

IN THE SEYCHELLES COURT OF APPEAL

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

Criminal Appeal SCA 12/2018

(Appeal from the Supreme Court Decision in CR 26/2016)

Jeffrey René

Appellant

Versus

The Republic

Respondent

Heard: 05 December 2018

Counsel: Mr. René Durup for the Appellant

Mrs. Langsilu Rongmei for the Respondent

Delivered: 14 December 2018

JUDGMENT

M. Twomey (J.A)

[1] The Appellant in this case was charged with the offence of sexual assault contrary to section 130 (1) read with section 130 (2) (d) and punishable under section 130 (1) of the Penal Code.

[2] The salient facts of the present case are the following:

The complainant's version of events

[3] The complainant, E.S, a fifteen year old girl, in the evening of 11 May 2016, had an argument with her parents at their home in Anse Baleine following which she decided to run away and go to live with her grandmother at Pointe Larue. She packed two bags and armed with a candle left the family home and started walking in the direction of Pointe Larue. Arriving at the Anse Royale fun park at around midnight, the Appellant, the driver of a silver coloured bus, stopped and offered her a lift. She accepted and sat in the front passenger seat. At the junction of Montagne Posée road, the Appellant informed her that he would be proceeding to Avani Hotel to collect a worker and then would bring her to her grandmother's.

[4] Throughout the journey, the Appellant touched her inappropriately and each time she asked him to stop. When the worker from Avani was picked up she moved to the back seat of the bus. They continued on their journey and, arriving at Iz-Up Bar, Anse Aux Pins, the worker, one Richard Cesar, alighted to buy beers. Whilst he was in the bar, the Appellant offered her coke from a half filled bottle and, as she was thirsty, she drank it. Soon after, she felt dizzy. After the worker had been dropped home she again asked the Appellant to drop her at her grandmother's.

[5] She indicated the route for him to take but he took a different route and in a parking lot at Nageon Estate asked her to have sex with him. She refused and moved to the back of the bus. He locked the doors, forcibly undressed her and sexually assaulted her. On reaching her grandmother's home, her aunt noticed her discomfiture and called her parents who brought the police. She was medically examined. She was adamant that she did she did not consent to have sexual intercourse with the Appellant.

The Appellant's version of events

[6] The Appellant testified. He stated that he was a driver with R and S Travel Services and on the night in question he was on duty collecting workers from various hotels and conveying them to their respective residences. He stated that at Anse Royale, he saw the complainant hitchhiking. He stopped and she asked for a lift to Pointe Larue. At the Montagne Posée junction, he asked her to get out as he was going to Avani to pick up a

worker. She refused and, although it was against company policy, he agreed to let her come along.

[7] After picking up Richard Cesar from Avani, they proceeded toward Pointe Laure and at Iz-Up Bar at Anse aux Pins, he stopped as he usually did for Cesar to buy cigarettes, coke and beer for them. He offered the complainant a soft drink but she refused. After he had dropped the worker, he again asked her to disembark and again she refused. She indicated the way to her grandmother's at Nageon Estate, asking him to take a right turn leading to a parking area but again refused to disembark as she was afraid of the dogs.

[8] He implored her to disembark but instead she started stroking the back of his neck and asked him to have sexual intercourse with her. He protested, stating that he was tired and not in the mood. In his mirror he saw her removing her clothes and again inviting him to have sexual intercourse with her. He had no intention of having sexual intercourse with her and asked her to put her clothes back on. She eventually disembarked, got her luggage and came up to him and thanked him. He denied having sexual intercourse with her or sexually assaulting her.

Conviction and sentence

[9] The learned trial Judge found that the Appellant's testimony in court differed materially from the statement he gave to the police. The trial Judge also found that there were material inconsistencies between the Appellant's evidence and that of his witness, Richard Cesar, who stated that the complainant never spoke. He also found that the forensic evidence confirmed the complainant's testimony that there had been sexual intercourse between the Appellant and the complainant. He accordingly convicted the Appellant of the offence of sexual assault contrary to section 130 (1) read with section 130 (2) (d) and punishable under section 130 (1) of the Penal Code. The Appellant was sentenced on 1 March 2018 to 12 years' imprisonment. He challenges both the conviction and sentence in this appeal.

Grounds of appeal

[10] The Appellant is appealing against conviction on the following grounds:

1. The decision of the judge that the Appellant was guilty cannot be supported by evidence.
2. The judge erred in sentencing the Appellant excessively.

Appeal against conviction: guilt not supported by evidence

[11] The Appellant has filed only one ground against his conviction as laid out above. In this respect, Rule 18(7) of the Seychelles Court of Appeal Rules provides that:

“No ground of appeal which is vague or general in terms shall be entertained, save the general ground that the verdict is unsafe or that the decision is unreasonable or cannot be supported by the evidence.”(Emphasis added)

[12] However, while Rule 18 (7) permits the ground of appeal as filed by the Appellant to be entertained, it must be pointed out that submissions on such a ground of appeal are circumscribed by common law. It is trite that in challenging a conviction on the grounds of unreasonable decision or that it cannot be supported by evidence, the focus is on the weakness of the evidence.

[13] It must be noted by comparison to jury trials, in determining whether a verdict is unreasonable or cannot be supported by the evidence, the appellate court must undertake its own independent evaluation of the evidence and determine, as a question of fact, whether it was open to the jury to be satisfied of the accused’s guilt beyond reasonable doubt. This is obviously because of the fact that in a jury trial the process of reasoning by which its decision is reached is never disclosed and can only be a matter of inference by the appellate court. Hence the court may only allow an appeal on this basis when the jury must have entertained a reasonable doubt. It is not sufficient to show that the jury might

have had a reasonable doubt. In carrying out such an evaluation, the standard to be met is, in the case of a jury, when the verdict cannot be supported on the evidence.

[14] However, where an appellate Court is reviewing the reasoned decision of a judge, as in the present case, its role is different. Its evaluation then must be done on the standard as to whether the reasons for the decisions are illogical or irrational, even if the verdict could be supported on the evidence.

[15] In most common-law jurisdictions, a ground of appeal based on the fact that the impugned decision is unreasonable or cannot be supported by the evidence is regulated by the provisions of criminal procedure. Not so in Seychelles. The case law however from those jurisdictions is persuasive.

Law from comparative jurisdictions on decisions that cannot be supported by evidence

[16] In Australia, the principles governing such a ground of appeal were summarised as follows in *R v Klamo* (2008) 18 VR 644; [2008] VSCA 75:

- “1. The court of criminal appeal must ask itself whether, upon the whole of the evidence, it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty.*
- 2. In considering that question, the appeal court must bear in mind that the jury has the primary responsibility of determining guilt or innocence and has had the benefit of seeing and hearing the witnesses.*
- 3. In most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced.*
- 4. It is only where a jury’s advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred...*

[17] Further, the High Court of Australia in *M v R* [1994] HCA 63 stated:

“In most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. It is only where a jury's advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred. That is to say, where the evidence lacks credibility for reasons which are not explained by the manner in which it was given, a reasonable doubt experienced by the court is a doubt which a reasonable jury ought to have experienced. If the evidence, upon the record itself, contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the court of criminal appeal to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted, then the court is bound to act and to set aside a verdict based upon that evidence...”

[18] Similarly, the Supreme Court of New Zealand in *R v Munro* [2007] NZCA 510 510 stated:

- (a) *The appellate court is performing a review function, not one of substituting its own view of the evidence.*
- (b) *Appellate review of the evidence must give appropriate weight to such advantages as the jury may have had over the appellate court. Assessment of the honesty and reliability of the witnesses is a classic example.*
- (c) *The weight to be given to individual pieces of evidence is essentially a jury function.*
- (d) *Reasonable minds may disagree on matters of fact.*
- (e) *Under our judicial system the body charged with finding the facts is the jury. Appellate courts should not lightly interfere in this area.*
- (f) *An appellant who invokes s 385(1)(a) must recognise that the appellate court is not conducting a retrial on the written record. The appellant must articulate*

clearly and precisely in what respect or respects the verdict is said to be unreasonable and why, after making proper allowance for the points made above, the verdict should nevertheless be set aside.”

- [19] The uniformity of approach by common law courts when such a ground is advanced is also seen in the jurisprudence of Scotland. In the case of *Abdelbaset Ali Mohamed Al Megrahi v Her Majesty’s Advocate* (No. C 104/01 Appeal Court, High Court of Justiciary, March 14, 2002) (the Lockerbie bombing case) the High Court of Justiciary in reviewing the law relating to appeals of judge decisions explained the function of an appeal court:

“The second matter of general importance is the proper function of an appeal court in a criminal appeal, particularly where, as in the present case, the decision was that of a court of judges which has provided a written judgment giving the reasons for the conviction...”

*This raises a fundamental point in regard to the role of the appeal court in criminal cases. It is plain that in the past the appeal court has never taken upon itself the role of resolving issues of fact, any more than the determination of guilt. In *Webb v HM Advocate* 1927 JC 92, more fully reported in 1927 SLT 631 to which we will refer, the Lord Justice-Clerk (Alness) stated at page 631: “This is not a court of review. Review, in the ordinary sense of that word, lies outside our province. We have neither a duty nor a right, because we might not have reached the same conclusion as the jury, to upset their verdict...”*

...it would be for the appeal court to consider whether, having regard to the evidence which was not rejected by the trial court, the verdict was one which no reasonable trial court, properly directing itself, could have returned. It is implicit in this exercise that the assessment of evidence may legitimately give rise to differing views, and that evidence may be rejected simply because it is inconsistent with other evidence. That is the responsibility of those who are charged with the task of reaching conclusions as to what facts are proved.”

The law in Seychelles in relation to decisions that cannot be supported by evidence

[20] In *Akbar v R* [1998] SCCA 37 this court stated:

“An appellate court does not rehear the case on record. It accepts findings of facts that are supported by the evidence believed by the trial court unless the trial’s Judge’s findings of credibility are perverse.”

[21] In *Beeharry v R* (2012) SLR 71, the Court of Appeal stated that an appeal is not a rehearing. It held that the appellate court should only interfere with findings of fact when satisfied that the trial judge had reached a perverse decision. The appellate court however may evaluate the inferences drawn for the facts.

[22] It is clear therefore that the powers of appellate courts are circumscribed in the evaluation of facts. In this context we find it unnecessary to disturb the findings of fact by the trial judge. We restrict ourselves in our evaluation of the evidence to consider whether wrong inferences were drawn by learned trial judge from the facts.

Evidence relating to sexual intercourse

[23] In the present case, Counsel for the Appellant, Mr. Durup has submitted several different strands of evidence which in his view do not support the conviction. First, he submits that the learned trial judge erred by interpreting the Appellant’s evidence-in-chief as confirmation that no sexual intercourse had taken place. It must be noted that in his evidence-in-chief the Appellant gave an inconsistent account as to what had happened compared to what he had stated in his statement to the police after he was arrested. In his statement to the police which was admitted without objection he stated that he was

“going to penetrate [his] penis in [the complainant’s] vagina, [but] her legs blocked [his] way...instead of penetrating her [he] ejaculated at the corner of her legs” (sic).

Further, he maintained that:

“... as [he] went at the back of the bus she already removed all her clothes she wanted [him] to make love to her, [he] had no intention of doing that to her, [he] came back to [his] seat. [He] sat there behind the wheel, she had put her clothes back on, [he] told her that she had to disembark ... she had taken too long with [him] as [he needed] to go to work at 7.00 am the next morning” (sic).

[24] In his examination-in-chief he maintained that no sexual intercourse had taken place. In cross-examination he insisted that he had not had sexual intercourse with the complainant. The following exchange bears this out:

Q And what did you do after you removed your boxer

A No sex happened.

Q But you removed your boxer, what did you do?

A We were both excited.

Q And...

A Then I ejaculate voluntarily without any penetration.

Q Where did you ejaculate?

A I believe it was on her legs.

Q So you maintain till this morning that you have not done any sexual assaults on the victim?

A Never (page 169 of the court transcript).

[25] It must be noted that in re-examination, this contradiction was not explored, clarified or addressed in any way. It is evident that the Appellant was obfuscating the truth, shifting blame and being evasive; one minute alluding that there was no sexual intercourse whatsoever and the next saying that there was some form of interaction but without full sexual intercourse. Given these inconsistencies, it was in our view, entirely correct for the trial judge to find that the statement given by the Appellant to the police, in which he admitted going into the back seat of the bus, removing his shorts and boxers in order to engage in sexual intercourse with the complainant, contradicted his testimony in court in which he denied ever engaging in any form of sexual intercourse with the complainant. He was in the circumstances entitled to draw the inference he took.

Evidence relating to the time lapse between Cesar's disembarkation from the car and that of the complainant

[26] Secondly, it was submitted that the learned trial judge did not consider the possibility of a time lapse between the witnesses Richard Cesar being dropped off and the Appellant asking the complainant to disembark which would show corroboration of the Appellant's evidence. This submission is really of utmost banality and inconsequentiality in the greater scheme of things and specifically in supporting the ground of appeal that the Appellant's conviction cannot be supported by evidence. We do not find it a material consideration.

Snickering by the Appellant

[27] Thirdly, with regard to the Appellant's snickering in court, the submission that this could be due to idiosyncratic behavior on his part as opposed to the finding by the learned trial judge that the Appellant took the whole trial process as a joke, is not borne out by the evidence. The Appellant on several occasions stated that he took the matter as a joke (see pages 167 and 168 of the transcript of proceedings). The learned trial judge also made observations of this sniggering which we accept. We are bolstered in this finding by the obvious facetiousness of the appellant as demonstrated in the following exchange:

Q So what stopped you from participating in the identification parade?

A It is my constitutional right to either refuse or to go.

Q. You were invited to participate, you were not forced to.

A Sometimes I am invited to a party and I do not go. (page 179 of the transcript).

The forensic evidence

[28] Fourthly and importantly in terms of relevance to the conviction, Mr. Durup has submitted that the learned trial judge erred in finding that the forensic evidence confirmed sexual intercourse between the complainant and the Appellant.

[29] Mr. Vimesh Ramessur, the Senior Forensic Scientist, testified that a swab from denim shorts worn by the complainant contained a mixture of DNA profiles from both the complainant and the Appellant. He explained that the mixture contained epithelial cells from the Appellant's penis and the complainant's vagina. He further explained that the female epithelial cells are obtained from the vaginal wall internally. While the trial judge misdirected himself in finding that the swab from which the DNA was extracted was taken from the floor of the bus as opposed to the denim shorts, his conclusion that there was sexual intercourse is correct as confirmed by the presence of the DNA profiles of both the complainant and the accused.

The state of the complainant's clothes and her behavior

[30] Fifthly, issues are made about inferences drawn by the trial judge in relation to a drink offered to the complainant and to the fact that the complainant's clothes were dirty and torn and to her behavior on arriving at her grandmother's residence. These inferences were drawn by the trial judge in relation to whether the sexual act was with or without the consent of the complainant. He found that the complainant's explanation as to what had happened was credible and corroborated by the fact that her clothes were dirty, that she was emotional, afraid, speechless and crying. He made no inference about the drink offered to the complainant as he said he could not be sure from the evidence whether it

had been spiked. He inferred that these facts pointed to the lack of consent by the complainant to the sexual act.

[31] The distress of a complainant is often taken into account in sexual assault cases and can amount to corroboration when there is no evidence that the complainant feigned it (see Archibold Criminal Pleading, Evidence and Practice (2013) parag 20-13 and *R v Romeo* [2004] Crim. L. R 302, CA; *R v Knight* 50 Cr. App. R. 122, CA). In the circumstances we see no reason to fault these inferences by the trial judge.

[32] At the most, the submissions by Counsel for the Appellant with respect to the only ground of appeal on conviction show inconsistencies in the evidence. However, as pointed out by learned counsel for the Respondent, Mrs. Langsilu, these inconsistencies are neither serious nor material to affect the evidence proving the Appellant's guilt (see on this point *Zialor v R* SCA 10/2016).

Appeal against sentence

[33] The Appellant is also appealing against his sentence of 12 years' imprisonment. The approach of the appellate court in terms of sentence is generally not to overturn a sentencing decision unless it is clearly wrong in principle or manifestly excessive (*Labiche v R* SCA 1 (a)/2004, LC 288).

[34] Sexual assaults are traumatic and humiliating. Our society is plagued by such offences. We have of late experienced an upsurge in such crimes with an almost equivalent normalisation in the national psyche of an entitlement to sexual intercourse with or without consent. The attitude of the Appellant in treating this process as a joke, his sniggering in court, his lack of remorse, his total disregard for the young life he has destroyed is not looked on lightly by this court.

[35] Locked in a bus, a terrified 15-year-old was subjected to a most horrendous ordeal by a 49-year-old man. She lost consciousness, when she came to he told her to get out of the bus. She could not move her legs in fear and was dumped in the dark with dogs around her. She subsequently had suicidal thoughts and had to undergo psychological treatment.

She still suffers from anxiety attacks. She missed out on school for weeks as she could not face people. These are all aggravating factors when considering an appropriate sentence. In *Francis Crispin v R* SCA 16/2013, the Honourable President of the Court of Appeal held the following:

“The guiding principles in sentencing are summed up in four words: retribution, deterrence, prevention and rehabilitation ... [The appellant] ignores the mental and physical pain and damage he causes his victims. The 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.”

[36] We do not see any reason to depart from this view. We find that the sentence was appropriate given the circumstances of this case and was in no way harsh or excessive.

[37] We therefore dismiss this appeal in its entirety.

M. Twomey (J.A)

I concur:

F. MacGregor (PCA)

I concur:

F. Robinson (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 14 December 2018.