

IN THE SUPREME COURT OF SEYCHELLES

THE REPUBLIC

v.s

NR

Criminal Side No: 45 of 2002

Mr. Govinden counsel for the Republic

Mr. Freminot counsel for the accused

Accused - present

RENAUD B. Ag C.J.

J U D G M E N T

The accused stands charged with the offence of sexual assault contrary to Section 130(1) as read with Section 130(2)(b) and punishable under Section 130(1) of the Penal Code.

The particulars of the offence were to the effect that the accused also known as “M”, on the 12th December 2001 at BV, Mahe committed a sexual assault on a girl under the age of 15 years by inserting his finger in the vaginal orifice of C. C. for a sexual purpose.

The accused pleaded not guilty and was duly represented by Counsel.

The victim who was 9 years old at the time, testified albeit not under oath as directed by the Court. The witness testified that she lives at MA with her mother brother and stepfather and goes to BV School. Her brother is 2 years younger than her. On 20th December 2001 her mother went to town in the morning and left her and her brother alone at their house. She knows the accused who is also called “M” or “PN” because he used to come to drink bacca at her grandmother’s place who lives nearby. The accused also comes to her house on many occasions to sit and talk with her mother who gave him some food at times. The accused used to play and make jokes with her and she is friendly with him. Sometimes he would slap her and told her to go and wear her panty. On that fateful day the witness testified that after breakfast she was playing with her brother under the shed where her mother hang clothes to dry when the accused came and asked for her mother. Upon telling the accused that her mother was not there, the accused called her and gave her SR10.00 and invited her to go where her mother hang the clothes at the back of the house. Once there the accused pulled down her shorts then he inserted his finger in her vagina. The accused also took out his private part and passed it

on her mouth. She was afraid and stayed quiet. The accused then said that he was going to work and warned her not to tell anything to her mother. At that time her younger brother was there too. After the accused went away, because she was afraid, she and her brother entered the dining room by climbing through the window where 2 louvre blades were missing. She used to go inside the house through that space when the door is locked. She placed the SR10.00 on the table in the dining room and showed it to her mother later on but did not tell her mother about the incident. Her stepfather returned home first and later on her mother came. It was her younger brother who told her mother about the incident and her mother asked her about it and she then informed her mother.

The younger brother of the victim who is in class P2 at school was 7 years old. He also testified but not under oath. He testified that he knows the accused as "M" because he sees him many times at his house on Saturdays or at the shop at MA. Her grandmother lives next door and sells bacca and has seen the accused there drinking bacca many times. On 20th December 2001 he and her sister did not go to school. "M" came and asked them where was their mother and they told him that she has gone to work. The accused then asked her sister to go behind the house. Once there the accused took out his penis and asked her sister to suck it which she refused to do. The accused gave her SR10.00 and told her not to tell his mother anything and that he (the accused) has gone to work. The accused told her sister whether she wanted to do "mal elve" (naughty) to which she replied no. Then the accused remove her panty. The witness then added that the accused inserted his finger in her sister's vagina. He was looking when the accused was rubbing her hand on her sister's vagina. After that the accused left and he went to play at her grandmother's house. When his mother came he was already inside his house. Her sister had hidden the SR10.00 in the wardrobe for her mother not to see. Her mother found out about the money and enquired to which her sister said that M gave it to her. The witness then told her mother that M gave her sister the SR10.00 and asked her (sister) to go behind the house where her mother does the washing and he (M) took out his penis and asked her sister to suck it and her sister refused and M rubbed his hand on her sister's vagina.

The mother of the victim testified that she is a 34 year-old housemaid and in December 2001 she was living at MA with her husband her daughter (victim) and her son. She knows the accused who is also known as "M". She came to know the accused because he goes to the mother-in-law of the witness to drink bacca she also know him as a friend who use to come to her place. When the accused comes to drink bacca he would sit and talk to her and if there is food she would give him some and he would bring whatever he gets like vegetables for her. To go to where bacca is sold one has to pass by her house and the accused used that same way. Her children go to their grandmother's house to play. She recalled that in the morning of 20th December 2001 at around 9 a.m. she went to town and she informed her mother-in-law that she would not be for long. She informed her that she would lock the door of her house. When she came from town at about 12.15 p.m. she saw SR10.00 on the table. Her husband who was there at that time asked her how come the children were inside due to the fact that the door was locked. She enquired from her children about the SR.10.00 note and her daughter told her that "M" gave it to her for him to do "mal elve" (naughty) with her. Upon enquiring from her son what "mal elve" that M wanted to do with her sister, her son told her that when

they were playing outside M who was shirtless and wearing a brown short came and took her sister at the back of the house where the washing is done, lift up her dress and rubbed his hand on her vagina and gave her sister SR10.00 and told her to buy twisties. The witness testified that after that she removed her daughter's panty and looked and saw clear substance and she then contacted Beau Vallon Police Station and informed them what has happened. The Police shortly afterwards came and the children showed the Police the place where the incident took place. Afterwards she accompanied her daughter with the Police to the Station. From there she accompanied her daughter and the Police to hospital where her daughter was examined by a lady Doctor. She identified the clothes of her daughter and remarked that she noticed some stain in her panty.

Woman Police Sergeant Marie testified that she took part in the investigation of this case. She started her enquiry on 20th December 2001 after receiving a call from the Beau Vallon Police station regarding a case of sexual assault. She obtained possession SR10.00 which she kept in her possession. She was informed that the SR10.00 note that was admitted and marked as Exhibit P2, was obtained from the mother of the victim. At 16.10 hrs on that day she accompanied the victim to hospital for examination and also obtained the clothes of the victim which were admitted and marked as exhibit P1(a) to (c). The witness also obtained a birth certificate of the victim that was admitted and marked as Exhibit P3. She also took a written statement from the victim. The statement was taken in the presence of the mother of the victim. She also obtained a written statement from PW2 the brother of the victim.

Police Officer Justin Dogley testified that he was at the Police Station at Beau Vallon on that day at about 14.59 p.m. He knows the accused. He was informed by the mother of the victim, that the accused was at MA when she made the complaint. The complaint was to the effect that the accused has sexually assaulted her daughter. Accompanied by ASP Cecile and Constable Lydia Quatre they went to MA where they met the mother of the victim who repeated her complaint. At that time the victim was crying. The officers were shown the scene of the incident by the mother. That was behind the house where washing is done. He noticed that on the ground, grass has been partly crushed and it was still crushed. They then took the victim and her mother to the Police Station. Afterwards they searched then searched for the accused and arrested him on 22nd December 2001 and later that same day the accused elected to give a statement to the Police. The statement was admitted and marked as Exhibit P4.

Dr. Zia Ul'Hassan Rizvi testified that he is a Medical Surgeon and Gynaecologist and was qualified in Mumbai in 1989 and has been in Seychelles for the past four and half years as head of the Gynaecology Department. He knows one Dr. Mercedes who is a Specialist Obstetrics who has since gone back to Cuba after expiration of her contract of employment she was responsible to the Registrar in that Department. The witness is familiar with the handwriting of Dr. Mercedes. He does not know the victim in the present case but has documents and medical notes pertaining to her in his possession which was made by Dr. Mercedes on 20th December 2001 at 4.30 p.m. He testified that from those notes he could say that the victim was brought by the mother and a policewoman because of an alleged rape. It is recorded that according to the child a man put his penis around her vulva and put his finger inside the vagina. The notes states that the child was examined – physical examination shows that the skin was normal, no

external injury, vulva normal, the panty slight blood stain discharge, the anus with no injury, the hymen seems only a small laceration, no bleeding and she noted that she (Dr. Mercedes) could not pass the finger. These information are contained in a signed medical report made by Dr. Mercedes in respect of the victim in this case. From further examination it is noted that no spermatozoa was found. The objection of Defence Counsel was overrule and the Medical Report made by Dr. Mercedes dated 14th January, 2002 was admitted and marked as Exhibit P5. In the opinion of the witness the laceration of the hymen could just be a trauma caused by some sharp object or it could be because of forceful penetration. Even sometimes spreading the legs by playing could cause the hymen to lacerate or even attempts to put fingers in the vagina could do that.

The Accused elected to give evidence under oath. He testified that he is 47 years old and lives at MA. He recalled that on 20th December, 2001 he went to drink a bottle of bacca and had to pass under the verandah of the mother of the victim to reach where bacca is sold. The victim asked him twice for twisties to which he replied that he had none to give and those that were in his possession were for the children of her sister. There were four packet of twisties in a clear plastic bags and the two children saw those with him. He then sat and drunk his bacca whilst the complainant was playing and running around. He repeatedly denied putting his finger in the vagina of the complainant. He used to play with the complainant and the complainant at times would lift her skirt and told her to go and change. The witness stated that it was the mother of the complainant who wanted to put him in trouble and that was the second that this has happened. On a previous occasion the mother sent her child to get bananas and her daughter was sent to President Village because the mother of the complainant had accused somebody else for something that that somebody did not do. The child is now 13 years and the mother of the child did something and finally sent the child to the President' Village. Under cross-examination the Accused stated that he did not stay long when he was drinking his bacca, he just went there and came back. In his statement to the Police the accused, when put to him, denied that he said:-

“I then touched her on her vagina, at that time she did not have her panty and I told her to go and dress.”

He however admitted telling th complainant to go and change but never inserted his finger. He said that he

“touched her on her left buttock and told her to go and change.”

The accused stated that:-

“those persons are not on friendly terms with my mother and family and I am the only one who is on friendly term with them.”

The accused is charged with the offence of sexual assault contrary to section 130(1) as read with Section 130(2)(d) and punishable under Section 130(1) of the Penal Code.

The particulars of the charge are that the accused also known as “M” on the 20th December 2001 at BV, Mahe, committed a sexual assault on a girl under the age of 15 years by inserting his finger in the vaginal orifice of C. C., (I have retained the full name) for a sexual purpose.

The essential elements of the offence that the prosecution has to prove beyond reasonable doubt are that the accused inserted his finger in the vagina of C.C. Secondly, it must be proved beyond reasonable doubt that the accused inserted his finger in the vagina of C. C. intentionally for a sexual purpose and the said act was not accidental. Thirdly, that the complainant was under the age of 15 years at the time the alleged offence was committed.

In proving its case the Prosecution called six witnesses including the virtual complainant. The virtual complainant being a child of tender years testified not under oath as I believed that a child of that age would not appreciate the nature of an oath. Likewise, the younger brother of the complainant also testified and in view of his tender years he did not testify under oath.

Before I proceed to evaluate and consider the evidence, I warn myself of the danger of convicting the accused based on the unsworn evidence of the two child witnesses. Moreover, I believe that in such case it is appropriate that there must be corroboration of the material evidence in proving the charge against the accused. I need to find such corroboration of the unsworn evidence of the child witness other than from the unsworn evidence of the other child witness.

I have listened and observed the virtual complainant testified. Although she is of tender years she was clear concise and appeared to me to be truthful and was not relating fanciful or imaginary things. She was cogent and unshakable even under cross-

examination as to the material aspect as to what happened to her on that day. I believe her and accept her evidence despite a slight lapse as to whether she had gone to school on that day or not. As regards the evidence of the second child witness, the younger brother of the virtual complainant, I find him to be quite intelligent and that he was indeed relating to Court what he had witnessed on that day. His testimony was not fanciful, imaginary or concocted. He was clear concise and cogent in his testimony as to the material aspects of what he observed on that day. I also accept his evidence as being the truth, albeit with the slight omission as to where her sister kept the SR10.00 when they were in the house. I have considered the evidence of the mother of the complainant bearing in mind that she failed in her parental responsibility in allowing the two children to stay alone at the house when she had gone away. I do not find that this lapse on her part lead her to testify in any way to cover herself for it. What she told the Court as to what she did from the time she came to know of a possible illegal act on her child, are amply corroborated by other independent witnesses, namely, the Police Officers and the Doctor. I believe and accept the evidence of the Police Officers and the Doctor as being truthful as to the material particulars.

I have given very particular attention to the testimony of the accused. I believe him to the extent of matters not essential to the offence. On crucial issues I believe that he was obviously testifying in a way to exonerate himself. I therefore do not accept his evidence as being truthful all the way. I will later on clarify as to what I mean.

After careful analysis of all the evidence adduced by the prosecution witnesses I make the following findings.

On 20th December, 2001, the mother of the virtual complainant who was under the age of 15 years as borne (out by her birth certificate produced as exhibit in Court), and her younger brother who lived at MA, Mahe, left her two children at home when she went out. Her husband having left before her, the two children were therefore practically alone at the house. Their house is situated not far from their grandmother's house where bacca is sold. The two children were locked out of the house and were playing outside during the time that their parents were absent. Next to their house there is an access road that is used by clients who go to drink bacca and where the two children were playing. The accused is a regular visitor to the bacca shop and he used to pass by the house of the parents of the virtual complainant very often. In fact the accused is very friendly with the parents as well as the two children whom he gave small gifts etc at times. On that day, that is, 20th December, 2001 the accused went to have his drink of bacca and thereafter came to where the two children were playing. He invited the virtual complainant to where the washing is done in a shed behind the house. This is the evidence of both the virtual complainant and her younger brother. I find corroboration in the evidence of Justin Dogley who testified that when he visited the scene he observed grass that has been crushed and remained crushed when he went there. That was a deliberate act of the accused to try to hide the complainant at a place not visible to others. This shows bad intention and not an act as the accused said to make jokes or play with the Complainant. The accused removed the panty of the virtual complainant. I find corroboration in the evidence of the mother who saw stain in the panty of the virtual complainant. The exhibit of the panty in Court further corroborated by the lie of the accused who said that the girl had no panty and he slapped her on her bare buttock telling

her to go and put on her panty. If the accused had not interfered with the panty of the virtual complainant he would not have tried to lie in telling the court that the girl had no panty on. But did the accused insert his finger in the vagina of the virtual complainant? We have the direct evidence of the complainant who said that the accused rubbed her vagina with her hand and put his finger in her vagina. The younger brother of the complainant testified that he saw the accused touching the vagina of her sister. But this cannot corroborate the evidence of the complainant. I find corroboration of the fact that the accused did interfere with the vagina of the virtual complainant, by the evidence of Dr. Rizvi who testified that according to the medical observation made by Dr. Mercedes latter that same day after the incident, that there has been laceration of the vagina of the complainant. I cautioned myself that the laceration could have happened when the girl was playing or climbing through the louver window, but I believe that as the complainant had her panty on at the time that she was playing or climbing through the window, such laceration would have been prevented by her panty. The laceration found by the doctor was made on the bare vagina of the complainant, that, to my mind happened after the panty was removed by the accused. The complainant testified that she was told by the accused not to tell her mother what has happened. If nothing wrong had taken place, there would have been no need to tell that to the complainant. Further the complainant said that she was paid SR10.00 for not telling her parent of the incident. The SR10.00 note was produced in Court as an exhibit and that is further corroboration that the complainant was indeed induced to hide the truth regarding the indecent act of the accused. The mother testified that the two children were in the house when she came and the complainant was in fear and in a distressed condition when asked what has happened upon hearing of the incident from her younger brother. There is however no independent evidence to corroborate the fact alleged by the two small children that the accused put his penis in or around the mouth of the complainant asking her to suck it. I will here give the benefit of the doubt to the accused. To the extent that the accused touched the vagina of the Complainant as I have found above is sufficient proof required to find the actus reus of the offence with which he is charged. The accused has no parental authority to touch the vagina of the complainant and when he did so it could not been for any other purpose other than sexual. With this evidence the mens rea is proved to my satisfaction beyond reasonable doubt.

I do not believe the accused when he said it was a friendly pat scolding her because she was not wearing a panty. I also do not believe the accused that the whole matter was cooked up because the mother of the complainant is not on good terms with his family because the accused himself testified that he was on good terms with the complainant's family and on that day he went there and called the mother of the complainant to borrow a ladder to clean the gutter at his mother's place.

In the final analysis I find that all the elements of the charge has been proved to my satisfaction and beyond reasonable doubt and I find the accused guilty as charged. I convict the accused accordingly.

The accused has a right of appeal within 14 days.

I would like to make two observations.

May I take this opportunity to commend Learned Defence Counsel for his very humane and fatherly approach and manner of speaking when subjecting the two child witnesses to cross-examination.

I would like to make an observation that I consider very lamentable in this case. It is the primary responsibility of the parents to provide secure environment for their children. In this case I very much deplore the lack of responsibility of the mother of the virtual complainant and would call upon the authority concerned to whether consideration ought not to be given to the taking of legal action against the mother for such breach of the Children's Act.

B. RENAUD

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AG. CHIEF JUSTICE

Dated this October 2004