

IN THE SEYCHELLES COURT OF APPEAL

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

Criminal Appeal SCA 21/2015

(Appeal from Supreme Court Decision Criminal Appeal 69/2014)

Rupert Suzette

Appellant

Versu
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The Republic

Respondent

Heard: 31 July 2017

Counsel: Mr. Nichol Gabriel for the Appellant

Ms Brigitte Confait for the Respondent

Delivered: 11 August 2017

JUDGMENT

B. Renaud (J.A)

Charge

[1] The Appellant was tried in the first instance in the Magistrate Court on the 9th of October 2014 for the offence of Sexual Assault contrary to Section 130(1) of the Penal Code as read with Section 130(2)(d) of the Penal Code.

Particulars

[2] The particulars of the offence were that, the Appellant on the 29th of June 2010 at Carana Beach North East Point, sexually assaulted G N, a person of 14 years of age. The Appellant was convicted and sentenced to 9 years imprisonment.

[3] The Appellant being dissatisfied with the judgment of the Learned Magistrate, appealed against the sentence and conviction, to the Supreme Court and that Court maintained the conviction and sentence.

[4] The Appellant is now before this Court appealing against conviction and on the legality of the sentence imposed by the learned trial Magistrate.

Grounds of Appeal against conviction

1. The learned trial Magistrate erred in convicting the Appellant on insufficient and contradictory evidence.
2. The learned trial Magistrate erred in convicting the Appellant on hearsay evidence.
3. In all circumstances the conviction was unsafe and unsatisfactory.

Ground of appeal against the legality of the sentence

1. The sentence of nine years imposed on the Appellant was manifestly harsh and excessive and wrong in principle.

Relief sought

[5] The Appellant is now praying this Court to quash the conviction and sentence imposed by the learned trial Magistrate.

PRELIMINARY OBJECTION

[6] Learned Counsel for the Respondent raised an objection, firstly, to the effect that the Appellant is now appealing against the decision of the learned Magistrate, on conviction and sentence, as he had already done so before the Supreme Court which had upheld the decision of the learned trial Magistrate. The Appellant is now also appealing against conviction. Secondly, a second appeal can only lie against sentence or on a point of law but not matters of facts.

Section 326 of the Criminal Procedure Code Cap 54 provides that:

“(1) Any party to an appeal from the Magistrates’ Court may appeal against

the decision of the Supreme Court in its appellate jurisdiction to the Court of Appeal on a matter of law but not on a matter of fact or mixed fact and law or on severity of sentence.”

- [7] This Court had already addressed this issue in the case of ***Esparon & ors v R SCA 01/2014*** where the majority judgment held that this Court can effectively hear any decision of the Supreme Court on an appeal from that decision. At paragraph 38 of that judgment this Court stated –

“From the moment, the Supreme Court takes a decision one way or the other, it is appealable as a final decision in its own right to the Court of Appeal.”

- [8] The issue raised by the Respondent obviously falls within the ambit of an issue that this Court had pronounced itself on, hence, there is no necessity for a long discourse in addressing the points raised. However, this Court will not delve again into the finding of facts. The objection of the Respondent is accordingly dismissed and the matter will be heard on both conviction and sentence.

THE LAW

- [9] The relevant provisions of the Penal Code as are applicable to this case are reproduced below for ease of reference. **Section 130** which is concerned with “*sexual assault*” under which section the Appellant was charged reads as follows:

Section 130(1). *A person who sexually assaults another person is guilty of an offence and liable to imprisonment for 20 years:*

Provided that where the victim of such assault is under the age of 15 years and the accused is of or above the age of 18 years and such assault falls under subsection (2) (c) or (d), the person shall be liable to imprisonment for a term not less than 14 years and not more than 20 years:

Provided also that if the person is convicted of a similar offence within a period of 10 years from the date of the first conviction the person shall be liable to imprisonment for a period not less than 28 years:

Provided further that where it is the second or a subsequent conviction of the person for an assault referred to in subsection (2)(d) on a victim under 15 years within a period of ten years from the date of the conviction, the person shall be liable to imprisonment for life.

Section 130(2). *For the purposes of this section “sexual assault” includes-*

- (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.*

Section 130(3). *A person does not consent to an act which if done without consent constitutes an assault under this section if-*

- (a) the person’s consent was obtained by misrepresentation as to the character of the act or the identity of the person doing the act;*
- (b) the person is below the age of fifteen years; or*
- (c) the person’s understanding and knowledge are such that the person was incapable of giving consent.*

Section 130(4). *In determining the sentence of a person convicted of an offence under this section the court shall take into account, among other things-*

- (a) whether the person used or threatened to use violence in the course of or for the purpose of committing the offence;*
- (b) whether there has been any penetration in terms of subsection (2)(d); or*
- (c) any other aggravating circumstances.*

THE CONVICTION

[10] The particulars of the offence with which the Appellant was charged with, is described as that, he sexually assaulted G N on the 29th of June 2010 at Carana Beach North East Point, a person of 14 years of age, under Section 130(1) of the Penal Code.

[11] There is no dispute that the Appellant actually had sexual intercourse with G N who was

13 years 10 months at the time the sexual assault took place. The sexual assault was in the form of the penetration of her body orifice by the Appellant. The conviction of the Appellant for the offence with which he is charged cannot be faulted.

SENTENCE

The Victim

[12] The victim G N was born on 23rd August, 1996 and she was 13 years and 10 months at the time of the incident on 29th June, 2010. She was attending the same school where the Appellant was teaching but she was not attending the same class. After the incident she continued with her studies as usual without any negative interruption.

Circumstances

[13] On the material day G N on her own had planned how she would meet the Appellant at a particular place and she made her own arrangement in deceiving her schoolmates so as to avoid them knowing of her plan for that day. G N organised her own way to go to Victoria and eventually to North East Point and thereafter made her own way back to Victoria on that day.

[14] Upon reaching Victoria G N joined her other schoolmates at the Annual School Sport event at the Stadium where she spent the rest of the day. She eventually shared with her peers as to what went on earlier that morning between her and the Appellant.

[15] G N was not in any way traumatized immediately after the incident or anytime thereafter. She in fact did not complain to her parents or any other adults who were close to her at the time.

[16] It was some months later that her mother came to know of it when she checked G N's telephone and from then on her mother initiated criminal action against the Appellant.

[17] G N was not keen in pursuing any criminal case against the Appellant but it was rather at her mother's insistence that the Appellant was charged. In her evidence before Court four years after the incident when she was 17 years old, G N still indicated that she had no cause of complaint against the Appellant for what had happened.

[18] There is no evidence that G N was tricked, coerced, misled or in any way forced into having sexual intercourse with the Appellant. There is no evidence that that was the first time that she had ever had sexual intercourse.

[19] G N said that she recognized that the Appellant has his family to take care of, especially his son. She always believes in forgiveness and did not want the Appellant to be imprisoned.

Appellant

[20] The Appellant is a first offender. He was born on 29th October, 1984 and was 26 years old at the time of committing the offence. He had been married for 5 years and has a 4 year old son who has a speech dilemma needing therapy. He had since had another son. He also takes care of his father who has hypertension, is diabetics and who lives alone.

[21] Appellant graduated as a Science Teacher after 3 years study in Mauritius and has a Post Graduate Certificate of Education. He taught for 3 years until he was suspended pending the decision regarding this offence.

[22] The Appellant has since lost his job and conversely the Government lost the services of a Graduate Science Teacher which are already in short supply and who had obviously cost the country a lot of money to educate and train. His teaching career is finished. The State has now to clothe, feed and take care of him at the expense of the public funds. His young family has to also bear the consequences of his imprisonment.

[23] Social Services Report concluded that –

“The Court should take into account the nature of the assault and the age of the victim at the time of the offence and other features relevant to the case, such as circumstances leading to the act committed”.

[24] The Appellant committed the offence in June 2010, was apprehended some 3 months later and was suspended from his job. He awaited trial for 4 years before he was convicted in October 2014 and has since been serving his 9 year prison sentence that was imposed on him.

DECISION

- [25] The conviction of the Appellant for the offence with which he was charged cannot be faulted be it in the trial Magistrates' Court or on first appeal before the Supreme Court. The appeal is dismissed and the conviction is upheld.
- [26] Although the Appellant raised the issue of appeal against sentence on his first appeal, he did not seem to have pursued it when making oral submissions when his case was being heard in the Supreme Court. The learned appellate Judge took it that he had been satisfied with the 9 years imposed on him and in the circumstances did not interfere with it. (see para 10 of his judgment)
- [27] Where it concerns sentences for sexual offence, this Court does not take it lightly. Very careful consideration is given to the offence with which an Appellant is charged with, the circumstances surrounding the commission of the offence, the situation of the victim of the offence and any traumatic consequence she suffers and may keep on suffering, as well as, what is the most appropriate sentence that should be imposed on an Appellant after taking into consideration all the circumstances of the case including those of the Appellant. All these factors which have been considered are set out earlier above.
- [28] Taking into consideration all the circumstances of this particular case, it is just and fair that the sentence of the Appellant imposed by the learned trial Magistrate be reviewed downwards so as to meet the best interests and justice of this case. The 9 year sentence of imprisonment of the Appellant is accordingly set aside and in its stead a sentence of 4 years and 6 months is now imposed.
- [29] The period of imprisonment is to be counted from day when he was first sentenced by the Magistrate's Court. Any time spent on remand prior to starting that sentence, if any, shall also be deducted from the sentence presently given. Of course, any remission that the Appellant may be entitled to under the Prison Act shall also be discounted from the sentence presently given.

B. Renaud (J.A)

I concur:. F. MacGregor (PCA)

I concur:. J. Msoffe (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 11 August 2017