

IN THE SEYCHELLES COURT OF APPEAL

[Coram: S. Domah (J.A) , A. Fernando (J.A) , M. Twomey (J.A)]

Criminal Appeal SCA 46/2014

(Appeal from Supreme Court Decision CR No. 75/2012)

GK

Appellant

Versu
s

The Republic

Respondent

Heard: 09 April 2017

Counsel: Mr. Anthony Derjacques for Appellant

Ms. Ananth Subramanian for Attorney-General

Delivered: 21 April 2017

JUDGMENT

S. Domah (J.A)

[1] This was an appeal on both conviction and sentence from a decision of the Magistrates Court which convicted the appellant, then accused, and remitted the matter for sentencing to the Supreme Court inasmuch as the Magistrate took the view that she was jurisdictionally limited to impose a sentence of 8 years when the appellant deserved a higher sentence. The charge was for sexual assault contrary to section 113(1) read with section 132 and punishable under section 113(1) of the Penal Code. The offence carries a maximum sentence of 20 years imprisonment.

[2] The facts are simple even if disturbing. The trial court's finding was that the appellant had committed anal sex with a 15-year old boy in a police cell where the appellant, in a drunken state, found himself locked up with the child victim on another charge. Both were released on the same day. It is after the release that the child victim complained to the

authorities. He was examined by the Police Medical Officer and found to have the following injuries: “abrasions and two tears at the anal orifice.” The Certificate from the Senior Medical Officer Dr K. Viveganandan also spoke of the urine sample containing the presence of some spermatozoa. The medical examination was effected on the 28th January 2012 at 5.50 p.m. for the sexual assault upon the complainant which had been reported having taken place in the early afternoon in the police cell.

[3] The trial was postponed several times on account of procrastination on the part of the appellant to instruct counsel. He was given legal aid. But he did not want the court-appointed counsel to appear for him. His chosen counsel withdrew in presence of another counsel who was present but when the trial started he had simply disappeared.

[4] The appellant put up the following grounds of appeal:

1. *The learned Magistrate erred in law in not allowing the Appellant to be represented by an Attorney-at-Law in that:*
 - a. *He allowed Mr Basil Hoareau to withdraw without cause or reason and adequate provision for a new attorney in replacement.*
 - b. *He failed to allow Mr Clifford Andre to represent, fully and adequately the Appellant.*
 - c. *He failed to allow the Appellant sufficient time to properly instruct Mr Clifford Andre, or failed to allow Mr Clifford Andre sufficient time to prepare for his Defence.*
2. *The Learned Magistrate erred in law in failing to grant the Appellant a fair trial.*
3. *The conviction is manifestly unsafe in that the evidence on record does not prove the case beyond reasonable doubt.*
4. *The Learned Magistrate erred in law in failing to warn himself of the dangers of convicting a person on the uncorroborated evidence in a sexual case, involving a minor.*
5. *The Learned Magistrate erred in principle in not passing a sentence on the Appellant but ordering that the criminal action be remitted to the Supreme Court of Seychelles for sentencing.*
6. *The Learned Magistrate erred in law in not allowing the Appellant to address the Court, and on mitigation, prior to remitting the criminal action to the Supreme Court of Seychelles, for sentencing.*

OUTCOME OF THE APPEAL

[5] The appeal did not proceed to a hearing of the appeal. We relied on the Heads of Arguments to see whether the appeal had any merit at all. Ground 1 had to do with the history of legal representation in the case. Whether it was Mr Daniel Cesar, or Mr Basil

Hoareau, or Mr Clifford Andre is neither here nor there. The real question was whether the appellant had a fair trial in all the circumstances of this case albeit the abuse he made of his right to counsel. Under Ground 2, the record shows that he elected not to cross-examination the main witness but did cross examine the other witnesses. The trial was conducted with all the elements of basic fairness which a Magistrate ensures for an unrepresented defendant. He had asked for two days. He was given more than twice the number of days following which he came up with his defence. He was duly cross-examined. It cannot be said that the absence of counsel had any adverse impact on his case.

[6] The other grounds raised questions of law unsupported by case law. Ground 5 was another misapprehension of law. The question of remitting a case for sentencing an accused party to the Supreme Court resides in a text of law and does not reside in any principle. The jurisdiction of a Magistrate is limited to 8 years. The law provided for a maximum of 20 years and the facts, in the view of the magistrate, were such that a higher sentence was called for, which was in fact imposed. Ground 6 was another misapprehension. Once the facts suggest a gravity for which the Court takes the view that a higher sentence is to be imposed than its jurisdiction permits, the whole process of sentencing should proceed to the Supreme Court where the accused party is to be heard on all the aggravating as well as the mitigating circumstances of the case.

[7] As neither the Grounds of Appeal nor the Heads of argument raised any point of substance, our only consideration was whether the sentence was appropriate. The Bench took the view that, account taken of the prevalence and increase of such assaults on a vulnerable section of the community, we may well consider the possibility of an increase in the sentence. However, such an increase could not be contemplated without putting the Appellant into the picture.

[8] The Court of Appeal has all the powers of the Supreme Court and the power to increase the sentence is derived from Rule 31 (5) of the Court of Appeal Rules. This Rule reads:

“31(5): In its judgment, the Court may confirm, reverse or vary the decision of the trial court with or without an order as to costs, or may order a re-trial or may remit the matter with the opinion of the Court thereon to the trial court, or may make such other order in the matter as to it may seem just, and may by such order exercise any power which the trial court might have exercised:

Provided that the Court may, notwithstanding that it is of opinion that the point or points raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.

- [9] The power of the Supreme Court for an increase of sentence is found in section 7 of the Criminal Procedure Act and reads as follows:

Committal for sentence.

7. (1) When a Magistrate has convicted a person and he is of opinion that a higher sentence should be passed in respect of the offence than he has power to pass he may commit the offender for sentence to the Supreme Court

(2) The Magistrate may either admit the offender to bail or remand him in custody until he appears or is brought before the Supreme Court.

(3) When an offender is committed as aforesaid the Supreme Court may-

(a) exercise any of its powers of revision under section 329(1); and

(b) whether any such powers have been exercised or not deal with the offender in any manner in which he could be dealt with if he had been convicted by the Supreme Court.

- [10] This case presented disturbing features and the Bench was of the view that a greater sentence was warranted than what even the Supreme Court had imposed. However, that could not be done without the appellant having been warned in the first place. When the Court apprised counsel that there was the possibility of an increase of sentence in the matter, the learned counsel placed the option before the appellant.

- [11] The appellant preferred to exercise his option on the safer side and withdrew his appeal. We accordingly set aside the appeal on the motion of counsel on behalf of the appellant on due instructions by the latter.

- [12] We wish to make the following comment though. The irreparable harm done to vulnerable children and persons by pedophiles is today well documented. Public sensitization on the matter is well spread. Yet with three cases having come to the Court of Appeal in course of this session, we wonder whether the campaign against such reprehensible and degenerate behaviour should be more robust. The legislature has provided for a sentence of 20 years in cases of sexual assault. We may not stay insensitive to the call of the day in this area of criminal law. Accused persons convicted of such offences shall not expect leniency from the Court of Appeal or any other Court for that matter.

- [13] The appeal is set aside.

S. Domah (J.A)

I concur:.

A.Fernando (J.A)

I concur:.

M. Twomey (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 21 April 2017