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**IN THE SUPREME COURT OF SEYCHELLES**

**Criminal Side: CR 30/2016**

**[2017] SCSC 413**

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**THE REPUBLIC**

versus

**S E**

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Heard: 31 January 2017-9 March 2017  
Counsel: Ms. Amanda Faure, State Counsel for the Republic  
Mr. Nichol Gabriel for the accused  
  
Delivered: 18 May 2017

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**JUDGMENT**

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**M. TWOMEY, CJ**

[1] The accused was charged with sexual assault contrary to section 130 (1) as read with section 130 (2) of the Penal Code and punishable under section 130 (1) of the Penal Code. The particulars of offence are to the effect that:

S E of A K, Praslin on the 8 May 2016 sexually assaulted A.D. of Cote d'Or, Praslin by penetrating the body orifice of the said A.D without her consent for a sexual purpose.

[2] The Prosecution called a number of witnesses whose evidence is now outlined.

[3] Dr. Faisal Quereshi works at Baie Sainte Anne Hospital, Praslin. At 4 a.m. on 8 May 2016 he examined the complainant at the hospital. He stated in court reading his report that:

*“There was this lady brought to me in the early morning so I was on call night duty and it was a rape attempt case according to patient that Police was with the patient and then they came to me and when I start examination there were multiple bruises on the back, on the arms and on the legs, there was one haematoma I am not sure on the right side or left forearm and there were some struggle marks on the body (sic, verbatim – transcript of proceedings 31 January 2017).*

[4] He also states in the report that:

*“After party last night patient got lift with three persons in car- one of them raped her. According to her he did vaginal intercourse and they took her out of car by force and did rape. According to patient it was not full intercourse” ( sic Medical Report dated 8 May 2016 – Exhibit P1).*

[5] His findings, after an internal examination of the complainant, are: “normal, no bleeding, no laceration and no foreign body seen in vagina”. He took swabs of the rectum, perineum and vagina and all these returned negative for spermatozoa. The complainant had also told him that she fled the car and jumped into the sea to escape and that she swam for about 15 minutes until she reached the police station. She also stated that the bruises on her body were obtained from struggling and from the rocks in the sea. She was wet and crying and in shock when she came to the hospital.

[6] LF testified that early in the morning of 8 May 2016 while driving a rented car near Eve Island he saw a blonde girl in a short skirt looking distressed. He stopped the car and could see marks on her. He forced her into the car and took her to Baie Ste Anne Police Station. In the car the girl told him that someone had raped her and that the assailant was [a musician] from the group [a local musical group].

[7] J-M A, a freelance bartender by profession manned the bar for [a] concert at Baie Sainte Anne, Praslin concert from around 7 p.m. to 3 a.m. He knew the complainant as he had

gone to school with her. He remembered serving the complainant vodka twice but admitted that there was another friend, J-P S serving the other side of the bar and did not know if she had also been served on that side. He had a missed call on his phone at mid-day and then was woken up by another call at 2 p.m. The caller was J-P S who asked him if he had heard what had happened but did not tell him what it was. The complainant also called him and he met up with and said she had been raped by J H. He was shocked and could not believe it. The complainant asked him to take her to the reclaimed land to find her knickers and to try “to help her catch up with her memory”.

[8] In his testimony, he stated:

*“The main problem is that she could not remember anything, she was completely blank like she did not have any memory of what happened or what the face looked like but at one point she said she remembered an English African accent.”*

[9] They (the complainant, himself and J-P S) then drove to Lemuria Hotel to try and find the person as that was the place where most of the Africans worked. At the hotel they enquired from a Mauritian staff member about African employees and were told there was someone by the name of S working there. They returned to the front gate and the person named S came out and the complainant recognised him. She asked him if he had enjoyed what he did last night and he said sorry and that he had her bag and phone.

[10] In cross examination J-M A admitted that he had seen the complainant dancing with the accused at the concert and there was no hostility between them.

[11] J-P S also testified. He stated that he had served the complainant one cocktail and then she bought a beer. He confirmed J-M A’s testimony in relation to the meeting the day after the incident at [an] Island. He was also shocked when the complainant stated that she had been raped by [the musician] as he knew him well and had gone to school with him. He accompanied the complainant and J-M A to Lemuria Hotel to confront the assailant. In cross examination, he admitted that he had seen the accused and the complainant chatting and at one point the complainant leaning on the accused.

[12] N E, the man referred to as the Rastaman testified that he was at the musical show on 7 May and met the complainant at the show. When he first saw her she was alone but later she was dancing with the accused.

[13] The complainant testified. She was a 22 year old student (overseas) and had come back on holiday to visit her family. She arrived in Seychelles on 7 May 2016 at 6 a.m. and had gone to Victoria to catch the Cat Coco Ferry to go to Praslin. She had travelled on the ferry with J-M A and J-P S. They had reached Praslin at 12.30 p.m. She went home and saw her family but did not have lunch. She went straight to the field where the show was to take place. She wore a black shorts and a white top with a zip at the back. She then went to the Baie Sainte Anne jetty and had two glasses of vodka mango.

[14] She returned to the show and had another Takamaka drink. At one point she took a picture with a man who was “being annoying”. She was feeling “really, really bad, really tired” and “just wanted to go to sleep”. She chatted to the accused and told him he looked like [a musician] from “[the band]”. She felt really sick and dizzy and he said would take her home and that is when she left the field. He said his friend had a car. They went to the reclaimed land where cars are parked. She went a little further and urinated and he appeared out of nowhere and put her on the ground. She said “baby stop, baby stop”, hoping that if she called him baby” he would leave her to urinate thinking he would have sex afterwards and that that would give her time to run away.

[15] Instead he carried on and she fought him, hitting him and crying. He held her hands and tore off her underwear. She told him “[the musician’s name]” although she did not know his [the accused’s] name. He had sexual intercourse with her despite her protestations. She stated that:

*“He pushed me down and then he just laid on top of me and he was so heavy and I tried to push him away but there was no way and I was drunk and I was like crying because I did not want to accept what was happening.” (verbatim Page 14 of transcript of proceedings of 31 January 2017).*

[16] She stated that she was very confused and “did not know who did that to [her]”. The next day she tried to understand what had happened and who her assailant was. She

accompanied her friends to Lemuria where she confronted the accused. He said “I am sorry I was going to give you back your bag.”

[17] In cross-examination she admitted that she had voluntarily given a statement to the police directly after the incident in which she had stated:

*“I was with J H my friend who lives at Mahé...I know him very well too, He was the boyfriend of my friend who in England. I asked J to bring me home due that he was in a car which I don’t (sic) know the registration number and the colour. There were three guys sitting on the sit (sic) at the back of the car. J told me it’s ok if I embarked in front. J was taking the road of (sic) Eve Island when we arrived close at (sic) at the boat yard, he stopped the car and opened the door of the car and helped me to get out of the car. I told him to return me back (sic) but he didn’t want (sic). I don’t remember how I found myself on the ground...He put the private part of his body in the private part of my body. He spend few times on me (sic). I said J stop, but he didn’t stop. After that J woke up and he told me don’t be nervous. Don’t tell anyone what happened. J embarked in the car and drove away. I jumped in the sea and I swam till the bridge to let them go... (undated police translated statement of complainant Exhibit P5.)*

[18] She did not accept that she danced with the accused at the show but that she only took pictures with him. She did not remember if she had asked for cannabis or smoked it. However she later admitted to smoking at the reclaimed land near Barclays Bank. She also admitted asking him for drugs at the field. She reiterated that she did not have sex voluntarily with the accused. She also admitted that a urine test taken during the medical examination after the incident showed that she had taken cannabis. She stated that she had consumed the drug before the concert.

[19] Sheila Arnephy, a police corporal, was the officer who arrested the accused and detained him. Ryan Pool, a police constable was present when the arresting procedures were being carried out. He also witnessed the accused giving a statement at Praslin but did not sign as a witness to the statement. Vanessa Racombo a corporal attached at the CID office also

testified. She witnessed a further statement by the accused on Mahé. Marie-Andre Aimable, a police detective also gave evidence. She was the officer who interviewed and recorded the first statement from the accused on Praslin and the second on Mahé.

[20] The accused testified. He was a Cameroonian and 30 years old at the time of the incident and working for Constance Lemuria Hotel. On 7 May 2016 he was off duty and travelled with friends to the concert. They went by taxi and arrived early. They had food and drink and had the meal in the children's playing field at Baie Sainte Anne. At the concert he drank beer and was dancing with several persons in a group and then met the complainant but did not know her name then. She was alone and he approached her for a dance. A Rasatafarian brought two cans of beer and gave one to the complainant and she took it and left. He presumed at the time that it was her boyfriend. He then continued dancing with other ladies. When he saw the complainant alone again, he asked her to dance with him. She acquiesced. He held her by the waist from the back and she turned around and kissed him.

[21] They danced and at some point they took photos together (Exhibit D1). He bought her a beer and she said she wanted to smoke and pointed to a place away from the field. He went with her and they held hands. She asked him for *ganja* and he said he didn't smoke or have any. They then kissed intensively. She asked him to unzip her top which he did and she then removed her pants. They had intercourse during which he noticed that she was calling him by a different name.

[22] After she had got dressed he told her that his name was [S] and not the name she had been calling. She started shouting "Fuck you, who are you? Don't touch me." They were close to the road and he was scared people might think that he wanted to hurt her and so he left. He stated that when they were dancing she had given him her purse to hold and he had put in his pocket and after intercourse he had forgotten it was still in his back pocket. He later gave the purse to his manager.

[23] He was adamant that sex with the complainant had been consensual. He gave two statements to the police which are consistent with his testimony. He called two witnesses.

- [24] H S is a waitress at the Dhevatarata Hotel on Praslin. She accompanied the accused together with her boyfriend and a man by the name of A to the concert at B S A on 8 May 2016. The show started at around 10.30p.m. The accused danced with the complainant who previously had been dancing with a Rastaman. After the Rastaman left the complainant again danced with the accused, kissed him and held his hands. The Rastaman returned but she refused to go with him and continued dancing with the accused. The accused brought her a Phoenix beer. At one point she realised that the accused and the complainant had left. In cross examination she stated that the complainant looked happy when she was dancing with the accused but also that the complainant was tipsy and not 'normal'.
- [25] B G also testified. He had worked with the accused at Lemuria. He went to the concert with the accused, A and his girlfriend. At the concert they danced together in a group. After a while he noticed that the accused was dancing with the complainant. Before that she had been dancing with a Rastaman. She danced very close to the accused and kissed him many times.
- [26] In her closing submissions, Ms. Faure for the Republic has submitted that there were major discrepancies in the statements of the accused and his evidence in court but she did not submit what these were. She has raised several points about the accused having disregard for the complainant, for example that she had called him by another name and he had not ceased having intercourse with her. She has also submitted that the report of the bruises found on the complainant's body corroborate the fact that her consent to sexual intercourse was obtained by threats or force.
- [27] Mr. Gabriel for the accused submitted that there was a difference between consent and submission and relied on the case of *R v Constance* Cr 32/1999. He submitted that there was no evidence that the complainant resisted the actions of the accused. He relied on the case of *Gostoo v The Queen* (1979) MLR 89.
- [28] In a case of sexual assault in Seychelles, the prosecution has to prove that a sexual assault took place with sexual assault being defined as including inter alia an indecent assault and the penetration of a body orifice of another for a sexual purpose. In the present case it is not contested that sexual intercourse took place. The central matter in this case is the

complainant's assertion that she did not consent to the intercourse. The facts of the case raise two issues linked to consent; one is intoxication and the other is mistaken belief as to the identity of the sexual partner when consent is given.

[29] Section 130 (3) of the Penal Code provides:

*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 or 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.*

[30] The above definition establishes what amounts to the absence of consent. Most unsatisfactorily it fails to provide a definition of consent. 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.

[31] Our jurisprudence on this point is also especially thin and is not helpful on this point. The cases provided by Counsel are not relevant on this issue. I am of the view that given the non-exhaustive definition of consent in section 130, the provision has at least the merit of permitting judges to look beyond the strict wording of the enumerated categories of lack of consent where this is necessary.

[32] Insofar as the first issue of intoxication is concerned, the most authoritative case on intoxication and consent is the U.K. case of *R v Bree* [2007] 2 All ER 676. In that case both the complainant and the accused had been drinking heavily. The complainant was intoxicated to the point of vomiting and had a very patchy recollection of the night in question. She also agreed that she did not say "no" to sexual intercourse could not be sure whether she responded to the accused's advances. The accused believed that she consented. The Court of Appeal in granting the defendant's appeal held that the trial



judge failed to properly direct the jury on the meaning of capacity and its significance to consent where intoxication is involved.

- [33] The central principle established in *Bree* was that where the complainant has voluntarily consumed substantial quantities of alcohol, but nevertheless remains capable of choosing whether or not to have intercourse, that would not be rape (see Jacqueline Scott, 'The concept of consent under the Sexual Offences Act 2003' (2010) *Plymouth Law Review* 1. See also J. Temkin, and A. Ashworth, 'The Sexual Offences Act 2003: Rape, sexual assaults and the problems of consent' (2004) *Criminal Law Review* 339).
- [34] *Bree* established the principle that drunken consent is consent. Sir Igor Judge, President of the Queen's Bench Division stated that the key test was whether the alleged victim had through drink or other substances lost her capacity to consent. If, through drink a woman had lost her capacity to consent, sexual intercourse would be rape. Conversely, an alleged victim who had drunk "substantial quantities" could still consent to sex. The capacity to consent, said the judge, could evaporate before sexual intercourse took place.
- [35] This decision was heavily criticised. While, conversely when establishing the *mens rea* for sexual assault it is often said of the perpetrator that "a drunken intent is nevertheless an intent" the same phraseology, it is argued by critics, should not be used that a drunken consent is still consent (as intoxicated complainants should be somewhat protected (See on this point Simester, A., and Sullivan, G., *Criminal Law: Theory and Doctrine* (2004 2nd ed Oxford University Press). The boundaries of the qualification in *Bree*, however, remains somewhat fuzzy and further discussion on this issue are beyond the bounds of this case. Nevertheless, *Bree* remains good law and was followed in *R v Dougal*, unreported (2005) Swansea Crown Court.
- [36] What must be noted however is that at the core of consent is capacity and the distinction between factual consent and legal consent. In *Bree*, the prosecution case initially was that the complainant was too drunk, as in unconscious, to give consent but subsequently that she could not remember whether she had given consent. However, if her factual drunken consent is not regarded as legal consent that is, that she could not validly consent, it is

immaterial to consider whether she has consented. She could be equated to the person under the age of fifteen years who is legally cognitively incapable of given consent.

[37] In the present case the prosecution has not suggested that the complainant was so drunk as to be unable to give consent. Rather, Ms. Faure for the Republic submits that the complainant:

*“was not in full control of her faculties and that she was drunk, however that did not render her so powerless as to not have some form of discernment and to know that she was viciously being deprived of her right to consent to sexual intercourse”. (Page 11, Written Submission dated 23 February 2017)*

[38] In my view this equates the complainant’s consent with the *Bree* situation. It would appear that the prosecution’s argument is that the complainant despite consuming well over half a dozen vodka cocktails, beer, consuming marijuana and weary from travelling thousands of miles by plane prior to the incident was able to refuse consent and did so.

[39] However, the other side of the coin must also be considered. If she was able to refuse consent she was able also to give consent. The Court in these circumstances must infer whether consent was given from the evidence adduced.

[40] For their submission of absence of consent the prosecution relies on the complainant’s testimony and that of the Dr. Quereshi. I am unable to accept this submission as the complainant gave three different accounts of what happened on the fateful night.

[41] To Dr. Quereshi she stated that after a party she got a lift with three persons and one of them dragged her out of the car forcefully and raped her.

[42] To the police she stated that her friend’s boyfriend, one J H, at Eve Island opened the door of the car and she found herself on the ground with him on top of her raping her after which he embarked in the car and drove away while she jumped in the sea and swam away.

- [43] In court she stated that she danced with the accused and that she felt sick and dizzy and he offered to take her home and he had taken her phone and she could not call her sister and that she went to urinate and he came out of nowhere and sexually assaulted her.
- [44] Given her three very different versions of the incident, her credibility is seriously in doubt. In contrast the accused has been consistent in both his statements and his testimony in court which withstood cross-examination. He was a forthright and candid witness and I have no reason to disbelieve his account of how he had engaged in consensual sexual intercourse with the complainant.
- [45] The only other issue which may cast some doubt on the complainant's consent is the prosecution's submission that the complainant believed that she was having sex with 'Jim' as opposed to the accused.
- [46] In *Lespoir v R* Cr. A 3 /1989 (unreported), the Court of Appeal stated that it was trite law that fraud, force or threats vitiate consent. There is no suggestion in the present case that the accused fraudulently led the complainant to believe he was Jim in order to have sex with him.
- [47] The subjective 'mistaken belief in consent' test which was established in *DPP v Morgan* [1976] AC 182 that any belief by the accused that the complainant was consenting no matter how unreasonable would negate the *mens rea* element of the offence was overturned by the UK Sexual Offence Act 2003 which established that the accused's belief must be reasonably held. Again, we have no statutory provisions on this issue in Seychelles.
- [48] It is however immaterial in the present case whether the belief held by the accused was subjective or objective; the fact remains that the evidence points to the complainant consenting to sex with the accused and at some point during or after the act seemingly changing her mind. Her different accounts does not elucidate whether she did not consent to Jim or the accused or neither having sex with her.
- [49] What is quite clear from the evidence adduced is that the accused believed that she consented to have sex with him. Consent is communicated differently in sexual relationships. The dynamics of a sexual relationship may well be such that consent to

sexual contact in the form of a kiss or a caress is presumed between the parties until and unless a contrary indication is issued (See Abigail Louise Freestone, *Complainant-centred Justice: A Critical Analysis of Sexual Assault and the Meaning of 'sexual' Under the Sexual Offences Act 2003* University of East Anglia, 2010). Shouting the name of another sexual partner does not necessarily indicate the lack of consent to the actual sexual partner engaged at that point in time in sex.

[50] It is especially difficult to presume that consent to sex was not given in the present case given the evidence: a night of dancing together, drinking together and leaving hand in hand to a secluded corner of a car park with the complainant asking the accused to remove her blouse and having sex in three different positions.

[51] I am in the circumstances unable to find that the prosecution has proved its case beyond reasonable doubt as is required. I therefore acquit the accused of the charge.

Signed, dated and delivered at Ile du Port on 18 May 2016

**M. TWOMEY**  
**CHIEF JUSTICE**