Supreme Court Decision CS 138/2008)

Narajan Alphonse

Appellant

Versus

Romeo Monthy

Respondent

Heard: 14 December 2015

Counsel: Mr. France Bonte for the Appellant

Mr. Frank Ally for the Respondent

Delivered: 17 December 2015

JUDGMENT

F. MacGregor (PCA)

[1] This is an appeal against the decision of Justice Renaud of 26th July, 2013.

[2] The brief facts of this matter are that the respondent claimed that the appellant had physically assaulted him on 23rd, September, 2004. At all the material time, the respondent was a minor who had to be assisted by his father to file and prosecute his claim.

[3] The appellant had been charged with the charge of assault, causing grievous harm to the respondent at the magistrate's court (being Cr.case No. 156/2004). However, at the closure of the prosecution case, the court ruled that the appellant had no case to answer.

An application for revision of the magistrate's court decision, at the Supreme Court also failed.

[4] The Respondent filed the civil claim claiming that the unlawful actions of the appellant on the appellant amounted to a *faute*' in law.

[5] Having heard the evidence of the parties and their witnesses, the Supreme Court found for the respondent and awarded him damages totalling R 55,000.

[6] The appellant appealed to the Court of Appeal to challenge the decision on one ground of appeal, that;

“The finding of the honourable judge is against the weight of evidence in the case”.

[7] We need to dissect the ground of appeal;

- i. *Was there enough evidence to conclude that the appellant had assaulted the respondent?*
- ii. *If the answer is in affirmative, did the assault cause the respondent damages?*

Was there assault?

[8] The respondent called 11 witnesses to prove his case. All the witnesses except one were not present at the time of the assault, and did not therefore witness the assault. Rama Barra, a minor like the respondent, was present when the appellant assaulted the respondent. In his evidence, he repeated the same sequence of events as the respondent, up to the time the respondent fell to the ground after the assault, at which point he explained, he ran away in fear.

[9] Rama, in his evidence, said he was with the respondent when the appellant called both to go and pick chocolate from him. He was hesitant and stood at the gate to the appellant's premises, watching his friend go for the chocolate. He witnessed the appellant assault the respondent. He confirmed he was not able to go and give evidence at the magistrate's court, because he was scared of the appellant. This is understandable for a young boy

who witnessed his friend being assaulted. The evidence of Rama and that of the respondent remained largely unchallenged in relation to their presence at the residence of the appellant on the material day. The appellant did not challenge either of the two witnesses as to their assertions that he assaulted the respondent.

[10] We agree with counsel for the respondent when he argues on the effect of a party's failure to cross examine, citing *Keane on Modern Evidence*, 6th Edition. The reference states:

“A party who has failed to cross-examine a witness upon a particular matter in respect of which it is proposed to contradict his evidence-in-chief or impeach his credit by calling other witnesses, will not be permitted to invite the jury or tribunal of fact to disbelieve the witness's evidence on that matter”.

[11] There was no reason given, as to why a boy of Rama's age would give false evidence against the appellant. The court a quo had the advantage of observing the demeanour of the witnesses. We find no strong grounds to fault it on its finding that the appellant assaulted the respondent.

Damages

[12] Having established that the appellant assaulted the respondent, we need to enquire whether such assault caused the respondent damages, as awarded by the court below. The physical injuries had to be treated at the hospital. The physiological wounds had to be handled by a psychiatrist. It is still unclear as to whether the respondent has been completely cured of his psychological trauma from the assault. Mr Gerald Limsam testified that he was a counsellor who attended to the respondent when he was referred to the National Council for Children. He observed that the boy suffered posttraumatic stress disorder symptoms, flashbacks, nightmares and extreme fear. While he was not a professional psychiatrist, his observations cannot be dismissed.

[13] The main principle of liability for delict in the Civil Code is Article 1382 which provides that;

“Every act whatever of man that causes damage to another obliges him by whose fault it occurs to repair it.”

[14] To succeed on a claim of delict, the plaintiff must prove three elements, that is to say fault, injury or damage and a causal link. This was the position confirmed by this Court in the matter of *Emmanuel v Joubert SCA 49/1996, LC 117*.

[15] The claim arises at the earliest time when these three co-exist and it is from that time that it is open to the aggrieved person to bring an action to enforce the claim that has arisen (*see Emmanuel v Joubert supra*). In the present case, it was established that the appellant assaulted the respondent, and he was at fault in assaulting him. It was further established that the respondent suffered both physical as well as psychological injuries, and that there was a causal link between the assault and the injuries so suffered. The appellant cannot escape liability. He was at fault, and is obliged to repair the damage that he caused the respondent. We find no basis to contradict the learned judge on his findings. The appeal must fail.

Previous trial and discharge in criminal trial;

[16] The appellant argued at appeal that he had been tried and discharged at the magistrate’s court in a criminal trial, on the same facts. He therefore argued that on the basis of the discharge, he could not be sued in a civil case. That cannot be further from being reasonable. It is a long established principle that one may escape criminal liability, but still be liable for civil damages.

[17] We agree with *Cross & Tapper on Evidence, 12th Edition* at pg 116, that there are varied reasons as to why an acquittal should not be admitted as evidence of innocence in subsequent civil proceedings. Chief amongst these being the fact that the standard of proof is different. An acquittal may mean that the case as against the accused has not been proved beyond reasonable doubt, while the standard of proof required in civil

proceedings is that of a balance of probabilities. Evidence which is insufficient to establish liability on the basis of proof beyond reasonable doubt in criminal case may present sufficient coincidence of facts to establish liability on a balance of probabilities.

[18] Accordingly, this appeal is dismissed with costs.

F. MacGregor (PCA)

I concur:.

A. Fernando (J.A)

I concur:.

J. Msoffe (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 17 December 2015