

IN THE SUPREME COURT OF SEYCHELLES

Criminal Side: CN 17/2017

Appeal from Magistrates Court decision 96/2015

[2018] SCSC 69

H . E
Appellant

versus

THE REPUBLIC

Heard:

Counsel: Mrs. A. Amesbury for appellant

Mrs. C Cesar, Attorney General for the Republic

Delivered: 26 January 2018

JUDGMENT

Vidot J

[1] By a Notice of Appeal dated 27th June 2017, the Appellant indicated that he was appealing against both conviction and sentence of a judgment delivered on 26th June 2017 by Learned Magistrate J. Kerr (as she then was). However, the Memorandum of Appeal canvassed grounds of appeal against conviction only. I note that the Notice of Appeal is dated 27th June 2017 and filed only on 13th July 2017, which means outside the 14 day prescribed period. I note that the Respondent did not raise any objection to the late filing of the Notice of Appeal but shall also note that the Appellant was dependant on the prison authorities to file the document and he cannot be penalized for the delay.

[2] The Appellant was charged with sexual assault contrary to Section 130(1) and read with Section 130(2)(d) and punishable under Section 130(1) of the Penal Code, Cap 158, as amended by Act No. 15 of 1996. The particulars of the offence were that the Appellant who at the material time was residing at Anse, Reunion, La Digue, on 18th day of April 2015, at Anse Reunion, La Digue, sexually assaulted A.M, a girl of 15 years old by having sexual intercourse with her.

[3] The Grounds of Appeal as per the Memorandum of Appeal are as follows;

- i. The Learned Magistrate erred in holding that it was “open to the court indeed it is arguably the only logical course to treat the accused as having admitted the actus reus of the offence.” And this is at the outset before considering the evidence.
- ii. The Learned Magistrate failed to consider the mens rea of the offence and whether it was proved beyond reasonable doubt, therefore rendering the conviction unsafe and unsatisfactory.

Ground 1

[4] Counsel for the Appellant suggests from her arguments in respect of Ground 1 of the Memorandum that the Learned Magistrate was prejudging the case by the manner in which she commenced her Judgment in saying that “....*indeed it is arguably the only logical course to treat the accused as having admitted the actus reus of the offence.*” Learned Counsel noted that the Appellant had exercised his right to silence and that the Magistrate construed that against him and treated that as admission to culpability. Learned Counsel further questioned as to whether the Learned Magistrate had not been biased against the Appellant in adopting such approach.

[5] I note that this statement was made after the Learned Magistrate had heard the case and allowed the Appellant (Accused) to present his case in conformity with the law. The Learned Magistrate had heard submissions on behalf of the Appellant. In fact even before making that statement at the top of paragraph 3 of the Judgement, the Learned Magistrate had noted that the “*submissions challenge only evidence as to lack of consent*”. In fact

following perusal of the Court records, it is abundantly clear from the line of cross examination adopted that the Appellant was challenging consent only, suggesting that it was the complainant that enticed the Appellant to engage in sexual intercourse with her. Indeed when Mr. Gabriel, Attorney-at-Law, was questioning the complainant as to her past sexual history, the Learned Magistrate asked if a defence of “consent was being raised, to which Mr. Gabriel had responded in the affirmative.

[6] In her Judgment, following the comment pertaining to the actus reus being established, the Learned Magistrate had a lengthy evaluation of the evidence, considering both the prosecution and the defence’s case. It is only fair and in the interest of justice and proper procedure for a court to evaluate and make a determination as to commission of the actus reus of a crime irrespective that the defence exercised the right to silence.

[7] The Learned Magistrate proceeded to do a thorough evaluation of the evidence of all witnesses and also considered the cross-examination of the witnesses by Counsel. The Appellant was not prejudiced in any way whatsoever and I cannot agree with Counsel for the Appellant that the Learned Magistrate erred in her evaluation of the actus reus of the offence. Therefore, this ground of appeal fails.

Ground 2

[8] Under Ground 2, the Appellant’s contention is that the Learned Magistrate failed to fully consider the mens rea of the offence and whether it was proven to the prescribed standard of beyond reasonable doubt. Learned Counsel referred to Section 130(3) of the Penal Code which provides as follows.

“Any person does not consent to an act which if done without consents 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 15 years; or

(c) The person's understanding and knowledge are such that the person wa incapable of giving consent.

I have accorded due consideration to provisions of that section and the facts of the case and cannot find how the provisions of that section assists the Appellant's submission. This primary consideration in this case was whether or not there was consent.

[9] In this case, there is no dispute that there was penetration of the complainant's private part by the Appellant with his penis, as provided under S130(2)(d) of the Penal Code, which is necessary to establish the offence; see **R v Pierre [2007] SLR 200**. In order to evaluate the intention of the Appellant, it is necessary that the court satisfies itself whether or not there was consent. If after evaluating the circumstances of the case, the court is satisfied that an accused held the legitimate belief that the victim with full unimpaired capacity was consenting, then the mens rea of the offence of sexual assault will not be established. In this case the determining factor to establish mens rea is the behaviour of the Appellant and the complainant immediately before, during and after the act of sexual intercourse.

[10] I agree with Counsel for the Appellant that the Learned Magistrate was not explicit in her evaluation of whether the Appellant had the necessary mens rea to commit the offence. However, in her judgment the Learned Magistrate clearly stated that she considered all the **essential elements** of the offence. That in my view would includes the elements establishing the mens rea. The evidence of the complainant is pertinent in establishing the mens rea. She testified that the Appellant pushed her down on her bed. She asked him what he was doing and pushed him away. She struggled. He opened up her legs and she kept asking what he was doing. She asked him to stop. She tried to struggle but he overpowered her as he was too strong. Despite that, the Appellant persisted and had intercourse with her. There was no consent and the Appellant proceeded despite such reaction from the complainant. This definitely establishes the mental element. The Appellant's intention was to have sex with the complainant.

[11] As per paragraph 22 of the Judgment Learned Magistrate also fully considered authorities on the issue referred to by the then counsel for the Appellant. Counsel had referred to a 1979 Mauritian case of *Gastoo v R*.

[12] I also note that apart from averring consent and in particular that the complainant enticed the Appellant in having intercourse with her, which the court did not accept, the Appellant did not raise any other defence to negative mens rea. In **R v Heard [2007] 1Cr. App. R 37 CA**. it was held that it is always recommended and advisable that in a case of sexual assault where the defence is consent, once the prosecution brings forth evidence of behaviour of both accused and complainant referring to the state of mind of the complainant and the accused, that the accused brings evidence to negative that mens rea.

[13] I am satisfied that the Learned Magistrate considered the element of mens rea in this case and therefore find no merit on this ground of appeal which fails.

[14] I cannot fail to comment on the written submissions of counsels in this appeal. I acknowledge the effort of Mrs. Amesbury in the preparation of the submission. However, I am totally disappointed with submission of Counsel for the Republic which is totally lacking in the consideration of the Memorandum. It fails to identify the grounds of appeal being dealt with and I can sincerely state that ground 2 of the memorandum was not addressed at all. Further, Counsel made a lame attempt to address the issue of sentence when in fact Counsel for the Appellant did not appeal against sentence. I urge counsel to show more commitment and effort in the discharge of duty.

[15] The appeal is dismissed and sentence maintained.

Signed, dated and delivered at Ile du Port on 26 January 2018



M Vidot

Judge of the Supreme Court