

IN THE SUPREME COURT OF SEYCHELLES

Criminal Side: CO 70/2017

[2018] SCSC 50

THE REPUBLIC

versus

KENNY NEVILLE FANCHETTE

Accused

Heard:

Counsel: Mr. Kumar for the Republic
Mrs. Amesbury for the accused

Delivered: 23 January 2018

RULING

R. Govinden, J

[1] The prosecution has charged the accused in this case with the following offences:

[2] Act of intended to cause grievance harm contrary to and punishable under section 219(a) of the Penal Code. Namely, that he, on the 10th December 2017, at Grand Anse Praslin, unlawfully caused grievous harm to Ms. Maja Brandstom Nystrom who was strangled and attacked by him.

- [3] Sexual assault contrary to Section 130 (2) (a) of the Penal Code and punishable under section 130(1) of the Penal Code. Namely that he, on the 10th of December 2017 at Grand Anse Praslin did an indecent sexual assault on the person of Ms. Maja Brandstom Nystrom by mean of showing his penis to her and tried to have sexual assault with her whilst forcefully attacking her.
- [4] On the same day, the prosecution filed a notice of motion in which they asked for the remand of the accused person in pursuant to section 179 as read with article 18(7) of the Constitution.
- [5] The thrust of the application of the prosecution as supported by the affidavit of Detective Inspector Andy Bibi of the Seychelles Police Force are, firstly; that the offences are of very serious nature both on the facts and the maximum impossible penalties that can be inflicted on any counts, if the accused is found guilty under any counts.
- [6] The first count carries with it a penalty a maximum life imprisonment, whilst the second count one of 20 years imprisonment maximum.
- [7] Secondly, the prosecution avers that the safe environment of the country for tourist is badly affected by the criminals who brought danger to the economic and society.
- [8] The third ground for the remand application is that the accused is a habitual offender and that there is substantial ground to believe that if the accused is not remanded and he is released on bail, he might abscond and obstruct the course of justice.
- [9] The court remanded the accused on the strength of the application for remand of the Republic.
- [10] On the same day, the prosecution filed a motion and affidavit applying for the evidence of the virtual complainant, Ms. Maja Brandstom Nystrom, to be led de bene ese. The motion was granted and de bene ese evidence was led and in accordance with the good tradition of the bar Mrs. Amesbury able defence counsel accepted the brief at very short notice and the de bene ese evidence was led on the 22nd of December.

- [11] However, the remand of the accused on the 21st December was done without the benefit of counsel. Accordingly, Mrs. Amesbury as of the 14 January 2018 took the opportunity to apply for the bail of Mr. Fanchette.
- [12] In the application for bail, Mrs. Amesbury first submitted on the provisions of the Constitution. She submitted that under Article 18(7) (d), seriousness of the offence is not a stand alone condition for remanding of an accused person.
- [13] By necessary implications, she submitted that as serious as an offence can be, there cannot be remand of an accused based on that seriousness alone.
- [14] She submitted further that this case concerned article 18(7) (d) and (c) in that the prosecution is saying that there are substantial grounds for believing that the accused will failed to appear for trial and or will interfere with the witnesses or will obstruct the course of justice or commit similar offences whilst on bail.
- [15] Defence counsel submitted further that the first count as charged is not a serious offence but an act intended to cause grievous harm and not one of causing grievous harm.
- [16] As to the second count, Mrs. Amesbury submitted that the offence is not one of sexual assault but instead is an attempt to commit sexual assault as it is averred that he tried to have sexual intercourse with the virtual complainant.
- [17] At any rate the defence counsel argued that benefit of the doubt should be given to the accused person as he is not presumed innocent but he is innocent until found guilty.
- [18] Mr. Kumar for the prosecution objected to this bail application and said that on the facts, it is clear that the accused committed the offences. He further submitted that the affidavit of the prosecution in support of the remand application shows a strong and believable case against the accused person.
- [19] The court invited both counsels to consider the aspect of public interest consideration in this case, given the alleged nature and facts of the case and that of the issue of identification and the possible impact on the decision of the court as to bail.

- [20] On the issue of identification, Mr. Kumar submitted that the de bene ese evidence has sufficiently established the possible identification of the accused and that further two British Nationals would come to court to testify and confirm the identification of the accused person.
- [21] Mrs. Amesbury, on the other hand, argued that there was no identification parade effected in this case and that there was only a dock identification, which in evidence is one left wanted.
- [22] On the issue of public interest, Mrs. Amesbury, submitted that though there is a strong public interest in this case that the accused is dealt with stringently, that public interest must be balanced with the right of an accused to a fair hearing by independent court.
- [23] Upon hearing the submissions of both counsels, in the light of the notice of motion and the application of the prosecution for remand, I find as follows:
- [24] I disregard the totally averments made in the affidavit of the police inspector Bibi that the accused is a habitual offender and I fail to see to what extent it impact with this application before the court. It will only have impacted the application provided that the accused had breached the condition of bail that he was prior to release on by committing an offence and this is not the case here.
- [25] Secondly, I do not agree with the submission of learned counsel for the defence that seriousness of the offence would not suffice as a ground to remand an accused person per se. I find that article 18 (7) (b) is a stand alone provision and is not a cumulative provision of article 18 (7).
- [26] There can be such an offence that is so abhorrent, so vile and which affect a greater interest of the public at large that the court will remand the accused based on the public revulsion alone, given the serious nature of the case. Here I will pause to note that in cases of murder, the court as a matter of practice given the serious nature of the offence, would under normal circumstances not grant bail because of the abhorrent nature of this offence.

- [27] Thirdly, I consider this case to be one where the public interest is concerned. The facts revealed that a helpless young foreign visitor enjoying her holiday in Seychelles was attacked in such an abhorrent manner and was seriously wounded. The consequence of which would be felt far and wide. This is to be balanced with the right to presumption of innocence which weigh in favour of the accused person.
- [28] It is clear that the defendant's case, as seen in cross examination of the virtual complainant is one based on mistaken identity. The accused categorically denied that he was at the scene of the crime at the time of the alleged offence. It is up to the prosecution to establish this element beyond reasonable doubt, the defence has nothing to prove.
- [29] The accused counsel's submission is to the effect that the case of the Republic on identification is weak, therefore the benefit of the doubt has to be given in favour of the accused and that this will outweigh the public interest in seeing that the accused is remanded into custody.
- [30] I find that this submission is premature. The case for the prosecution is not over. The court will look at the reasonable doubt as to the identification of the accused at the end of the case, not after the leading of the virtual complainant's evidence.
- [31] I will therefore refrain from making a finding of fact on the basis of this aspect of the evidence. I find that there is a strong likelihood of the accused absconding given the serious nature of the offence that he is facing and its possible consequences upon conviction. I find that there is also the possibility of the accused interfering with witnesses if he is enlarged.
- [32] Accordingly, I will maintain the court's position on the necessity to remand the accused person in custody. I find there is no change of circumstances shown and so I rule accordingly. This case shall proceed on the Plead and Direction Hearing.

Signed, dated and delivered at Ile du Port on 23 January 2018

R. Govinden
Judge of the Supreme Court