IN THE SEYCHELLES COURT OF APPEAL

[Coram: F. MacGregor (PCA), M. Twomey (J.A), F. Robinson (J.A)**]**

Criminal Appeal SCA 20/2017

(Appeal from Supreme Court Decision Criminal Side No: 60/2012)

Ralph Sarah — Appellant

Versus

The Republic — Respondent

Heard: 21 August 2018

Counsel: Mr. Leslie Boniface for the Appellant

Mrs. Lansinglu Rongmei for the Respondent

Delivered: 31 August 2018

JUDGMENT

F. Robinson (J.A)

1. This is an appeal from a judgment of the Supreme Court following the conviction of the appellant, who pleaded not guilty, under count 1 of the Amended Formal Charge, for sexual assault contrary to and punishable under section 130 of the Penal Code. The appellant was sentenced to nine years imprisonment in relation to the offence for which he was convicted.

2. The appellant has appealed against conviction and sentence.

3. Counsel on behalf of the appellant withdrew the appellant's appeal against conviction on the day of hearing.

4. The appellant challenges his nine years sentence as manifestly harsh and excessive.

5. The case against the appellant rested essentially on the evidence of the complainant, (PW-1), and (PW-5). PW-1, who was 21 years old at the start of the trial, had been 17 years of age at the time of the incident.

6. Evidence was given by PW-1 that, on Sunday 9 September, 2012, after church, she went for a picnic at Beau Vallon with her friend Shannon. She had been at Beau Vallon for a while when her mother and sister arrived. PW-1 joined her sister, who was talking to her friends one Mario and PW-5, among others. PW-1 knew the people and spoke to them. The appellant was there with his girlfriend. Mario and PW-5 worked with the appellant in a barber shop at *"La Poudriere"*. When it was getting late, she phoned Shannon whose phone was off. By that time, her mother and sister had departed from Beau Vallon. The appellant told her that he would drop her off at her home. The appellant's girlfriend had a bottle of wine, which she shared with PW-1.

7. In the car with PW-1 and the appellant, who was the driver, were the appellant's girlfriend, Julio, PW-5 and Mario. Instead of dropping her off at her home in Union Vale, the appellant headed for Forêt Noire, where he dropped off his girlfriend, Julio and Mario. She was then alone in the back seat of the car and she slept. She did not realise that PW-5 was also in the car. After a while the car stopped. According to her evidence *"as I was trying to get up myself to see what was happening Ralph was removing his clothes and he pushed me and I was trying to scream but I did not hear anybody near the surrounding. And outside was very dark I could only notice one light and I didn't know where I was"*. She added *"[h]e was trying to slap me and I was trying to scream and he was pressing against my mouth. And at that time I was in a bikini he managed to do sex with me"*. Later in the proceedings she stated that she had not noticed that PW-5 was in the car because she had slept on the back seat when the others had disembarked from the car; and that she had only heard PW-5's voice when the appellant had asked him if he was ok. PW-1 also gave evidence of a bluish mark on her arm, which she testified was sustained in the course of the incident.

8. The evidence of PW-1 was not seriously challenged in cross-examination. She admitted that on the day of the incident she had also consumed whisky mixed with black ice, but denied the suggestion of Counsel that she was drunk. She confirmed her evidence-in-chief that she was sexually assaulted by the appellant in the back passenger seat of his car. When asked *"[a]nd at no time was your under clothing remove? "* She answered *"No; He only removed my panty on one side."*.

9. PW-5 testified to the following effect. On the day of the incident, while they drove away from the beach, the appellant asked him *"if he could have sex with* [PW-1]*"*. He ignored what the appellant had said. PW-1, who had started to get drunk, was lying on the back seat. She was wearing a bikini and a wrap. Arriving at *"Weeling"*, the appellant took a short cut leading to Bois de Rose Avenue. Upon taking that shortcut he told the appellant to stop the vehicle for him to urinate. While he was urinating, his girlfriend called him. While he was talking on the phone, he saw the appellant go to the rear of the car and open the door. According to his evidence *"[a]nd whilst I was talking to my girlfriend telling her to wait because I am already in a vehicle that I was coming to pick her up, whatever Ralph* [the appellant] *was doing he was doing behind my back. […]. When I turned back to the vehicle I saw that Ralph short was already on his feet and he was doing that action. I came and I tried to push him away telling him to stop it, I told him do you see what you've done. When I tried to stop him to push him away he tries to come back […]"*.

10. The medical evidence showed that when PW-1 was examined three days after the incident the hymen was not intact and there was no sign of *"something fresh"*. PW-8, Dr. Eda Kontoruss, opined that since the victim had been examined three days after the incident this could explain the absence of laceration or haematoma in the region of her vagina. The medical evidence also showed that there was a haematoma of about three centimetres in size on the left arm of PW-1. When cross-examined, she confirmed that everything was normal in terms of PW-1's vaginal area, except for the haematoma.

11. The appellant giving his dock statement did not address the charge framed against him.

12. Under section 130 (1) of the Penal Code, the sentence prescribed for this offence is a maximum of twenty years imprisonment. Section 130 (4) of the Penal Code provides —

> "130 (4) In determining sentences 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.".

13. In the Skeleton Heads of Arguments submitted on behalf of the appellant three submissions in support of the appeal were made. During the course of submissions Counsel pursued only one of those submissions. It was submitted that the sentence of nine years was not consonant with sentences meted out by other courts for the same substantive offence upon facts that are similar; and, in that regard, the sentence of nine years has led to a disparity of sentence in different courts.

14. The correct approach for an appellate court in sentence appeals is only to intervene where —

> "(a) the sentence was wrong in principle;
>
> (b) the sentence was either harsh, oppressive or manifestly excessive;
>
> (c) the sentence was so harsh outside the discretionary limits;

(d) some matter has been improperly taken into consideration or failed to take into consideration something which should have been;

(e) the sentence was not justified in law.".

See, for example, the case of *Godfrey Mathiot v The Republic*[1].

15. What ought the proper sentence to be? We have considered the submissions of both Counsel with care. We observe that the Skeleton Heads of Arguments submitted on behalf of the appellant offered no dependable arguments and authorities in support of the appeal. Moreover, the Skeleton Heads of Arguments did not take into account the hard line adopted by the legislator in relation to the punishment provided by law for such types of offences, which are on the increase. We opine that the Court of Appeal ought not to overlook the more serious view the legislator is taking of such types of offences. In *R. v James Henry Sargeant*[2], the Court of Appeal, on observing the general aspects of punishment — retribution, deterrence, prevention and re-habilitation, made the following observation in relation to the element of retribution —

> "The Old Testament concept of an eye for an eye and tooth for tooth no longer plays any part in our criminal law. There is, however, another aspect of retribution which is frequently overlooked: it is that society, through the courts, must show its abhorrence of particular types of crimes, and the only way in which the courts can show this is by the sentence they pass. The courts do not have to reflect public opinion. On the other hand court must not disregard it. Perhaps the main duty of the court is to lead public opinion.".

In *GK v The Republic*[3] the Court of Appeal considered that the element of retribution is also relevant in the punishment of this crime. The Court of Appeal emphatically stated *" [w]e 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*

[1] Criminal Appeal SCA9/1993 (Judgment was delivered on 25 March, 1994)
[2] (1974) 60 Cr. App. R. 74
[3] Criminal Appeal SCA46/2014 (Judgment was delivered on 21 April, 2017)

any other Court for that matter". See also *Francis Crispin v The Republic*[4], in which the Court of Appeal also observed *"society abhors such actions. The court must add an element of retribution in punishment of this crime to express the pain and disgust of the society when it convicts an accused with such crime."*.

16. In light of the above observations, what is the effect on the facts of this appeal?

17. Although the appellant was 33 years old at the time of sentencing and is the father of four minor children, the learned Judge gave full reasons to justify the sentence he imposed and emphasised on the aggravating circumstances contained in section 130 (4) of the Penal Code, which were present in the case in hand. These were mainly the use of violence in the course of the offence and penetration in terms of section 130 (2) (d). The learned Judge expressly observed that the appellant, who expressed no remorse, deserved the sentence passed.

18. We consider that the sentence passed is well deserve considering the aggravating circumstances highlighted above, weighed with the mitigating factors. We also emphasised that the sentence makes explicit the gravity of the offence, emphasises public disapproval, serves as a warning to others and reinforces the protection of women.

19. In the circumstances we have no hesitation in dismissing the appeal on sentence.

F. Robinson (J.A)

I concur: **…….** F. MacGregor (PCA)

[4] Criminal Appeal SCA16/2013 (Judgment was delivered on 28 August, 2015)

I concur: …….. M. Twomey (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 31 August 2018