

IN THE COURT OF APPEAL OF SEYCHELLES

Reportable

[2020] SCCA ...
SCA CR 18/2019
(Appeal from CR 31/2018)

Mathieu Morel

(rep. by Mr. N. Gabriel & Miss Vanessa Gill)

Appellant

and

The Republic

(rep. by Mrs. Gulmette Leste)

Respondent

Neutral Citation: *Morel v R* (SCA CR 18/2019 [2020] SCCA – 18 December 2020)

Before: Fernando, President, Tibatemwa JA and Dingake JA

Summary: Sexual assault of a 10-year-old girl by her stepfather. The only direct evidence was that of the victim and the persons to whom she related the incident about a year after the incident. No corroboration of the victim's evidence.

Heard: 1 December 2020

Delivered: 18 December 2020

ORDER

Appeal against conviction and sentence dismissed. Conviction and sentence imposed by the Trial Court affirmed.

JUDGMENT

FERNANDO, PRESIDENT

1. The Appellant has appealed against his conviction and sentence of 14 years imprisonment, imposed by the Supreme Court for sexual assault of a child below the age of 15 years during the year 2014 at Les Mamelles.

Grounds of Appeal against Conviction

2. “a) The learned trial Judge erred in convicting the Appellant on insufficient evidence and thus, there is a lack of evidence to prove all elements of the offence.

b) The learned trial Judge erred in convicting the Appellant on each element of the indictment, especially the ‘particulars’ of the offence beyond reasonable doubt. Further, the learned trial Judge opined that the differences in address on the charge and the testimony given in court did not affect or mislead the accused and was not fatal to the charge.

c) The learned trial Judge erred in convicting the Appellant by taking into the account the medical report tendered in evidence. There is no conclusive evidence of the fact that the Appellant was the one who caused the complainant’s hymen to not be intact. The true reason for the medical report being compiled and the date of such were also overlooked by the trial Judge.

d) The learned trial Judge erred in taking cognizance of the fact that the child has a sexual history, which is why the medical report was ordered in the first place by Social Services.

- e) The learned trial judge erred in stating in his judgment that “DNA evidence is only one strand of evidence which can assist in establishing the accused committed the offence if such evidence is available. It is not a necessity nor a legal requirement for conviction.”
- f) The learned trial judge erred by failing to take into account that the complaint was not made contemporaneously with the incident and because of this there was lack of direct evidence proving that the Appellant had committed the crime.
- g) The conviction is manifestly unsafe in that the evidence on record does not prove the case beyond reasonable doubt.
- h) The conviction should be set aside on the grounds that it is unsatisfactory or unsafe.
- i) There was no weight placed on the trustworthiness of the complainant’s evidence especially with the inconsistencies that existed with her oral testimony and that of her written statement.
- j) The learned trial Judge failed to appreciate the complainant’s demeanour especially her blaze attitude in answering questions put to her in cross-examination, which caused the trial Judge to laugh a few times.
- k) The learned trial Judge demonstrated behaviour which led the Appellant to believe that he was bias in favour of the complainant and he also gave the impression he had personal knowledge of the complaint and her personal circumstances.
- l) The learned trial Judge prevented counsel for the accused to put the Defence case to the complainant during cross-examination, thus, making the trial unfair.

- m) There is new evidence that has come through in the form of the Probation Report in which the complainant had said she was threatened not to speak of the incident. The complainant's conduct around the same time is inconsistent with a child who has been sexually assaulted in that she has formed a romantic relationship with an older boy." (verbatim)

3. Grounds of Appeal against Sentence

- "a) The sentence of 14 years imprisonment imposed by the trial Judge is manifestly harsh, oppressive, excessive, wrong in principle and inadequate.
- b) The learned trial Judge failed to take into consideration the sentences imposed for other offences, which are similar in nature.
- c) The sentence was passed on a wrong factual basis, having not taken into account the inconsistencies in the complainant's evidence, lack of scientific evidence proving that the Appellant had committed the offence and failing to take into account the incorrect address in the particulars of the offence.
- d) Material facts such as the lack of scientific evidence (DNA evidence) were not taken into account by the sentencing court.
- e) The lack of previous convictions was not taken into account by the sentencing court.
- f) Some matter has been improperly taken into account which is the fact that the mother of the victim had spoken on his behalf during his plea in mitigation and had stated that both she and the Appellant were on a path to rebuild their lives." (verbatim)

Prosecution Evidence in Brief

4. **PW 4 Dr. S. Brioche** had examined the victim NL on 06 October 2015. According to her the child had not attained menarche and her hymen was not intact. She had been 11.7 years old on the date of her medical examination according to her birth certificate. The tear of a hymen according to the PW 4 can occur due to sexual penetration, injury to the private part due to a fall, masturbation, or stretching of the hymen as a result of dancing, gymnastics, riding on horseback. Under cross-examination PW 4 had admitted that she had made a mistake in recording the date of birth of NL in her Medical Report. PW 4 had said that she was unable to state when the rupture to the hymen had occurred or how many times NL has had sexual intercourse. NL had not told her how her hymen was ruptured.

5. **PW 5, NL the victim in this case** had testified in February 2019 about an incident that had taken place in the year 2014, when she was about 10 years old. NL according to her birth certificate was born on 17 March 2004. She had been almost 15 years when she testified. NL had said that she used to live at La Misere but used to go to her stepfather's mother's house at Maldives with her mother. The Appellant is her stepfather. On being asked to state whether anything happened to her during her visits to Maldives she had stated as follows: "

“When I used to go there one day my mother left me alone she went somewhere I do not know where did she go to. Mathieu (*Appellant*) sisters and children had gone to the beach. His mother I don't know what was she doing but she was not at the house she had gone out for some time. I was crying because my mother had left me. I was seated in the living room and my stepfather was in the bedroom. My

stepfather was cleaning the bedroom. He called me and asked me to come and help him clean the room. When I went to the room he removed some clothes in the wardrobe and asked me to fold it. After folding the clothes, I told him that I was done doing it. I do not recall exactly what was he doing but he had turned his back against me. I was seated on the bed and then he turned and I asked him if I had finished helping him if I could go. He closed the curtains and with the curtain there was a rope which you tie the curtain with. He pushed me on the bed by touching my shoulders and then he took the rope and tied my hand with it and my feet.”

Thereafter NL gave the following answers, to the questions that was asked of her by the Prosecutor. “He removed his boxer. He went onto the bed. He came on top of me. He had sexual intercourse with me. He used his penis. He took his penis and put it in my vagina. I was crying out and struggling. I got up I sat down he untied my hand and feet.” Thereafter “I went to the toilet to wipe myself. When I came out of the toilet he told me not to tell it not to say anything to anyone or else he will kill my little brother and my mother.” Thereafter “I cried I went to the living room to watch cartoon”. After these things had happened the Appellant’s mother, sister and NL’s mother had come. When NL’s mother spoke to NL, the Appellant had looked at her with big eyes and he had a knife with a yellow handle at that time. She had wanted to cry but had restrained herself.

I have set out verbatim NL’s evidence as this was the only evidence before the Court directly implicating the Appellant and on which the learned Trial Judge relied upon to convict the Appellant.

NL had related what the Appellant had done to her for the first time to PW 2 and PW 3 when she was at the President’s village. She had related this at a ‘tete a tete’ with PW 2 and PW 3 at the President’ s village, when they had told the children

that one day they will have to go back to their parents. Every time the caretakers said this NL had cried. This is because she did not want to go back to her stepfather and see him again. After the 'tete a tete' she had requested to speak to PW 2 to explain to her why she always cried when told they have to go back home one day. It is at that meeting NL had spoken about what had happened to her. PW 3 had also been present at that meeting. After listening to her story PW 2 had told her that they will have to report the matter. Thereafter NL had been taken to the Social Services.

Under cross-examination NL had said that she had been brought to the President's Village as told to her by a Social Worker because the way things are at her home, namely she was being neglected and it was not safe for NL to remain at home. It had been suggested to her that there was no wardrobe nor curtains on the windows of the room of the Appellant. When asked as to why she had not struggled when the Appellant tied up her hands and feet, NL had said that the Appellant was stronger than her. NL had said that she made a statement to the Child Protection on 24 November 2016. Counsel for the Defence had drawn the attention of NL to a few omissions in the statement she made; in comparison to her evidence in court, but failed to mark and produce them. I therefore give no importance to them and also because NL had testified in Court almost 3 years after giving the statement, had been 12.8 years when she made the statement and said that she was afraid at that time. She had related as to what happened to her at the President's Village because she felt that she was then far from her step-father. The following dialog between NL and Counsel for the Defence is important in light of the evidence of DW 3 and DW 4 and in view of the defence of the Appellant. It is to be noted that NL had been subjected to a medical examination by PW 4, before she was moved by the Social services to the President's Village and before the 'tete a tete' with PW 2 and 3.

“Q. After you were examined by the Doctor did you tell your mother anything or the Social worker?

A. No.

Q. Your mother never asked you anything?

A. No because she had already asked me before I had gone for the test.

Q. What did she ask you?

A. If my stepfather had done anything wrong to me.

Q. And what was your answer?

A. No.

Q. Nyra, if you had been truthful about your stepfather abusing you, isn't it true you would have said at that precise moment, that he had abused you or after you had been examined?

A. No I did not say, because if I told my mother my mother would have gone and told him. And he might have killed my mother.

Q. So you waited a year later to tell the people at President's Village what had happened to you?

A. Because I was very far from my father.” (verbatim)

In order to understand the testimony of PW 5 the following statement she made while testifying in Court is also of importance: “Because all of the time after the incident had happened, I had always think that it was because of me the incident had happen. My Social Worker had spoken to me telling me that it is not my fault that such thing had happened to me. Even God had help me to understand that it is not my fault that such a thing had happened to me.” (verbatim)

It has not been suggested to PW 5 that she had fabricated the case against the Appellant. In fact, when asked “You do not like Mathieu (*Appellant*) do you?”, her answer had been “That is not true, I am not happy with what he had done.”

6. A careful examination of the entirety of the evidence of PW 5 gives a very plausible explanation for the delay and the reason for making the statement implicating the Appellant at a later date. PW 5 was 10 years old when the alleged incident took place, she came from a broken home where she had been neglected by her mother, She had no father to turn to, the Appellant was her step-father, her mistaken sense of guilt that she too was responsible to what had happened, the Appellant’s threat that he would kill her mother and the child the mother was carrying and the fear that she would have to go back to the same environment and live with the Appellant. A Court cannot close its eyes to the realities of life and be insensitive to understand the emotions of a young child.

7. **PW 2, M. Julie, a caretaker at the President’s Village** had said that one day in November 2016, when she and PW 3, M. Rouillon were doing a ‘Tete a tete’ with the children and informing the children that they will have to go back home when they become 18 years; NL had wanted to speak to her after the ‘Tete a tete’. PW 2 had said that they were being particularly strict with the children as they had not behaved particularly well on that day. NL had been in P5 at this time. NL had then told her “Ms Marie I wouldn’t go home because of the incident that happened.” NL had then told her one day when her mother had gone to town, leaving her behind with her stepfather (Appellant). The Appellant had then told her to join him clean the room. He had then tied her on the bed and had sex with her. There had been nobody at home at this time. The Appellant told her not to tell her mother and threatened to kill her mother and the baby in her mother’s womb. When her mother had come home, she had not been able to tell her mother because the Appellant was behind her mother with a knife. She had therefore not told anything to her mother thinking that the Appellant might do something. PW 2 had then

asked NL whether she could inform the Social worker and NL had agreed. PW 2 had said that NL was a happy child always smiling and making others laugh.

The Defence Counsel in cross-examination had suggested to PW 2, “And when she (*NL*) said there was nobody at home, she was referring to Maldives, wasn’t she? At Mathew Morel’s home?”, indicative of an awareness of an incident at the Appellant’s house.

8. **PW 3, Ms. M. Rouillon, a caretaker at the President’s Village** had corroborated the evidence of PW 2.
9. **PW 1, Ms. J. Thelemaque, a police officer attached to the Child Protection Unit**, had recorded the statement of the Appellant on 16 December 2016 wherein the Appellant had stated: “The accusations are false”.

Defence Evidence in brief:

10. **The Appellant** who was 28 years when he testified on oath before the Court had stated that he came to know DW 3 V. Jennevole, (hereinafter referred to as VJ), the mother of NL, when he went looking for scarlet women in town. After sometime he had begun to live with VJ and she had become pregnant for his son. He had also fallen into drugs. The Appellant had admitted that NL used to come visit him in Maldives around 2012 -2013. NL had been about 8 – 9 years at that time. When asked what it was like to have VJ and NL at home the Appellant had said that VJ “will never leave her daughter with me” as he did not have a good relationship with children. The Appellant had denied that he had sexually assaulted NL. He had said that there had never been any curtains to the windows of his bedroom. When the Appellant was asked a general question as to whether he was at his home in Maldives when NL came with her mother VJ to his place during weekends; having said that his brothers and sisters were also at home, had

come up with a strange answer, namely “On that day yes I was there.” It is noted that the Appellant had not been questioned about any specific date on this occasion. The answer is suggestive that the Appellant was conscious of an incident that had happened on a particular day.

11. **DW 2, L. Morel**, testifying on behalf of the Appellant who is her brother had stated that NL was a happy little girl who liked to play and when at her place in Maldives slept by her side. Contradicting the Appellant’s evidence DW 2 had said that there was a curtain in the Appellant’s room.

12. **DW 3, V. Jeannevole, (referred to as VJ) the mother of the victim NL**, testifying on behalf of the Appellant who is her boyfriend had stated she has two children with the Appellant. According to DW 3 her relationship with NL is OK. She recalls going to see the doctor at the Yellow roof building of the Victoria Hospital with NL and the Social Worker. The doctor had said that NL was not a virgin. Although this part of the evidence of DW 3 and the rest of what the doctor said is alleged to have said is hearsay, I have decided to place reliance on the statement that NL was not a virgin as it is corroborated by the evidence of PW 4, Dr. Brioche. VJ had said that NL was 11 years when she went to the doctor. VJ had then gone on to state what NL had told her about certain things that had happened to her. This again is not only hearsay and should not be considered since NL was not questioned about this by the defence when she was cross-examined. It is strange that VJ had said that she will never leave NL with the Appellant when they went to his house at Maldives.

DW 3 testifying in mitigation of sentence after been reminded that the Appellant has been convicted with respect to sexual assault against her daughter NL, had said: “My feelings I forgive for what he has done. What happens is that drug can make you act in different ways I cannot blame Mathieu for what has happened.”

13. **DW 4 J. Alphonse, a social worker attached to Unity House**, had testified about removing NL from the custody of NL's mother and taking her to President's Village as she was being neglected by her mother. DW 4 had also spoken about what the counsellor from La Misere Primary, reported to her about what NL had told her in 2015. That being double hearsay and never put to NL in cross examination, I am not prepared to place any reliance on it. DW 4 had stated that NL had not told her about being mistreated or ill-treated by the Appellant. DW 4 had stated that she accompanied NL with her mother VJ to PW 2, Dr. Brioche. DW 4 had spoken about certain matters that NL had told her, but since they amount to hearsay I shall not place any reliance on them. DW 4 had stated that NL had told her about being sexually assaulted by her father. She had also stated that NL had displaced signs of fear towards the Appellant.

It is clear that none of the witnesses called for the defence did not and could not have denied the allegation NL made against the Appellant on that day in the year 2014 when NL and the Appellant were alone at the Appellant's mother's house at Maldives, and therefore do not help the Appellant's defence of denial.

The Defence

14. The defence that the Appellant tried to put up in this case is that NL had a sexual relationship with another boy. This was according to the testimony of defence witnesses, DW 3 and DW 4 based on what NL is alleged to have told them. As stated earlier NL had not admitted to this nor had been questioned on these lines when she was cross-examined and thus whatever DW 3 and DW 4 had told Court is hearsay. But it is clear from an examination of the entirety of the evidence that the alleged relationship with another boy, even if the defence had succeeded in establishing it, had been, after NL had been abused by the Appellant and therefore does not absolve the Appellant from guilt. The Appellant who had taken

advantage of an innocent child of 10 years and sexually abused her cannot now turn around and blame the child for what he had made her to be, even if the story that NL had a sexual relationship with another boy was true.

Reasoning of the Trial Judge

15. The fundamental question to be determined in this case is whether the learned Trial Judge, who had the opportunity to assess the demeanour of PW 5, the victim in this case, while testifying, and the totality of the evidence led in this case had come to the correct determination in convicting the Appellant. This is what the learned Trial Judge had stated in his judgment in relation to the evidence led before him: “The witnesses for the prosecution were consistent and logical in their testimonies. Contrary to the submission of the defence, I find the testimony of the complainant NL to be cogent and rational. It was not dented at all by cross-examination. I must warn myself that when an accused is charged with a sexual offence, the Court must act with utmost caution if it is to convict the accused on the uncorroborated testimony of the complainant” He had gone on to say that he found the three witnesses who testified for the defence “to be untruthful and deliberately lied in their attempts to protect the accused. I do not believe their version of events at all, they lack credibility and I reject their evidence entirely. On the other hand, I am satisfied that the complainant was truthful and consistent throughout her testimony. The evidence of Marie Julie and Michaela Rouillon were consistent and showed consistency in the complaint made by NL and her testimony in Court.” This is not an inference drawn by the learned Trial Judge by established facts, but a clear finding of fact made on the basis of direct evidence before him and this Court should be very slow to disturb such a finding, unless there is good reason to do so. The evidence of PW 5, by itself was sufficient to establish all the elements of the offence as accepted by the learned Trial Judge. This disposes of grounds of appeal (a), (g) and (h).

16. The learned Trial Judge had even warned himself in convicting the Appellant on the uncorroborated testimony of the complainant, when this Court had in September 2011 in the case of **Lucas V The Republic case No. SCA 17/09** stated: *“We therefore hold that it is not obligatory on the courts to give a corroboration warning in cases involving sexual offences and we leave it at the discretion of judges to look for corroboration when there is an evidential basis for it...”*

As regards appeal ground (b) I agree with the learned Trial Judge’s finding at paragraph 17 of his judgment: “In fact all the witnesses including the accused and the defence witnesses testified with clear acceptance that the place in question was indeed Maldives. It is therefore clear that the charge as framed did not at all affect or mislead the accused in his defence and therefore not fatal to the outcome of the case.” As stated at paragraph 9 above, when the Appellant was asked a general question as to whether he was at his home in Maldives when NL came with her mother VJ to his place during weekends, he had said “On that day yes I was there.” It is noted that the Appellant had not been questioned about any specific date on this occasion. The question put to PW 2 in cross-examination as referred to at paragraph 7 above shows that the defence was well aware that the incident had taken place at Maldives. In view of the Appellant’s denial that he had sexually assaulted NL, it cannot be said as correctly stated by the learned Trial Judge that the place of offence as stated in the charge, had misled him. I therefore dismiss ground (b) of appeal.

17. As regards appeal grounds (c) and (d) there is nothing in the judgment to indicate that the learned Trial Judge had taken into account the medical report in convicting the Appellant, save that for stating what was in the report in setting out the Prosecution evidence. It is clear from the evidence of PW 4, Dr. Brioché as stated at paragraph 4 above that there was nothing to establish that the NL had a sexual

history. Medical evidence corroborative of the act of rape is not a sine qua non for a conviction in a case of sexual assault. As correctly stated by the Respondent in the Skeleton Heads of Arguments the case before the Trial Judge was not to decide between which of the 2 persons who or what caused the rupture of the hymen of the Complainant or whether the Complainant was a virgin or not, but whether the Appellant had sexually assaulted the Complainant as charged. I therefore dismiss grounds (c) and (d).

18. As regards appeal ground (e) I am of the view that the learned Trial Judge did not err in stating what is referred to at ground (e) and thus it is dismissed.

19. As regards appeal ground (f) I agree with the learned Trial Judge's statement at paragraph 20 of his judgment: "However delay does not necessarily indicate the complainant's allegation is false and there may be good reason why victim of a sexual assault may have hesitated to complain at the earliest opportunity. If the Court is satisfied with the reason advanced by the complainant, conviction may ensue." In this case the learned Trial Judge had at paragraph 20 of his judgment warned himself of the danger of conviction considering the delay. PW 5, the victim's evidence set out in paragraph 5 above sets out clearly why the complaint was not made contemporaneously with the incident and the evidence of PW 5, PW 2 and PW 3 shows the circumstances under which the complaint came to be made. If not for the threat to send back the victim to her mother, who continued to live with the Appellant, her step-father, this would have been another case of sexual abuse of a minor child gone unnoticed.

20. As regards appeal ground (i) I give no importance to the few inconsistencies that existed with the oral testimony of PW 5 and her statement made to the police, since they are not material and also because NL had testified in Court almost 3 years after giving the statement, had been 12.8 years when she made the statement

and said that she was afraid at that time. Further the said inconsistencies were not proved in Court. I therefore dismiss ground (i) of appeal.

21. There is no merit whatsoever in appeal grounds (j), (k), (l), and (m) and they are dismissed.
22. In view of what has been stated above I dismiss all the grounds of appeal against conviction and have no hesitation in dismissing the appeal against conviction and confirming the conviction.
23. As regards appeal grounds (c) and (d) against sentence I find that the matters stated therein have a bearing if at all only in relation to conviction and certainly not matters that any court would take into consideration, once a conviction is entered. A court convicts an accused only when it is satisfied beyond a reasonable doubt of the accused's guilt. There are no degrees of guilt in sexual assault. A person is either guilty or not guilty and a sentence is imposed only when a person has been found guilty on the basis of the Prosecution proving its case beyond a reasonable doubt and convicted of an offence. I cannot understand the Appellant's Counsel's complaint at appeal ground (f) against sentence for that is a matter that was considered in mitigation of sentence and at the instance of the Appellant's Counsel. As regards appeal ground (e) the learned Trial Judge had taken into consideration at paragraph 8 of his Sentencing Order that "the convict is a first offender".
24. As regards appeal grounds (a) and (b), it must be said that the learned Trial Judge had imposed the minimum mandatory that could be imposed under the law. There is no way we could interfere with the sentence given, relying on the case of **Poonoo Vs AG [2011] SLR 424**, on the basis that it is grossly disproportionate to the offence committed in view of the following aggravating circumstances as stated by the learned Sentencing Judge:

- i. the victim was only 11 years old when the Appellant, who was her step-father sexually assaulted her
- ii. the convict used force to subdue and tie up the victim,
- iii. the convict used threats to secure the silence of the victim after the commission of the offence.

25. I therefore have no hesitation in dismissing the appeal against sentence and affirming the sentence imposed by the Trial Court.

26. The appeal against conviction and sentence dismissed and conviction and sentence affirmed.

Signed, dated and delivered at Ile du Port on 18 December 2020

Fernando, President



I concur

Tibatemwa-Ekirikubinza, JA

I concur

Dingake, Justice of Appeal