IN THE COURT OFAPPEAL OF SEYCHELLES

Reportable
[2024] (3 May 2024)
SCA CR 12/2023
(Arising in CR 60/2021)

In the matter of a Reference by the Attorney General

under Section 342A of the Criminal Procedure Code of Seychelles,

arising out of the acquittal of the accused in CR 60/2021

(rep. by Ms. Corrine Rose)

Neutral Citation:	*R v Labrosse* (SCA CR 12/2023) [2024] (Arising in CR 60/2021) (3 May 2024)
Before:	President, Gunesh-Balaghee, De Silva, JJA
Summary:	Clarifying the correct application of section 130(3)(C) Penal Code in proving the offence of Sexual Assault and if it is required to prove the *mens rea* of the accused - Sufficiency of a forensic psychologist's report containing his/her conclusions in determining the incapacity of a mentally impaired person to consent to sexual intercourse
Heard:	15 April 2024
Delivered:	3 May 2024

OPINION

The mens rea of the offence of Sexual Assault is two-fold. Firstly, there must be the intention on the part of the accused to commit any one or more of the acts which make up the *actus rea* of Sexual Assault. Secondly, there must be knowledge on the part of the accused that the victim does not consent to such physical act. The burden is on the prosecution to prove the means rea.

The expert testimony of a forensic psychologist is admissible in assisting the Judge to arrive at a conclusion on the incapacity of a mentally impaired person to have sexual intercourse. Nevertheless, such evidence is not conclusive but corroborative. It can only assist the judge to form his own independent view on the matter in issue after considering all the attendant circumstances.

JUDGMENT

DE SILVA JA

(Fernando President, K. Gunesh-Balaghee JA, concurring)

Factual Matrix

1. The Respondent was charged with one count of Sexual Assault contrary to section 130(1) read with section 130(2) of the Penal Code of Seychelles and one count of Burglary contrary to section 289(a) of the Penal Code and punishable under section 289 of the of the Penal Code of Seychelles.

2. At the conclusion of the case for the prosecution, the Respondent made an application of "no case to answer".

3. The learned Trail Judge granted this application by way of Ruling [2003] SCSC 427 (CO74/2021), dated 9th June 2023. The Respondent now stands acquitted of all counts.

4. This Reference under section 342A of the Criminal Procedure Code of Seychelles is made by the Attorney General seeking the opinion of the Court of Appeal on the following point of law:

> "*whether the learned judge correctly identified the mens rea elements of the offence of "sexual assault", contrary to section 130(1) read with section 130(2)(d) of the Penal Code of Seychelles."*

The Attorney General specifically seeks the opinion of the Court of Appeal on the application of section 130(3)(c) of the Penal Code of Seychelles.

Court of Appeal of Seychelles Rules 2023

5. These Rules were published on 13 November 2023 and came into operation on 13 January 2024.

6. According to Rule 24(1)(a), the Applicant shall lodge with the Registrar five copies of the Applicant's main heads of argument within one month from the date of service of record. Rule 24(2)(i) states that where the Applicant has not lodged heads of argument in terms of this Rule, the appeal shall be deemed to be abandoned and shall accordingly

be struck out unless the Court otherwise directs on good cause shown. In this case the date of service of record on the Attorney General is 14 February 2024 the heads of argument were lodged with the Registrar on 28 March 2024.

7. Ms. Corine Rose, State Counsel has filed an affidavit dated 28 March 2024 and moved Court to condone the delay in the filing of heads of argument. According to her evidence, she was out of the jurisdiction from 2nd to 10th March, 2024 attending the Commonwealth Law Ministers & Senior Officials meeting. She had to go through the record and check for foreign authorities as the point of law raised had not really been litigated locally. Due to her other official commitments, she was able to file the heads of argument only on 28 March 2024.

8. I am of the view that the facts alluded to do not fall within "good cause shown". These are matters that were within the full control of the learned Counsel for the Appellant and could have been addressed administratively. Ms. Rose was the Counsel who prosecuted the case before the Supreme Court and would have been fully conversant with the facts and the law. She had ample time between 14 February and 2nd March. If she was so tied up with work, she could have passed the file on to another officer in the Attorney General's Office, especially because this was a reference by the Attorney General himself and in deference to him.

9. These Rules must have uniform application to command compliance. The rule of law requires all Counsel appearing before us to be treated in the same manner. We must not treat the Attorney General as a privileged suitor.

10. According to Rule 24(2)(i), the appeal shall be deemed to be abandoned on the failure on the part of the Appellant to comply with it. In ***Jinawathie and Others v Emalin Perera*** **[(1986) 2 Sri.L.R. 121 at 130]**, it was held that when a thing is deemed to be something, it does not mean that it is that which it is deemed to be, but it is rather an admission that it is not what it is deemed to be, and that notwithstanding it is not that particular thing it is nevertheless deemed to be that thing. The application of Rule 24(i) would deem the appeal abandoned although in fact it may not be.

11. Nevertheless, Rule 24(2)(i) vests a discretion in Court to act otherwise for good cause shown. In view of the jurisprudential importance of the issue before the Court we have decided to examine the merits of the reference and express our opinion in relation to the reference by the Attorney General

Relief Sought

12. The Attorney General seeks the following opinions of this Court:

(A) Clarifying the correct application of section 130(3)(C) Penal Code in proving the offence of Sexual Assault and if it is required to prove the *mens rea* of the accused

(B) Sufficiency of a forensic psychologist's report containing his/her conclusions in determining the incapacity of a mentally impaired person to consent to sexual intercourse

13. According to Section 342A (2) of the Criminal Procedure Code, a reference section 342A shall not affect the acquittal or conviction by, or the decision, declaration, decree, direction, order, writ or sentence of, the forum below.

Scope of Section 130(3) of the Penal Code

14. Section 130 of the Penal Code reads, *in extensu*, as follows:

> *"(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.

(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.

(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 of 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.

(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 or committing the offence;(b)whether there has been any penetration in terms of subsection (2)(d); or(c)any other aggravating circumstances."

15. In ***Reference by the Attorney General under Section 342A of the Criminal Procedure Code*** **[(18 of 2021) [2022] SCCA 40 (19 August 2022), para. 21]**, Fernando PCA held:

"The general rule, in criminal cases, as stated earlier, is that the legal burden of proving any fact essential to the prosecution case rests upon the prosecution and remains with the prosecution throughout the trial. ***Adrian Keane in his book, The Modern Law of Evidence, 3rd Edition*** *states that there are three categories of exception to this general rule, namely where a statute expressly places the legal burden on the defence, where a statute impliedly places the legal burden on the defence and where the accused raises the defence of insanity. In* ***Woolmington V DPP, 1935 AC 462, Lord Sankey LC*** *said: "Throughout the web of the English criminal law one golden thread is always to be seen, that is the duty of the prosecution to prove the prisoner's guilt subject…to any statutory exception…"*

16. Generally, a sexual offence is made punishable only where both *mens rea* and *actus rea* is established by the prosecution. In ***Harding v. Price*** **[(1948) 1 KB 695]** Goddard CJ stated *actus non facit reum nisi mens sit rea* (an act is not punishable without a mental element). Nevertheless, the law has now developed to accept certain types of offences which create a strict liability.

17. The opinion sought by the Attorney General more specifically focuses on the required *mens rea* element of the offence of Sexual Assault.

18. The *actus rea* of the offence of Sexual Assault is set out in section 130(2) of the Penal Code. It explains four types of acts where Sexual Assault is committed. They are *(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.*

19. The *mens rea* of the offence of Sexual Assault is two-fold. Firstly, there must be the intention on the part of the accused to commit any one or more of the acts which make up the *actus rea* of Sexual Assault. Secondly, there must be knowledge on the part of the accused that the victim does not consent to such physical act.

20. Section 130 of the Penal Code does not define what is meant by consent. As was held by Twomey CJ (as she was then) in ***R v S E*** **[(CR 30/2016) [2017] SCSC 413 (17 May 2017), para. 30]**:

> *"Crucially missing from the definition are the elements necessary for consent such as voluntariness, freedom and choice to agree, the agreement itself, and more to the point, as concerns the particular characteristics of this case, the capacity to agree when intoxicated. The absence of a definition of consent is especially problematic given the fact that the presence or absence of consent has long been the crucial concept in establishing sexual offences and the fact that consent is and will continue to be inherently ambiguous."*

21. It is clear that consent covers a range of behaviour from wholehearted enthusiastic agreement to reluctant acquiescence. The question is where does the law draw a line in relation to the offence of Sexual Assault.

22. Some guidance can be set out in determining whether there was consent. In ***R v Olugboja*** **[(1982) QB 320]**, Dunn LJ held that *consent, or the absence of it, is to be given its ordinary meaning and if need be, by way of example, that there is a difference between consent and submission; every consent involves a submission, but it by no means follows that a mere submission involves consent*.

23. There is no indication in section 130 of the Penal Code or in any other provision that the legal burden of proving presence of consent is on the accused. Therefore, applying the ratio in ***Reference by the Attorney General under Section 342A of the Criminal Procedure Code*** [supra., para. 21], I hold that the burden of establishing that there was no consent on the part of the victim for the physical act of sexual assault lies with the prosecution.

24. In examining consent in relation to Sexual Assault, one must bear in mind that at the core of consent is capacity and the distinction between factual consent and legal consent. Factual consent is where based on the factual circumstances, the consent of a person is established. Nevertheless, there are situations where the law disregards such factual consent.

25. One such example is found in section 130(3)(b) of the Penal Code. Where the victim of Sexual Assault is a *person is below the age of fifteen years*, it matters not whether there is factual consent. The law disregards such consent and imposes liability on the accused. Here there is strict liability and all what the prosecution needs to prove in that situation is that the victim was under fifteen years old. In ***R v G*** **[*(Appellant) (On appeal from the Court of Appeal (Criminal Division))* [2008] UKHL 37, para. 3]** it was held:

> *"The mental element of the offence under section 5, as the language and structure of the section makes clear, is that penetration must be intentional but there is no requirement that the accused must have known that the other person was under 13. The policy of the legislation is to protect children. If you have sex with someone who is on any view a child or young person, you take your chance on exactly how old they are. To that extent the offence is one of strict liability and it is no defence that the accused believed the other person to be over 13 or over."*

26. In this context, the question arises whether it is a defense that the accused thought that he or she was engaging in consensual sexual intercourse when in fact the consent

given at the time of the offence was not valid consent.

27. The attention of Court was drawn to the decision in ***A Local Authority v JB*** **[(2020) EWCA Civ 735]** where it was held that there must be a balance between the principle of autonomy and principle that vulnerable people in society must be protected.

28. The parallel sought to be drawn between section 130(3)(b) of the Penal Code, which deals with statutory Sexual Assault, which is one of strict liability, and section 130(3)(a) & 130(3)(c) of the Penal Code are misplaced.

29. Sections 130(3)(a) and 130(3)(c) of the Penal Code deal with rebuttable presumptions. But section 130(3)(b) of the Penal Code is an irrebuttable presumption. For example, an accused has no defence once the prosecution proves that the victim was below 15 years at the time of the act.

30. Whereas, section 130(3)(c) of the Penal Code deals with a rebuttable presumption. In considering the application of this section, one must start with section 12 of the Penal Code which states that every person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved. The burden is on the prosecution to prove that the victim was not of sound mind.

31. I would however say that the need to prove that the victim did not or could not have consented under 130(3)(c) may depend on the facts of each case. If the victim was an inmate of a mental asylum and was clearly raving mad in the eyes of any person, the prosecution may be relieved of its burden in proving that the accused knew she did not consent. But on the facts of this case that is not the case. Here was a woman, who lived in a house with an elderly man. The Prosecution did not choose to call this person or anyone from the neighbourhood who knew her. The forensic psychologist had only interviewed her a few times and had hardly known her before. The victim had made statements to her, which a completely wildly insane person could not have. There was no evidence whatsoever of medical records to show she was a psychiatric person and had been receiving treatment, her educational history and that the accused had knowledge of them. It is common knowledge that schizophrenics or persons suffering from bipolar conditions have lucid intervals and someone meeting them

may not know of their condition. Further they are supposed to be sexually very active.

Probative Value of a Report of a Forensic Psychologist

32. In general, a witness is permitted to testify only to facts personally observed by him. The judge is required to draw the necessary inferences from the facts testified to by a witness. However, there may be situations where the judge must come to conclusions on some matters, which require special knowledge of a technical or scientific character. In such situations, the opinion of an expert will furnish a judge with scientific and technical information that is outside the knowledge and experience of the judge. Section 17(1) of the Evidence Act makes such evidence admissible.

33. Section 17(1) of the Evidence Act which states that in any trial a statement, whether of fact or opinion or both, contained in an expert report made by a person, whether called as a witness or not, shall, subject to this section, be *admissible* as evidence of the matter stated in the report of which direct oral evidence by the person at the trial would be admissible.

34. This governs the admissibility of any statement, whether of fact or opinion or both, contained in an expert report. Admissibility and probative value of evidence are two distinct concepts. Admissibility governs the reception of evidence by a court at any judicial proceeding. It is a legal issue and essentially a negative concept. According to Cross and Tapper [*Cross on Evidence*, 13th ed., by Colin Tapper, 1985. Butterworths, London, p. 58], the admissibility of evidence depends first on the concept of relevancy of a sufficiently high degree and secondly, on the fact that the evidence tendered does not contravene any of the exclusionary rules applicable to it.

35. The Attorney General seeks our opinion on the sufficiency of a forensic psychologist's report containing his/her conclusions in determining the incapacity of a mentally impaired person to consent to sexual intercourse.

36. Let me begin by examining what is meant by psychology. According to Kalat [Kalat, James W., *Introduction to Psychology*, Nelson Education (2016)], the term psychology derives from the Greek roots psyche meaning "soul" or "mind" and "logos: meaning "word" and thus, psychology is literally the study of mind or soul. Gross [Gross, R., Psychology: The science of mind and behaviour", 7th edition.

Hodder Education (2015)] suggests that psychology as a discipline seeks to understand, predict and control human behaviour.

37. The probative value of evidence, which the Attorney General appears to have in mind in using the word *sufficiency*, is on the other hand a question of fact which is based upon rules of common sense. In ***Lord Advocate v Blantyre*** **[(1879) L.R. 4 A.C. 792]**, Lord Blackburn held:

> *"For weighing evidence and drawing inferences from it, there can be no canon. Each case presents its own peculiarities, and in each, common sense and shrewdness must be brought to bear upon the facts elicited in every case which a judge of fact in this fact, discharging the functions of a jury in England, has to weigh and decide upon it."*

38. According to Bartol [Bartol, C. R. & Bartol, A. M. (1987), History of Forensic Psychology, I. B. Weiner & A. K. Hess (Eds), Handbook of Forensic Psychology (pp. 3-21). New York: Wiley], the first psychologist who was called in 1896 as an expert witness in a court of law was a German psychologist named Albert von Schrenck-Notzing, who reportedly testified in the trial of an accused who was charged with triple murder.

39. Initially the expert opinion of a psychologist on the mental condition of an accused was rejected on the ground that the psychologists are not medical professionals, and the testimony of medical persons are only admissible in this regard [***Odom v. State***, 174 Ala. 4, 7, 56 So. 913, 914 (1911)]. Nevertheless, subsequently the US courts accepted the competency of psychologists as competent expert witnesses [***People v. Hawthorne***, 293 Mich. 15, 291 N.W. 205 (1940); ***Jenkins v. United States***, 307 F.2d 637 (D.C. App. 1962)]. In ***Jenkins*** (supra) the US Supreme Court by majority held that a clinical psychologist who was an expert in mental health could give an opinion on the presence or absence of mental disorders in a person.

40. In Psychologists as expert witnesses in the Family Courts in England and Wales: Standards, competencies and expectations, Guidance from the Family Justice Council and the British Psychological Society [The British Psychological Society 2016, page 4] it is said that:

> *"2.4 Skill areas offered by psychologists include issues of mental capacity and mental competence which may include instruction by the Court of Protection. Adult mental capacity assessments may relate to the capacities to engage in the legal process, to give evidence or to give consent in matters such as adoption, sexual contact, financial matters or living arrangements. Child mental capacity assessments may relate to capacities to engage directly in the legal process, to give evidence, and on the quality and veracity of a child's testimony.*
>
> *2.5 Family Court cases may require psychologists to evaluate parents' functional capacities to meet all of the needs of their child(ren) throughout the period of being younger than the legal age of adulthood. Public and private family proceedings tend to have differing perspectives, but practitioner psychologists are often required to comment upon an individual's capacity for change within the child's timeframe.*
>
> *2.6 A psychologist's evidence may be necessary to evaluate single or multiple issues including: mental health; behavioural and emotional functioning; intelligence; mental capacity; neuropsychological functioning (e.g. memory, attention, executive functioning); veracity of disclosure; personality type; forensic risk; substance misuse and/addiction; learning needs; psychological impact of disability, sensory impairment or ill health; psychological impact of trauma and/or abuse; neuro-developmental conditions (e.g. autism spectrum disorder); attachment styles 4 Psychologists as expert witnesses in the Family Courts in England and Wales and interpersonal relationships; capacity for change; and personal, developmental and therapeutic needs. In addition, these features may all be influenced by socioeconomic deprivation; separation and divorce; disputed immigration/asylum status; social isolation; child protection; homelessness; criminality; domestic violence; and varied cultural, religious and ethnic backgrounds".*

41. Nevertheless, it is important to make a distinction between the evidence of a psychologist and other medical expert. As Haward states [L.R.C. Haward, *A Psychologist's Contribution to Legal Procedure*, (1964) 27 Mod. L. Rev. 656 at 659-661] the results of a psychologist's investigation depend very much on the nature and success of the relationship he enters into with the party concerned. The evidence of a psychologist is decidedly different from a physician, neurologists or psychiatrist according to the facts, method by which they are obtained and the form of communication.

42. Therefore, an evaluation of the probative value of the opinion of a psychologist must be considered also upon an assessment of the psychological procedures adopted by the psychologist to evaluate.

43. Notwithstanding the special knowledge of an expert witness, the judge remains the sole arbiter of facts. In ***Davie v Edinburgh Magistrates*** **[(1953) S.C. 34 at 40]** Lord President Cooper explained the functions of an expert witness to be as follows:

> *"Their duty is to furnish the judge or jury with necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence."*

44. As with any expert, the opinion of a forensic psychologist is not conclusive on the matters dealt with. The evidentiary value of forensic psychological evidence is corroborative. It can only assist the judge to form his own independent view on the matter in issue.

45. The trite rule of evidence is the rule of best evidence. The Judge must be provided with the best possible evidence to assist him to come to necessary findings. For example, in this matter, the victim lived in a house with an elderly man. The prosecution did not choose to call this person or anyone from the neighborhood who knew the victim. The forensic psychologist had only interviewed her a few times and had hardly known her before. The victim had made statements to her, which a completely wildly insane person could not have. The victim also made a statement to the Police. There was no evidence whatsoever of medical records to show how the victim was a psychiatric person and had been receiving treatment, her educational history and that the accused had knowledge of them.

46. Subject to the court being satisfied of the qualifications and competence of a forensic psychologist, as an expert witness, his or her evidence is admissible in assisting the Judge to arrive at a conclusion on the incapacity of a mentally impaired person to have sexual intercourse. Nevertheless, such evidence is not conclusive on the matters dealt with. The evidentiary value of forensic psychological evidence is corroborative. It

can only assist the judge to form his own independent view on the matter in issue after considering all the attendant circumstances.

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J. De Silva JA

I concur:

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A. Fernando President

I concur:

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K. Gunesh-Balaghee JA

Signed, dated and delivered at Ile du Port on 3 May 2024.