IN THE COURT OF APPEAL OF SEYCHELLES

Reportable

[2024] (3 May 2024)

SCA CR 20/2023

(Appeal from CO 69/2019)

In the matter between

A H **Appellant**

(rep. by Mr. S. Rajasundaram)

and

The Republic **Respondent**

(rep. by Ms. L. Monthy)

Neutral Citation: *AH v R* (SCA CR 20/2023) [2024] (Arising in CO 69/2019) (3 May 2024)

Before: Fernando President, Robinson, Andre, JJA

Summary: Appeal against conviction for sexual assault.

Heard: 15 April 2024

Delivered: 3 May 2024

ORDER

Appeal against conviction allowed, and in consequence both conviction and sentence quashed and the Appellant acquitted and released forthwith.

JUDGMENT

FERNANDO, PRESIDENT (Robinson, Andre, JJA concurring)

1. The Appellant has appealed against his conviction for the sexual assault of his daughter AH. He has not appealed against his sentence.

The Charges:

2. The Appellant had been charged as follows before the Supreme Court:

Count 1
Statement of Offence
Sexual Assault contrary to section 130(1) as read with section 130(2) (d) and section 130(3) (b) of the Penal Code and punishable under section 130(1) of the Penal Code.

Particulars of Offence
Mr. AH of Glacis, Mahe, on a date unknown to the Prosecution in March 2019, sexually assaulted his daughter, namely Ms. AH, aged 5 years old at the time, by licking her lips, inserting his penis into her mouth and inserting his finger into her vagina.

Count 2
Statement of Offence
Wilfully or negligently exhibits to a child any indecent material contrary to section 152(1) (ff) as read with section 152(2) (b) of the Penal Code and punishable under section 152(1) of the Penal Code.

Particulars of Offence
Mr. AH of Glacis, Mahe, on a date unknown to the Prosecution in March 2019, wilfully or negligently exhibited to his daughter, namely Ms. AH, aged 5 years old at the time, indecent material, being a video of two naked women taking a bath.

3. At the conclusion of the trial, the Appellant had been acquitted of the second count.

Grounds of Appeal:

4. The Appellant had filed the following grounds of appeal against his conviction:

"1. The learned Judge while rightly dismissing the charge on count 2 against this Appellant and acquitting him, erred in his judgment in holding that the Appellant is guilty on count 1 while convicting him. The facts and statements of count 1 and 2 are having inextricable events in terms of the commission of the alleged offences, child's testimony in respect of count 2, thus the fate of dismissal of count 2 would necessarily follow for count 1.

2. The learned Judge failed to appreciate that this Appellant has proved the motive of NC, PW3, the mother of the alleged victim, of her constant fights with this Appellant, causing injuries to him and the final challenge that she would see the Appellant end up in jail as a personal animosity in that she had used the child to go against this Appellant with a motivated false complaint.

3. The learned Judge misdirected himself on the testimony of the child, the alleged victim as if the testimony is cogent, ignoring the child's testimony of her version towards her parents besides other material issues such as place and time of the alleged commission of offences in terms of identification.

5. The learned Judge erroneously concluded himself on the testimony of the Gynaecologist Dr S. Brioch of her opinion that it is possible for the hymen to remain intact even if the girl (alleged victim) have been fingered, by failing to assess himself of the medical status of the hymen. The status of the hymen on various conditions is only a probability and not conclusive." (verbatim)

Respondent's failure to file their heads of argument contrary to rule 24(1)(b) read with rule 24(2)(j):

6. Both the Appellant and Respondent were served with the Court of Appeal records pertaining to this appeal on the 15th of February 2024 in accordance with rule 23(3)(n) of the Court of Appeal of Seychelles Rules 2023. The Appellant in compliance with rule 24(1)(a) of the said Rules, filed his main heads of argument, i.e. within one month from the date of service of the record, namely on the 4th of March 2024. According to the said Rules, namely rule 24(1)(b), the Respondent had to file their main heads of argument, within two weeks from the receipt of the Appellant's heads of argument, namely on the 18th of March. The Respondent having failed to do so, filed a Notice of Motion in accordance with rule 26, dated 5th of April to condone the delay in filing the Respondent's heads of argument, for the reasons set out in the affidavit attached to the Notice of Motion. Rule 26 states: **"***The*

times fixed within these Rules may, on good cause shown by notice of motion supported by affidavit, be extended by the President or the Court." The said Notice of Motion had been filed by the Respondent two weeks after the specified time period to file their main heads of argument. Ms. L. Monthy, State Counsel, Attorney General's Chambers, and Counsel for the Respondent, in her affidavit had in setting out her reasons for the delay stated that she was involved in a murder trial before the Supreme Court, and that "simultaneously she had to go through the records of the proceedings in between attending to regular matters in the Supreme Court and deal with the other workload in the office". She had stated that the delay was not intentional and requested that the delay be condoned in the interest of Justice in view, that the virtual complainant was a child of tender age of 5 years at the time of the commission of the offence and the relationship between the virtual complainant and the Appellant. The Appellant filed objections to the Notice of Motion to condone the delay stating that the Respondent had enough and sufficient time to file their objections and that the merits of the appeal cannot be cited to condone the delay. We are of the view that the reasons set out in Ms. Monthy's affidavit has no merit whatsoever. We are surprised that an officer of the Attorney General's Chambers could come up with such a lame excuse since the Attorney General's chambers consists of several officers and this appeal could have been passed on to some other officer if the officer assigned to handle the appeal was too busy. We therefore refused to grant an extension of time. However, the Court did hear the Respondent on a few issues raised by the Court.

Prosecution Case:

7. The learned Trial Judge had first questioned the victim AH (referred to later as AAH as stated in her birth certificate and for the purpose of distinguishing with the Appellant who has been described as AH) who was 6 years and 7 months on video conference before taking her evidence. This is to satisfy himself whether her evidence can be relied upon and whether she knew that, she had to speak the truth and should speak of things of what she knew and not of what others had told her to say. Having thus satisfied himself, Prosecuting Counsel had been called upon to lead her evidence.

8. AAH had said she is a student of P1. At the time she testified, AAH had said that she was living with her grandmother, aunty, uncle and brother and prior to that, she had been staying at La Gogue with her father (Appellant), mother and brother. AAH had stopped living with her mother when the Appellant and her mother had a fight. She had then gone to live with her father at Glacis along with her brother. Her

paternal grandfather and grandmother had also lived with them in that house. It was thereafter that she came to live with her aunty and uncle at La Gogue. According to the testimony of AAH, it was when she was living with her father at Glacis, that the incident pertaining to this case had occurred.

9. AAH's testimony, can be summarized as follows: "One day when AAH was at the Appellant's place he had taken his phone and switched it on and AAH had seen on the phone that there were women who were bathing. The Appellant had then touched AAH on her side. AAH had demonstrated before Court how the Appellant had thereafter squeezed her mouth. He had then taken his fingers and inserted "where I urinate". She had asked him to stop but he had continued. AAH had said that it was painful. When the grand mother came and turned on the lights the Appellant had stopped, but when the grandmother turned off the lights and left the Appellant had "continued." Thereafter he had **"**climbed on top of me. He went up and down on me**".** AAH had also stated that the Appellant kissed her. The Appellant had also placed his mouth where according to AAH, she urinates. All this had taken place only once. AAH had given the full name of the Appellant to Court. AAH had said that she did not see her father thereafter and did not tell anybody about what happened immediately thereafter because she was afraid. It was sometime later that she had told her mother that her father had done "malelve"/ indecent acts with me," but had not given details of what he did. The mother had taken her to the Police where she had relayed everything that had happened to the police officer in the presence of a Social Services Officer. AAH had not given the details of what she told the police. Since there is no evidence of what in fact she told the mother or the police of what the Appellant did to her, there is no way of determining whether there is any consistency in the versions, she told the mother and the police.

10. Under cross-examination AAH had stated the names of her uncle, aunty and grandfather and said she calls her grandmother 'Nana'. AAH had said that it was her mother, who forced her to go to Glacis, with her father. AAH having earlier said that she was not happy being with her father at Glacis had later said that she was happy. AAH had denied that her memory was refreshed one or two days before she came to testify in Court and that nobody had assisted her "to tell or not to tell the truth" and what she had told the Court was from her memory. AAH had said she was sleeping but woke up when the Appellant started kissing her. She had said that the Appellant was watching something on the phone and had asked her to look at the phone. AAH had said that when her mother and the Appellant fought, her mum had placed a cigarette in the Appellant's eye. AAH had denied the suggestion that somebody had assisted her with what to tell and what not to tell the Court, and insisted that she was speaking the truth. AAH had no doubts as to the fact that it was

the Appellant who did those things to her, as he was the one that was beside her. She had not told her grandmother as to what had happened. The following day when she went to the beach with her mother and brother, she had not told the mother what happened the night before. AAH recalled that her mother took her to the police station but could not recall what happened there or whether she signed any paper there. AAH had said that she does not like her father "Because of what he had done." AAH had said that she is afraid of both her mother and the Appellant. AAH had specifically stated that nobody asked her to tell the Court of what she told Court. In re-examination AAH had said that she told the police what happened to her.

11. As previously mentioned in paragraph 9 in summarising the evidence of AAH, there is no mention by AAH of the appellant licking her lips or the insertion of his penis into her mouth, as stated in count 1.

12. NC, the mother of AAH testifying before the Court had stated that she has 6 children and AAH was her fourth child. NC had stated on a day in the month of April 2019, when she was at her neighbour's place "Just out of the blue AAH shouted that her father did indecent acts with her". On being questioned AAH had said, "her father kissed her and then inserted his private part in her mouth." When asked what she told the Appellant, AAH had said she had told her father to let her sleep. AAH had also told NC that the Appellant got her to watch an indecent movie on the phone. NC had assumed that it was the same indecent movie that the Appellant had once shown her. AAH had not described the movie. According to NC, the incident had occurred at the Appellant's house. NC had then brought AAH to a Social Services worker whom she knew. Thereafter NC had taken AAH to the Child Protection Services in town, where AAH had been kept for about three hours. NC had been asked to stay outside. According to NC at the time, she testified AAH and her younger brother were residing at the President's Village. It is to be noted, that AAH in her testimony had not stated that the Appellant inserted his private part in her mouth. NC had not spoken of her daughter having told her that the Appellant inserted his fingers into her vagina or that he had climbed on top of her and moved up and down.

13. Under cross-examination NC had admitted that in September 2018 she had injured the Appellant in his eye in self-defence when he fought with her. She had admitted that one day when the Appellant was fighting with her she had said that she would send him to jail in anger, but that had been a long time ago. NC had separated from the Appellant after this fight. According to NC, AAH did not like to speak the untruth and hated those people who lied. NC had said that the Appellant is jealous of her but does not know the reason. When questioned about the indecent movie NC

had said it was two black ladies taking a shower doing certain things, which she had said was pornographic, but had not gone on to describe. She was unable to state how long before the incident pertaining to AAH, that the Appellant had shown this to her. Therefore, there is no proof that what AAH claimed that what was shown to her by the Appellant and what NC had watched on the Appellant's phone are the same. NC had denied the defence suggestion that she had asked AAH to come up with this fabrication to take revenge from the Appellant. NC had also said that the Appellant had tried to bribe her first with SCR 50,000 and thereafter SCR 100,000 but she had refused. In re-examination NC had said that the fight between her and the Appellant was prior to the incident and she had not pursued with the complaint she made to the police, probably because she loved him. In re-examination, NC had repeated what she said in her examination-in-chief as to what AAH had told her about what the Appellant had done to her, but added that the Appellant having inserted his private part in AAH's mouth "got her head to go up and down". It is clear that NC had thus added up to her earlier version and probably exaggerated.

14. Ms. Julia Alphonse from the Child Protection Services in town had stated that AAH while giving the statement was consistent in what she said but was a "bit frightened".

15. The medical evidence in this case does not corroborate or contradict the evidence of AAH and thus of no use in proving the prosecution case. The doctor had examined AAH on the 2nd of April 2019, probably a month after the alleged incident. According to the doctor "the external genitalia appears normal. There is no abnormal vaginal discharge. Hymen is intact." The doctor had been questioned by the Prosecutor, about the fingering of the vagina of AAH as follows:

"Q. - So Doctor you noted that the hymen of the alleged victim was intact. In your expert opinion, is this medically possible in view of the allegation of fingering of the alleged victim's vagina?

A. – Yes because the hymen is stretchy. It is hydro-elastic. So it does not mean that every time you finger it is going to rupture the hymen. There are instances where it does not rupture the hymen and there are instances where fingering does rupture the hymen."

The learned Trial Judge had at paragraph 25 of his judgment in referring to the said question and answer had stated: "That in effect settles any doubt that the act of fingering did not happen as AH's (*referred to as AAH*) hymen was not broken". The above pronouncement although unclear seems to indicate that in the opinion of the

learned Trial Judge, the allegation of the act of fingering in count 1 remains unsubstantiated.

16. NC, the mother of the victim had told the doctor that the Appellant in addition to "fingering her vagina" had put "his private part in her mouth".

Defence Case:

17. The Appellant had opted to testify from the witness box in his defence, which was one of a total denial. According to him, he separated from NC, the mother of AAH on the 15th of September 2018, when she burnt him in his eye with a cigarette during a fight. During the fight NC had told him that she would make sure that, he would go to prison. After the fight he left NC and went to his mother's house at Glacis with his children by NC, namely the alleged victim AAH and his son N. At his mother's house it was mainly his mother who took care of the children as being a fisherman, he was "always at sea, 8 to 10 days". When told of the allegation against him, the Appellant, while denying the allegations had said: "I never did that to my daughter, and moreover, I am a human being, and there are plenty of women out there, how can I do this to my own daughter, especially in my mother's house." When asked why such an allegation had been made against him, the Appellant had said: "the Lady always said that she would send me to prison". The learned Judge had said that this was hearsay. In my view, it is not hearsay but a direct assertion of a perceived threat, relevant to understanding the circumstances and dynamics at play in this case. Notably, NC's own testimony appears to corroborate the Appellant's claim that she wanted to send him to prison. The confirmation of the Appellant's allegations by NC introduces significant doubt regarding the prosecution's narrative. However, these doubts were neither adequately addressed by the learned Trial Judge, nor did the prosecution present evidence to dispel these doubts.

18. As regards the video the Appellant had said, that he had a small Nokia at that time which did not have a touch screen and that you cannot have videos on such phones. This evidence stands uncontradicted.

19. ARH, the mother of the Appellant, testifying before the Court had stated that the relationship between her son the Appellant and his ex-girlfriend NC with whom he had two children, namely AAH and N was never good as they had constant fights. They had broken up when NC had burnt the Appellant in his eye. That is, when he came to live with her with AAH and N. She had categorically denied the allegations made against her son the Appellant and said he would never have done such things and especially in her house. She had said that AAH "each morning when she wakes up, she has joy in her that will call 'Nana' and then even at school she wants me to

bring her at school. She never shows that something that has happened to her." (verbatim)

Conclusion:

20. This is one of those cases where both the prosecution and the defence have come up with very definitive positions. AAH saying that the Appellant sexually assaulted her and the Appellant denying that allegation in very strong terms, namely by stating: "I never did that to my daughter, and moreover, I am a human being, and there are plenty of women out there, how can I do this to my own daughter, especially in my mother's house."

21. The evidence of AAH stands alone as she has not given the details of whatever the Appellant did to her, to her mother, except that the Appellant had done indecent things to her. There is also no evidence of what she had told Ms. Julia Alphonse from the Child Protection Services. Therefore, the testimonies of the mother and Ms. Alphonse, cannot be relied upon, to show any consistency in the evidence of AAH, leave aside corroboration. In fact, as stated at paragraphs 12 and 13 above, it is clear from the evidence of the mother of AAH that there has been a tendency to exaggerate, for AAH in her testimony had not stated that the Appellant inserted his private part in her mouth and "got her head to go up and down". This gives some credence to the Appellant's version referred to at paragraph 17 above that the mother had threatened to send him to jail. NC had also not spoken of her daughter having told her that the Appellant inserted his fingers into her vagina or that he had climbed on top of her and moved up and down. As stated at paragraph 15 the medical evidence in this case does not corroborate the evidence of AH.

22. In my view, a Court should not lightly regard any evidence merely because a person is of tender years. I agree with the learned Trial Judge when he states: "I note that in this case, the complainant is of tender age. Such witnesses are very vulnerable and could have been subject to influence by others. However, this does not mean that such vulnerable witnesses should not be believed. I find that many times child witnesses are more credible than adult witnesses. The Court therefore, has to assess their understanding of the charges levelled against the accused and the court processes in evaluating their testimony". **Lord Chief Justice, Lord Judge in the case of R VS Baker [2010] EWCA Crim 4**, said: "*We emphasise that in our collective experience the age of a witness is not determinative on his or her ability to give truthful evidence. Like adults some children will provide truthful and accurate testimony, and some will not…*" There is no doubt that that the best Judge of the facts is the one who is the Trial Judge, as it is he who had the opportunity to see the demeanour of AH and the rest of the prosecution witnesses in this case. The

learned Trial Judge had said: "I found her to have been cogent in her evidence. She survived cross-examination unscathed and efforts to falter her did not shake her. She was consistent in giving evidence and her testimony was consistent…I believe that AH was being truthful when she testified and that she was not influenced by her mother."

23. AH's evidence has its shortcomings, for there is no evidence, that the alleged offence had taken place in March 2019, as stated in the charge or when. The only evidence in this regard before the Court is that AAH had complained to her mother about the offence committed by the Appellant probably on the 1st of April 2019 as AAH had been examined by the doctor on the 2nd of April 2019. According to the evidence of both the Appellant and NC, AAH had gone to live with her father in Glacis in September 2018, after they separated. Thus, a possible delay in making the complaint coupled with the Appellant's allegation that it was NC who had influenced AAH to make the complaint against him, and the evidence of ARH, the mother of the Appellant that AAH did not show any signs that such a thing had happened to her, creates a doubt in the prosecution case. Further, the date of offence becomes important in a case of this nature in view of the Appellant's evidence that most of the time he is always at sea, and thus if a date had been given the Appellant could have come up with a more specific defence of alibi.

24. I am also of the view that a Court should equally have evaluated the defence's case mentioning both the strengths and weaknesses in general of
the evidence of the prosecutrix, especially when there is an allegation by the Appellant, the father of AAH that it was the mother who had made their daughter to fabricate the case against him to take revenge against him. In this case, the learned Trial Judge should have had a basis to reject the evidence of the Appellant who had chosen to testify from the witness stand and that of his mother ARH and specifically stated in his judgment as to why he decided to reject the evidence of the Appellant. This the learned Trial Judge had not done and a mere narration of the defence evidence does not suffice. The reason set out in the judgment for convicting the Appellant by the learned Trial Judge is that he does not believe that the mother of AAH influenced AAH to make such allegations against the Appellant. That certainly cannot be a valid basis to reject the defence evidence. The learned Trial Judge also appears to have erred in his assessment of the medical evidence referred to at paragraph 15 above and as stated at paragraph 25 of his judgment in coming to a determination to convict the Appellant. There has been no proper and equal evaluation of the defence case. The Trial Judge must consider all evidence holistically. When a judge decides to summarise evidence, he or she must do so in a balanced manner, without showing any undue favour to the State's case (see

Agnes v The Republic (SCA 20 of 2019) [2020] SCCA 39 (18 December 2020), S v Chabalala 2003 (1) SACR 134 (SCA) and Snowden v HMA [2014] HCJAC 100).

25. In a case of this nature, the Trial Judge may have every reason to accept the sole testimony of the victim and convict an accused, but that should be done, having balanced that evidence with the defence evidence and when he determines that the defence version cannot be believed and does not create a reasonable doubt in the prosecution case. That is the whole purpose of calling for a defence under section 184 of the Criminal Procedure Code. The learned Trial Judge's failure to do so as stated at ground 2 of appeal, is fatal to the conviction and this alone would have sufficed to quash the conviction of the Appellant.

26. In **Nicholas Brian Julie v R (SCA 21 of 2017) [2018] SCCA 18 (30 August 2018)**, this Court held that when evaluating or assessing evidence, it is imperative to evaluate all the evidence and not be selective in determining what evidence to consider. The Court went on to state: "*We are reluctant to disturb the findings of a Trial Judge on facts and credibility, but when there has been no evaluation or critical analysis of the evidence by the learned Trial Judge but a mere reliance on the evidence and that mainly of the complainant, we are compelled to intervene*."

27. In the **South African case of S V Van der Meyden 1999 (1) SACR 447 (W) 450** it had been stated: "*What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false, some of it might be found to be unreliable, and some of it might be found to be only possibly false and unreliable, but none of it may simply be ignored*".

28. In the Southern African case of **Ricky Ganda vs The State [2012] ZAFSHC 59**, it was held: *"...The proper approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and having done so, to decide whether the balance weigh so heavily in favour of the state as to exclude any reasonable doubt about the accused's guilt*." In the South African case of **Zulman JA in S v V2000 (1) SACR453 (SCA)** it was stated: "*It is trite that there is no obligation upon an accused person, where the State bears the onus, "to convince the court". If his version is reasonably possibly true he is entitled to his acquittal*

even though his explanation is improbable. A court is not entitled to convict unless it is satisfied not only that the explanation is improbable but that beyond any reasonable doubt it is false…" In the Zimbabwe case of **S V Makanyanga 1996 (2) ZLR 231** the court observed: "*A conviction cannot possibly be sustained unless the judicial officer entertains a belief in the truth of the criminal complainant, but the fact that such credence is given to the testimony does not mean that conviction must necessarily ensue. Similarly, the mere failure of the accused to win the faith of the bench does not disqualify him from an acquittal. Proof beyond reasonable doubt demands more than that the complainant be believed. It demands that a defence succeeds wherever it appears reasonably possible that it might be true*."

29. I also hold with the Appellant in relation to grounds 3 and 4 of appeal. As stated at paragraph 11 above AAH, the virtual complainant in the case has not stated about the Appellant licking her lips, or inserting his penis into her mouth as stated in count 1, and what NC has said in that regard has no relevance. In view of the learned Trial Judge's view of the doctor's evidence referred to at paragraph 15 above the allegation of the act of fingering in count 1 remains unsubstantiated. Ground 1 of appeal has no merit as the learned Trial Judge had acquitted the Appellant on count 2 as there was no evidence that the video contained indecent material and therefore has no impact on the testimony of AAH.

30. I have reason to believe that the learned Trial Judge appears to have had a lurking doubt in his mind as to the guilt of the Appellant, when considering the sentence of 5 years imposed on the Appellant, and that, having mostly rejected the submissions in mitigation on behalf the Appellant at paragraph 5 of his Order on Sentence. The sentence in a case of this nature as per the charge as set out in paragraph 2 above was a mandatory term of not less than 14 years. According to section 130 (1) of the Penal Code:

"*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…"

Certainly, a Judge can give a reduced sentence from the mandatory sentence of 14 years provided in the Penal Code, by setting out the reasons for doing so, but in this

case, other than setting out the aggravated nature of the offence committed at paragraph 6 of his Order on Sentence, he has not stated any reasons for departing from the mandatory sentence provided.

31. In **R V Cooper [1969] 1 All ER 32 at 34** it was said, an appeal court: "*must in the end ask itself a subjective question, whether we are content to let the matter stand as it is, or whether there is not some lurking doubt in our minds which makes us wonder whether an injustice has been done. This is a reaction which may not be based strictly on the evidence as such; it is a reaction which can be produced by the general feel of the case as the court experiences it...*" In this case there is a lurking doubt in our minds as to whether the conviction should stand, based on an analysis of the evidence of both the victim and the Appellant, and the general feel of the case.

32. For the reasons enumerated above, I allow the appeal against the conviction and in consequence both conviction and sentence are quashed and the Appellant acquitted and released forthwith.

Fernando President

I concur:

F. Robinson JA

I concur:

S. Andre JA

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