

IN THE SUPREME COURT OF SEYCHELLES

CriminalSide: CO26/2016

[2018] SCSC 224

THE REPUBLIC

versus

J R

Accused

Heard: 26 & 29 May 2017, 22 & 23 June 2017, 10 Aug 2017 and 08 Sept 2017
Counsel: Mrs. L. Rogmei, Attorney General for the Republic
Mr. R. Durup for the accused
Delivered: 01 March 2018

JUDGMENT

Vidot J

The Charges

[1] The Accused stands charged with the following offences;

Count 1

Statement of Offence

Sexual assault contrary to Section 130(1) and read with Section 130 (2)(d) of the Penal Code and punishable under Section 130(1) of the Penal Code.

Particulars of Offence

JR of Pointe Aux Sels, Mahe, on the 12th May 2016 at Nageon Estate car park, Pointe Larue, sexually assaulted a minor girl aged 15 years old, namely Ms. XY of Anse Baleine, Anse Royale, Mahe, by penetrating the body orifice, namely the vagina of the said XY by using his penis for sexual pleasure.

Count 2 (In the alternative to Count 1)

Statement of Offence

Sexual assault contrary to Section 130(1) read with Section 130(2)(a) of the Penal Code and punishable under Section 130(1) of the Penal Code.

Particulars of Offence

JR of Pointe Aux Sels, Mahe on the 12th May 2016 at Nageon Estate car park, Pointe Larue, committed indecent assault against a minor girl aged 15 years old, namely XY of Anse Baleine, Anse Royale, Mahe.

The Prosecution's Case

- [2] The principal witness for the Prosecution was the complainant. Her testimony in fact encapsulates the case for the Prosecution. XY a young girl of 16 years (15 years at the time of the incident) testified that
- [3] at the time of the incident she was and still is a student at the Independent School. It is her testimony that on the evening of 11th May 2016 she had an argument with her parents. That pertains to her using the phone to call someone and her parents were not happy with that. Since she has been having problems with her parents she had decided to run away from home and go to live with her grandmother at Pointe Larue. Her family resides at Anse Baleine in the Anse Royale district. She had previously sought permission to go and live with her grandmother, but it was denied.

- [4] Therefore, after everyone had gone to sleep, she packed two bags and armed with a candle she left home, determined to walk to Pointe Larue to her grandmother's home. Arriving at the Anse Royale fun park, she noticed the Accused's van. He stopped, tried to talk to her and after he offered her a ride to Pointe Larue, she accepted and climbed in the front passenger seat. Arriving at the Montagne Posee junction, the Accused informed her that he was going to Avani to pick up a worker. She had no choice but to go along with him. Throughout the journey, the Accused was touching her inappropriately and asking questions. That made her uncomfortable. Numerous times, she asked him to desist from touching her, but he ignored her plea.
- [5] After the worker was picked up, she had moved to the back seat. Arriving at Izup bar, Anse-Aux-Pins, the Accused stopped to allow Richard Cesar (hereafter Richard) to go and buy some items from the bar. At that time she was really thirsty and the Accused had offered her some coke from a half full bottle. She was reticent at first but she finally accepted some. Sometime after drinking the cola she felt dizzy. After the Accused had dropped off Richard, she asked him to drive her to her grandmother. She showed him the route to take but he took a different route and took her to a parking where he sexually assaulted her. She asked him to stop as she was not consenting to such act. She felt him penetrate her with his penis and passed out at times. When he had finished he asked her to disembark and left her at the parking lot.
- [6] She made her way to her grandmother's home. She acknowledged to her aunty that she had been sexually assaulted. Her parents were called and they came, took her to the Anse-Aux-Pins Police Station and she was referred to the hospital where she met with Dr. Olga Fedora who examined her. Swabs were taken from her which together with swabs taken from the Accused and from the van were sent to Mauritius for analysis. The Prosecution relies on the testimonies of Dr. Olga and Mr. M. V. Ramessur, Senior Forensic Scientist from the Forensic Science Laboratory of Mauritius to support and confirm the assault.

Defence case

- [7] The Defence refutes all allegations that the Accused sexually assaulted the Complainant. It is the Accused's position that there was no sexual act between the Accused and XY. At the close of the Prosecution's case, the Accused elected to give evidence on oath and also called one witness; Richard Cesar.
- [8] JR testified that on the evening on 11th May 2016, he was on duty. He is a driver and he collects workers from various establishment and convey them to their residence. He recounted meeting XY at Anse Royale on the way from Avani. He disputes that he was the one who decided to stop but that rather XY was giving the hitchhiking sign. He passed that person and noticing that it was a girl, he stopped, reversed and asked her what her problem was. She asked for a ride to Pointe Larue and since he was going through Montagne Posee, he acceded to the request. She boarded the van and on the way had conversation as to the reasons she was out at night so late.
- [9] Reaching the Montagne Posee junction, he stopped, asked her to disembark as he was going to Avani to pick up a worker. That was Richard. He insisted she disembarked but XY had refused. Even if carrying such passenger was against his work policy, he nonetheless agreed to take her along. At Avani, he picked up Richard. He introduced the latter to XY. On the way back, upon arriving Izup Bar at Anse-Aux-Pins, Richard had asked him to stop. He normally goes there to buy beer for himself and coke and cigarettes for JR. He offered to buy XY a soft drink but she declined the offer. He dropped Richard at Mirabel and asked XY to disembark. She refused. So they proceeded to Richard's house and they asked XY where exactly her grandmother lives at Pointe Larue. She wasn't sure. They went up Nageon Estate, reaching a junction, XY had asked him to take the right turn but that lead to a parking area where there were some public bins and there were dogs around. He insisted that XY disembarked. She still refused as she said she was afraid of dogs.
- [10] Thereafter, he implored the complainant to get off but she started to caress the back of his neck. He protested. XY then asked him to make love to her and he told her he was tired and not in the mood. He checked in the mirror and saw her at the rear of the van taking off her clothes. She invited him to make love to her. He remained in the driver's seat and

refused. He had no intention of having sex with her. He asked that she puts her clothes back on, which she did and that if she refused to disembark he would put her luggage down.

[11] The complainant could not find her way to her grandmother's house and asked him to go and ask neighbours for direction. He did not but she went knocked on the door of a house. There was no response. He insisted she got her luggage out of the van, she did and came up to him and thanked him.

The Law

Sexual Assault

[12] Section 130(1) of the Penal Code provides as follows;

“Any 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 Section 2(c) of (d), the person shall be liable for a term of not less than 7 years and not more than 20 years.

Provided”

[13] Section 130(2) (d) provides that sexual assault includes *penetration of a body orifice of another for sexual purpose*”.

[14] This Court has to determine whether any sexual act took place between the Accused and the Complainant. If the court finds in the affirmative, then the next issue for consideration is whether such sexual act was consensual. For the purposes of Section 130(2)(d) of the Penal Code, sexual assault is not restricted to penile penetration, but includes also penetration other than the sexual organ; see **R v Pierre [2007] SLR 200**. In the present case, the complainant alleges that there was penile penetration whilst the Accused denies it. In evidence under oath he denies that any sexual act of whatever nature took place. In

order to establish the offence on Count 1, the Prosecution needs to establish beyond reasonable doubt that the Accused intended to engage in penetration of the Accused by use of his penis. It was held in **Heard [2008] QB 4**, that this requires no more than a requirement that penetration was deliberate. The onus is on the Prosecution to prove that the Accused did not reasonably believe that the complainant was consenting at the time of penetration; see **Blackstone's Criminal Practice 2012 B3 17 p300**)

Evaluation of Facts and Law

[15] In assessing whether or not the charge as been established, as aforementioned, the Court has to evaluate (a) if there was a sexual act and if so, (b) whether the sexual act was consensual. A person above the age of 15 years has capacity to give consent to a sexual act. However, Section 130(3) provides that;

“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 15 years; or*
- (c) the person's understanding and knowledge are such that the person was incapable of giving consent.*

Therefore, in order to establish the offence, the Prosecution needs not only establish actus reas, but equally the mens rea. It has to be satisfied that before or during the commission of the offence, the Accused could not have believed or laboured under the impression that he had the necessary consent to engage in the sexual act. If in its evaluation of the evidence, the Court is satisfied that the Accused held the legitimate belief that the complainant with unimpaired capacity was consenting, then the mens rea of the offence of sexual assault is not established.

[16] This Court reminds itself that as held in **R v Wilfred Volcere (2016) CR68/2014** (unreported), in case of sexual assault, corroboration is not an absolute necessity.

Corroboration will nonetheless accord more weight and credibility in establishing the elements of the offence. It was held in **Raymond Lucas v Republic SCA 17/2009**, it is matter for the Judge's discretion whether any corroboration warning is appropriate in sexual offence cases; see **R v Easton [1995] 2 Crim App. R 469**.

[17] In her closing submission, Counsel for the Republic has referred to the evidence of Dr. Olga to support the charge. Reference was made in particular to the following evidence'

"Q: Doctor, you say the hymen was not intact when you examined it?"

A: Correct

Q: Can you explain further?"

A: It means that some penetration took place before and hymen was not intact. So penetration took place"

I cannot agree with the Prosecution that this proves that the Accused had intercourse with XY. Dr. Olga was not asked to explain if she meant that there was penetration at the time of the incident on 12th May 2016 or sometime prior. The Accused is therefore given the benefit of the doubt that exists as regards that part of the evidence.

[18] It is the Defence position that that the Accused did not sexually assault XY. The Defence drew attention to some key pieces of evidence that could be interpreted that there was no sexual assault. In particular, the defence relied on the Accused's testimony on oath that he did not have sex with the complainant. The Accused had testified that whilst parked at the parking lot at Nageon Estate, he remained in his seat and that the complainant had caressed the back of his neck and asked that he makes love to her. He had refused; she had insisted and had moved to the far rear of the van and removed her clothes, still insisting that they make love. He had continually asked her to put her clothes back on. Whilst she had invited him to make love to her, he had told her that that he was not in the mood and that he was tired.

- [19] The defence also relies on the medical evidence. Dr. Olga had testified that upon examining XY, she did not find any fresh lesions and lacerations that was indicative that there was no force exerted on her. In fact in her medical report (Exhibit P16) Dr. Olga made the following findings; *external genitalia appear normal. The hymen is not intact. Normal per vagina discharge. No fresh lacerations or lesions seen.*”
- [20] Sgt. Danielle Denousse of the Anse-Aux-Pins Police station, had also testified that after XY was brought to the station by her parents in the early hours of 12th May 2016, she conducted a physical assessment of XY and she did not find any visible marks or bruises on her. Furthermore, the clothes that XY was wearing on the night of the alleged incident were not in any way torn, irrespective that the complainant testified that the Accused removed her clothing from her forcefully.
- [21] This court agrees that above outlined evidence relied on by the Defence to refute all allegations of sexual assault may have merit. However, the absence of any physical marks and bruises and lacerations and lesions around the complainant’s private parts and clothings that had not been torn cannot be conclusive to allegations that there was no sexual assault or that if there was sex, that it was consensual.
- [22] I note in particular that the version of the incident that the Accused testified on oath differs materially from that recorded in his Confession (P1) admitted without objection. In his testimony he had insisted that he did not engage in any sexual act with the XY. He stated that he stayed in his seat while XY invited him to have sex. He rejected all her advances. He went to the back and that when XY removed her clothes, he moved back to his seat as he had no intention of doing anything with her. Yet in the Confession, he admits to going in the rear seat, to have removed his shorts and boxers in order to engage in sex with XY but that he got overexcited and ejaculated even before he penetrated her. Such material contradictions in the Accused’s defence contribute to the Court doubting his testimony and labelling it as suspect and therefore lacking credibility.
- [23] I also note that the Accused’s testimony is contradicted by his own witness, Richard. In particular, the Accused testified that when he reached Mirabel at Pointe Larue to

disembark Richard, he asked XY to disembark too and she refused and asked that she be taken to her grandmother's home. He had firstly gone to drop Richard at his house. Richard testified that there was no conversation between the Accused and the Complainant. Actually, Richard testified that XY did not talk to them at all. This makes the Accused's evidence more suspect. I also don't believe the Accused that XY did not know the residence of her grandmother. XY goes there regularly. This is confirmed by the unchallenged evidence of the Complainant's mother. I am also convinced that the parking lot was a place well known to the Accused. The Complainant's father testified to having seen the Accused in the Pointe Larue and Nageon Estate area before. I believe that the Accused had every intention of taking XY to that area. His intention was not honest.

[24] This Court finds the complainant to be credible. She displayed maturity. She even stated that out of such devastating experience, she came out of it more mature. That said, she is still going through hell as she finds it hard to relate to others, especially to her father. She was an outstanding student but that since that incident her grades have deteriorated as she has lacked focus in her studies. On the other hand, the Accused came across as being arrogant and whilst the complainant was giving her testimony I observed him snickering. It appeared that the trial process was a joke to him. In fact, he had testified that when the Police was recording the statement under caution he took it as a joke . The same attitude was at times replicated during the trial process.

[25] I find that the evidence of Mr. Ramessur, Senior Forensic Scientist, to be pertinent is confirming that there was sexual intercourse between the Accused and XY. His findings of DNA profile analysis corroborates the Complainant's testimony that there was sexual intercourse.

[26] Under cross examination Mr. Ramessur further explained "*when someone is having relation, normally you have a transfer of epithelial cells that come out of the penis and during the ejaculation the transfer of the female epithelial cells along with the semen stain, that is where, when we test the stain we obtained the female profile and the male profile in the mixture. So you have contact with victims or in this case during sexual*

assault, there must have been contact, that there is in the mixture we picked up female profile and male profile”(p10; proceedings of 22-06-17 pm)

Mr. Ramessur had explained earlier that the DNA analysis carried out for semen stain recovered from the floor of the van revealed a mixture for both persons. The mixture profile corresponded to the victim and the suspect.

I note that the pertinent swabs from XY was vaginal and anal. In this instance it is the vaginal swab that is relevant. The forensic scientist was stern in his position that the profile as per the analysis of SE 13 (exhibit P13) originate from the private parts of the Accused and the complainant and not from any other body parts. When asked to explain from where the female epithelial cells are located, Mr. Ramessur responded; *“you can get it from the vaginal swab internally”* He added that if swabs was from another body part it will not give a *“full DNA profile of the female....”*

[27] The above evidence confirms that there was contact between the private parts of the Accused and the Complainant, as otherwise the DNA profile as per Exhibit 14 would not have been as conclusive. Based on such evidence I am satisfied that there was intercourse between the Accused and the Complainant. In fact Mr. Ramessur’s testimony confirms this.

[28] Therefore, the Court now has to evaluate if the sexual act was with or without consent.

[29] **Blackstone Criminal Practice** provides that *“consent covers a range of behaviour from wholehearted enthusiastic agreement to reluctant acquiescence”*. Nonetheless, a valid consent can only be given by a person armed with capacity to do so and such consent should be voluntary, that is by choice. In order to exercise a choice a person has to be free from any form of physical or mental pressure. However, it remains a matter for the Court as to what degree of coercion has to be exercised upon a person’s mind before he or she is not agreeing by choice, with freedom to make that choice.

[30] As mentioned above the fact that XY’s clothes were intact could be indicative that there was consent. Equally the absence of bruises, lacerations and lesions on her genitalia could be interpreted in the same way.

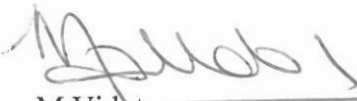
- [31] However, the Complainant gave evidence that she was given coke that could have been spiked as she did not feel well after having drunk it. The defence denies giving her anything to drink. I believe that she was given coke to drink but I cannot confirm if it was spiked or not. However, I do believe XY when she testified that she tried to scream but couldn't and that she asked the Accused not to do anything to her. I do believe XY when she stated that she asked him to stop when she was on her. She testified that she wanted to run did not have the strength to walk as her legs were trembling. I feel that she was at a point where she was worn out with a stranger who had taken advantage of her as a young girl in not taking her to her grandmother's home despite showing him the way to the latter's home. I also believe that had there been consent, the Accused would not just have asked her to disembark from his van and left her at the parking lot after the engaging in intercourse. He would have taken her to her grandmother.
- [32] I equally believe XY when she says that she pushed the Accused away and that she tried to resist. I noticed that the tube top she was wearing can be easily pulled down without it necessarily getting torn. I believe that the Accused removed her shorts. I note that Mr. Remassur testified that the clothes he received were dirty and therefore the unlikelihood as per Accused's testimony that XY had removed her clothes, folded them up and placed them on the seat.
- [33] The reaction of XY when she reached her grandmother's house is consistent with someone who had been affected by the incident. WPC Danielle Denousse testified that when she met with XY in the early morning of the 12th May 2016, XY was emotional and afraid. She was speechless and crying. XY and her parents testified that following the incident she has changed; at times she is sad and cries. There was a need for her to be examined by a psychologist and had a few therapy sessions with Ms. A. Labiche. XY used to be a bright student but her grades have since the incident been dropping to the point that she no longer enjoys school and at least one teacher has expressed concerns about her. I find that such behaviour and reaction to be consistent with someone that has been traumatized by the incident and indicative that she could not have consented to sexual intercourse with the Accused. That makes her version of testimony more credible than that of the Accused.

[34] XY was visibly upset, sad and tormented when giving evidence. Her mother had testified that she has completely changed mentally and that she is tormented. XY insisted that she did not ask for sex but stated; "*It's rape.*" I observed her demeanour closely throughout the case and I found her evidence credible.

[35] Yet the Accused maintains that that no sexual act took place. Apart from claiming that the Complainant offered him sex which at one point he alleged he declined and at the other that he ejaculated before sex due to overexcitement he did not raise any other defence to negative mens rea. I find that the Prosecution has established the all the elements of Count 1 beyond reasonable doubt and finds the Accused guilty as charged and convict him accordingly.

[36] Having found the Accused guilty of Count 1, there is no necessity to consider Count 2 which was in the alternative.

Signed, dated and delivered at Ile du Port on 01st March 2018



M Vidot
Judge of the Supreme Court