

IN THE SEYCHELLES COURT OF APPEAL

[Coram: A. Fernando (J.A) ,B. Renaud (J.A) F. Robinson (J.A)]

Criminal Appeal SCA 10/2016

(Appeal from Supreme Court Decision Criminal Side No: 67/2013)

Trevor Zialor

Appellant

Versus

The Republic

Respondent

Heard: 27 November 2017

Counsel: Mr. John Renaud for the Appellant

Mrs. Lansinglu Rongmei for the Respondent

Delivered: 07 December 2017

JUDGMENT

F. Robinson (J.A)

1. Background Facts

2. On 7 April, 2016, in the Supreme Court of Seychelles, Trevor Zialor, the Appellant, was convicted of one count of sexual assault of a child under 15, contrary to section 130 (1) of the Penal Code read with section 130 (2) (d) of the Penal Code and punishable under section 130 (3) of the same Act. The offence carries a maximum sentence of 20 years.

3. The particulars of the offence with respect to the count of which the Appellant was convicted had been to the effect: *"Trevor Zialor, a mechanic of Baie Lazare, aged 25 years, on the night of 31st October, 2013, sexually assaulted a minor girl, aged 12 years,*

namely Verona Dufrene by penetrating the body orifice of the said Verona Dufrene for a sexual purpose."

4. The Complainant, who was born on 12 August, 2001, and was still 12 years old at the start of the trial, gave unsworn evidence. The Appellant exercised his constitutional right to silence at the trial. On 24 May, 2016, before the same Court, the Appellant was sentenced to 11 years imprisonment in relation to the offence for which he was convicted.
5. The Appellant initially appealed against the sentence in his Notice of Appeal dated 31 May, 2016, on one ground. Subsequently, the Appellant with the leave of the Court of Appeal of Seychelles, filed 6 grounds of appeal in his Amended Notice and Memorandum of Appeal, dated 30 October, 2017, challenging the conviction. The Skeleton Arguments dropped Ground 3. The last ground of appeal, Ground 7, pertains to the sentence meted out to the Appellant. The Appellant contended that the sentence is *"manifestly excessive and wrong in principle"*. The detailed facts appear in the judgment.
6. The Grounds of Appeal and Skeleton Arguments raised only this point of substance as follows. At the appeal, learned Counsel for the Appellant repeated – and elaborated upon in considerable detail – the argument that he had advanced at the trial, pertaining to the alleged material inconsistencies that he had found among the Complainant's statement to the police, her examination-in-chief and her cross-examination. On that point, learned Counsel contended that the learned trial Judge did not attach sufficient weight to the inconsistencies and unreliable nature of the evidence of the Complainant.
7. When examined on 26 May, 2014, the Complainant stated that on Wednesday 30 October, 2013, she went to the house of Anisha Magnan (PW-7) at Baie Lazare. PW-7, who was in secondary 4, at the Anse Royale School, was her friend.
8. On Thursday 31 October, 2013, she went to the hairdresser at Pointe Larue. After leaving the hairdresser, she went to PW-7's house at Baie Lazare. PW-7 took her to a house and told her that it was her aunt's house. Hansley and Joshua, who are PW-7's cousins, were

at PW-7's aunt's house, when they arrived at the house. In the evening, she inquired with PW-7 about where she was going to sleep. PW-7 showed the Complainant a room, in which the Complainant agreed to sleep. Then they went back to sit in the living room. PW-7 gave her a change of clothes. She decided to go to sleep at about 9 p.m. The bedroom was large and white with louvre windows and contained one big bed, a wardrobe and a type of cabinet. When she went into the said bedroom to sleep, Hansley was cooking dinner, Joshua was at the house but the Complainant did not know what Joshua was doing, and PW-7 was in another room. She did not want to eat. The Appellant came to the house, at about 9:30 p.m., before she went to bed. Other than the Appellant no one else came to the house. The Appellant came for PW-7. The Appellant and PW-7 were talking in the other room, where PW-7 was. The Appellant did not talk to her at all when he was in the house.

9. The Complainant fell asleep at about 10 p.m. The following discourse between learned Counsel for the prosecution and the Complainant revealed what allegedly ensued after the Complainant had gone to sleep —

"Q. So now tell us what happened then after you had gone to sleep or when did you have to wake up?

A. Whilst I was sleeping I felt that somebody was touching me.

Q. Now what happened after that?

A. I opened my eyes and then I saw Trevor he was pressing my hand down and he removed my clothes.

Q. Now Trevor when he pressed your hand, which hand did he press? How did he come, was he on the side of the bed, was he on the bed? How did he reach you?

A. He was on top of me on the bed.

Q. And so tell us after he started removing your clothes and then what happened?

A. He roughly removed my clothes and then he took his penis and

put it in my vagina.

Q. Did he talk to you then? Did he say anything?

A. Whilst he was doing that I was screaming for Anisha and Trevor told me to shut up.

Q. Now when Trevor told you to shut up what happened after that?

A. I was struggling and at the same time calling out for Anisha.

Q. Did anyone come?

A. Nobody came.

Q. Now do you know maybe how long maybe Trevor was there with you or what he was doing?

A. It was a short time.

...

A. For about two minutes.

Q. And whilst he was doing this to you did he do anything else to you, did he hit you or anything?

A. No, nothing else.

Q. Now how was he holding you? You said you were resisting, how was he holding you down? He was holding your hands and?

A. He was pressing on my hand.

Q. Now when he was doing this to you in what matter was he doing this? Was it painful? Was he causing you a lot of pain or distressed.

A. Yes, it was painful."

After that the Appellant got up and left. She could not recall the time.

10. On Saturday, 2 November, 2013, the Complainant stayed at PW-7's aunt's house. That night she could not recall the time that she went to the bedroom to sleep. When she was going to sleep, Joshua and PW-'s younger brother were at the house. After some time the Appellant and Hansley came. They were talking to each other when they got back. The Complainant recalled waking up at about midnight, when she felt someone touching her. She stated that Hansley did to her what the Appellant had done to her previously. The door was not locked. Once in the room he locked the door and started pressing on her. She tried to resist, but her efforts were in vain. Then he took his penis and put it in her vagina. He did that for a short time and then he left. Subsequent to the assault, she spent the night at the house of Ti Marie (Marie Jacqueline Legaie (DW4)). On Sunday 3 November, 2013, the Complainant was found by the police.
11. When cross-examined on 26 May, 2014, the Complainant testified that on Wednesday 30 October, 2013, she did not go to Baie Lazare.
12. On Thursday 31 October, 2013, she caught the bus to Baie Lazare via Les Canelles, at 8:30 a.m. She had woken up late and missed the school bus. She fell asleep on the bus. At Baie Lazare, she descended from the bus: she crossed the road to get to the other bus stop. While she was waiting for the bus, PW-7 came and sat next to her. PW-7 told her to accompany her to the Baie Lazare clinic, where she was going to do "dressing". They proceeded to the clinic and after that they went to the house of PW-7. In the afternoon she caught the bus and went home. She told her mother that she had not gone to school because she had fallen asleep on the bus; and that she had met one of her friends. She slept at home on Thursday.
13. When cross-examined on 30 May, 2014, the Complainant stated that she went to the hairdresser on Thursday. After that she went directly to PW-7's house at Baie Lazare. She stayed at PW-7 aunt's house on Thursday night, Friday and Saturday. On Saturday night she slept at the house of Ti Marie (Marie Jacqueline Legaie (DW4)).
14. Later during the course of cross-examination, the Complainant, when asked whether "*it was the first time that [she] saw the blood on the bed sheet on Friday?*" replied "*Yes I*

saw it in the evening". She stated that nothing happened on Thursday night, which was the day she had gone to the hairdresser.

15. The Complainant testified to the fact that, in 2012, when she was on holiday at Stephe's place, her friend, she saw the Appellant once going by in a pickup truck. That was the only time she had seen the Appellant before the incident. Learned Counsel did not dispute the fact that the Complainant had testified to having seen the Appellant, but disputed the fact that she had stated that in 2012 she had spent her holidays at the house of Mr. and Mrs. Barbe, who are the parents of Stephe, when according to learned Counsel she had spent only a weekend at the end of January 2012.
16. We remark that the evidence of Stephe's mother, Erica Barbe (DW-5) was led by the defence, who stated that the Complainant had spent a weekend at her house in 2013.
17. When re-examined on 30 May, 2014, the Complainant testified to "*the incident*" having occurred on Friday night and to another incident having occurred on Saturday night.
18. Queency Dufrene (PW-2), the mother of the Complainant, testified that the Complainant did not sleep at her house on Thursday, Friday and Saturday night. On Friday evening she reported the absence of the Complainant to the police. Upon her request, the Complainant's name was broadcasted over the radio. At about 6:30 p.m., on Sunday, the Baie Lazare police called her and told her that the Complainant was at the police station.
19. Doctor Leonel Guerra Rosales (PW-3) examined the Complainant on 3 November, 2013. PW-3 reported that other than a red mark on the Complainant's right breast there were no other marks; and that he found no evidence of trauma although the Complainant had no hymen. When cross-examined, the doctor stated that it would be impossible to say whether or not she had had sex for the first time during those 3 days.
20. We have to determine, therefore, whether or not the inconsistencies were material ones that could affect the Complainant's evidence on the essential issue that she had been sexually assaulted by the Appellant. The issue is intimately linked with the questions:

first, whether or not we are bound to accept the evidence of the Complainant about the sexual assault between herself and the Appellant given that she was not cross-examined on that particular matter? Second, whether or not the conviction should be upheld despite the fact that the prosecution at the trial failed to prove that the offence had been committed on the precise date set out in the Information namely, 31 October, 2013?

21. It was stated in *Vilakazi v The State* (636/2015) [2015] ZASCA 103 (10 June 2016) —

"In *Woji v Sanlam Insurance Co. Ltd* 1981 (1) SA 1020 9A) Diemont JA provided a helpful guide to approaching the evidence of young children. The guide highlights, as the focal point, the trustworthiness of the evidence. At 1028A-E of the judgment the learned judge said:

"The question which the trial Court must ask itself is whether the young witness' evidence is trustworthy. Trustworthiness, as is pointed out by Wigmore in his Code of Evidence para 568 at 128, depends on factors such as the child's power of observation, his power of recollection, and his power of narration on the specific matter to be testified. In each instance the capacity of the particular child is to be investigated. His capacity of observation will depend on whether he appears "intelligent enough to observe". Whether he has the capacity of recollection will depend again on whether he has sufficient years of discretion "to remember what occurs" while the capacity of narration or communication raises the question whether the child has "the capacity to understand the questions put, and to frame and express intelligent answers" (Wigmore on Evidence vol II para 506 at 596). There are other factors as well which the Court will take into account in assessing the child's trustworthiness in the witness-box. Does he appear to be honest – is there a consciousness of the duty to speak the truth? Then also "the nature of the evidence given by the child may be of a simple kind and may relate to a subject-matter clearly within the field of its understanding and interest and the circumstances may be such as practically to exclude the risks arising from suggestibility" (per Schreiner JA in *R v Manda*

[1951] (3) SA 158 (A)]. At the same time the danger of believing a child where evidence stands alone must not be underrated.”.

22. Inconsistencies must, therefore, be measured by the yardstick of seriousness and materiality which must be linked with the overall issue of truthfulness. Not every inconsistency is serious and material, and inconsistencies need not affect *per se* the appreciation by a trial court that a particular witness’s testimony is true.
23. We address the alleged material inconsistencies that learned Counsel found in the Complainant’s statement to the police. One of the inconsistencies, which learned Counsel submitted that he has found, was with respect to the account given by the Complainant that she was sexually assaulted by the Appellant on the night of Thursday 31 October, 2013, at PW-7’s aunt’s house. We remark that the Complainant was not cross-examined about the act of sexual assault between herself and the Appellant and its place of occurrence in the face of her evidence in chief and cross-examination.
24. Learned Counsel stated that there were inconsistencies between the Complainant’s evidence-in-chief and her cross-examination when she said she had been sexually assaulted by the Appellant on the day she went to the hairdresser, by reason of the fact that she could only have gone to the hairdresser on Thursday, as testified by her mother. We think that this inconsistency does not constitute a material inconsistency that could affect the Complainant’s evidence that she had been sexually assaulted by the Appellant. We are satisfied that the Complainant did not contradict herself in her evidence with regards to the act of sexual assault she was subjected to by the Appellant and its place of occurrence. We remark that the Complainant was not cross-examined about those specific matters. Moreover, we are convinced that the absence of cross-examination could not have arisen due to the delicate nature of cross-examining the Complainant, who was subjected to long and intense cross-examination. In *Browne v Dunn* (1893) 6 R. 67 (House of Lords 1 January 1893), it is stated —

”It was a rule of professional practice and essential fair dealing with the witnesses that if, on a crucial part of the case, a party intended to ask the

jury to disbelieve the evidence of a witness, that party should cross-examine that witness or at any rate make it plain, while the witness is in the box, that the evidence was not accepted. If the party failed to do that, then he would not be allowed in his address to the court to rely on that argument at all. In the absence of such cross-examination it would be the duty of the Judge to comment to the jury on the fact that one party's case had not been put to another, even though the two cases were diametrically opposed."

This case is the basis for the term "rule in *Browne v Dunn*" (see *Browne v Dunn* (1893) 6 R. 67). The learned trial Judge, who had the advantage of seeing the Complainant and assessing her evidence, was clearly aware of the inconsistencies but nevertheless accepted her evidence. The learned trial Judge in his considered judgment found that —

"the fact that the victim was sexually assaulted in the house of Marie-Lina Franchette between the period 31st October 2013 and the 3rd November 2013 is borne out by the evidence of the victim. Although there is certain amount of confusion in the victim's evidence in regard to whether it was Thursday or Friday, it is clear that it was the accused Trevor Zialor who had first assaulted her by placing his penis in her vagina while she was asleep alone in the bedroom shown in P2."

25. In the present case we do not consider the account given by the Complainant about the act of sexual assault between her and the Appellant was of an incredible character. We fully agree with the learned trial Judge's decision in accepting the Complainant's evidence.
26. The Information specified particulars of the offence charged in the count. In the particulars, the offence was alleged to have occurred, "*on the night of 31st October, 2013*". Section 111 of the Criminal Procedure Code provides —

"111 Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which

the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."

27. On appeal, learned Counsel did not advert to the legal proposition that the date in the information was a material particular or that the defence had not been given the opportunity to adduce evidence of alibi. Usually, the date of an offence specified in the particulars is not treated as a material fact that the prosecution must prove beyond reasonable doubt. It was stated by Atkin J in *R v Dossi* (1918) 13 Cr App R 158, although his Lordship acknowledged that there were exceptions to the general rule (at 159-160) —

"[43] From time immemorial a date specified in an indictment has never been a material matter unless it is actually an essential part of the alleged offence. "And although the day be alleged, yet if the jury finds him guilty at another day the verdict is good, but then in the verdict it is good to set down on what day it was done in respect of the relation of the felony; and the same law is in the case of an indictment" (Coke, 2 Inst (1817) 318 ... Thus, though the date of the offence should be alleged in the indictment, it has never been necessary that it should be laid according to truth unless time is of the essence of the offence. It follows, therefore, that the jury were entitled, if there was evidence on which they could come to that conclusion, to find the appellant guilty of the offence charged against him, even though they found that it had not been committed on the actual day specified in the indictment."

28. In the case of *Wright V Nicholson* [1970] 1 All ER 12 the Divisional Court distinguished *Dossi* and quashed the conviction because the defendant had been misled by the particulars of the charge and had not been given the opportunity to adduce evidence of alibi, that was said to be available, with respect to the whole month of August. The Divisional Court found that the appellant should have been made aware of the decision to place reliance on dates other than those specified and should have been given the opportunity to deal with them, after an adjournment if necessary. The law report contains many examples of other cases where the materiality of particulars of the date has been

considered, but the decision in each such case depends upon the offence alleged and the facts of the particular case.

29. In the present case the variance between the Information and the evidence, which has been laid as to a specific date, and the evidence, which had been that the offence had been committed within the period of 31 October, 2013, to 3 November, 2013, was such that there was no grave injustice to the Appellant by reason of the fact that none of the witnesses called by the defence afforded him alibis between the period of 31 October, 2013, to 3 November, 2013.
30. With regards to the sentence we wish to make the following comment. There is a worldwide and growing awareness of the particular vulnerability of children and of the fact that child abuse, including sexual exploitation of children, is a serious and ever-escalating problem. The legislature has provided for a sentence of not less than 14 years and not more than 20 years imprisonment. The Court of Appeal stated in *GK v The Republic* SCA46/2014 (judgment delivered on 21 April, 2017): "*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*". In the *GK's case* the finding of the court 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. The appellant, who had been sentenced to 8 years imprisonment, was warned by the Court of Appeal that a greater sentence was warranted. He withdrew the appeal. In the present case we think that the learned trial Judge must have had in mind the case of *Poonoo v The Attorney General* 2011 SLR 424, when he imposed a sentence of 11 years imprisonment.
31. For the reasons stated above, we affirm that a sentence of 11 years imprisonment is neither wrong in principle, nor manifestly excessive.
32. In the circumstances we have no hesitation in dismissing the appeal both on conviction and sentence.

F. Robinson (J.A)

I concur:

A. Fernando (J.A)

I concur:

B. Renaud (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 07 December 2017