IN THE SUPREME COURT OF SEYCHELLES

Criminal Side: CN 20/2017

Appeal from Magistrates Court decision 34/2016

[2018] SCSC 220

I P
Appellant

versus

THE REPUBLIC
Respondent

Heard: 8 December 2017 and 9 Janaury 2018

Counsel: Mr. Guy Ferley Attorney at Law for the Appellant

Ms. Gulmette Bootna, State Counsel for the Respondent

Delivered: 5 March 2018

JUDGMENT

Burhan J

[1] The Appellant in this case was charged before the Magistrates' Court as follows:

Count 1

Assault Causing Actual Bodily Harm contrary to and punishable under Section 236 of Penal Code, Cap 158.

Particulars of offence are that, I P of [redacted] Mahe on 28th March 2015 at [redacted], Mahe unlawfully assaulted G P by means of fist blows and kicks thereby causing the said G P actual bodily harm.

[2] The Appellant was convicted after trial and sentenced to a term of 6 months imprisonment and a fine of SR 5000/=. It was ordered that the term of 6 months imprisonment, be suspended for a term of 2 years and in default of payment of fine a term of 3 months imprisonment be imposed. It was also ordered that a further sum of SR 2000/= be paid as compensation to the victim G P in terms of section 30 of the Penal Code.

[3] The Appellant seeks to appeal from the said conviction and sentence on the following grounds:

a. The evidence adduced by the prosecution is not in conformity with the medical certificate.

b. Despite the Learned Magistrate expressing serious doubt in her judgment in respect of the evidence of the prosecution's main witnesses, she had proceeded to convict the accused.

c. The medical report and the evidence in respect of the injuries as given by the police officer are consistent with the Appellant's version of self- defence.

d. Having admitted in her judgment the doubtfulness of the testimony of evidence of the prosecution, the Learned Magistrate should have proceeded to acquit the accused.

e. The sentence imposed by the Learned Magistrate is harsh and excessive.

[4] The background facts of the case are that the victim, G P was the former wife of the Appellant Mr. I P. It is apparent from the evidence that a matrimonial property case was pending between the two of them. At the time of the incident G P and their 10 year old son J P had been living in the house of on T P. The Appellant I P was occupying the matrimonial property, a house at [redacted]. According to the evidence of T V, on the day

prior to the incident G P had made a call to the Appellant in his presence and asked whether she and her son J P could come and live in the house as T P needed his house to himself. The conversation according to witness was calm and apparently, the Appellant had said it was fine. Witness further stated he had spoken to the Appellant on an earlier occasion calmly and explained to him that he needed his place, as he had friends who were coming to stay with him and the Appellant had replied, he would be moving out of his house at [redacted] in two weeks and getting an apartment.

[5] The following day after the conversation between G P and the Appellant, T V had accompanied G P and her son J P, to the house at [redacted] to clean it and on greeting the Appellant, they were surprised when he had aggressively told them to stop bothering him and to get out of his property and to leave him alone. The Appellant had gone in and brought a machete and come out and within seconds had grabbed G P by the back of the neck, kicked her down to the ground and had begun beating her. The Appellant had raised the machete above the head but T V had shouted "Do you want to kill her in front of your son" and then he had lowered the machete but advanced aggressively towards T V. He had backed down and G P had been helped up by her son J P and they had gone back to their car. The Appellant had shouted abusive language to them as they were leaving. They had driven to the Anse Royale police station and reported the incident and were informed that the Appellant Ian, had already complained that they had trespassed on his property.

[6] The victim G P too gave evidence on very similar lines. She stated further that her right arm was bruised and bleeding and her leg too was bleeding and she suffered from internal pain in her pelvis area and back. At the hospital she admits she did not feel much pain and the doctor had just looked at her and not touched her and given her painkillers. It appears she had become worse thereafter and once again gone to see a doctor at the Victoria hospital in the evening. Her son J P too was also called by the prosecution as a witness.

[7] It appears from the evidence of witness T V that J P had been filming the incident and had photographed her injuries just after the assault but no recording or photographs were produced by the prosecution as evidence in the case.

[8] Corporal Claudia Dogley who gave evidence for the prosecution stated that that at the time G P had come to the police station, she was feeling pain and had some bruises and marks on her body but she could not remember exactly where the injuries were. She admitted under cross examination she had stated in her statement she had examined G P and found a scratch mark on her right arm and a reddish mark on it.

[9] One of the main grounds urged by Learned Counsel for the Appellant is that the Learned Magistrate had stated in her judgment at paragraph 36 *"in considering the true nature of the assault and the real extent of the victim's injuries it would have been helpful if the Court to have had access to the various pieces of physical and documentary evidence that was referred to but never produced. As it is the only independent evidence does not corroborate the prosecution account. Having observed the demeanour of the doctor I accept the possibility that he did not conduct a thorough physical examination of the victim despite her report of a serious assault, but I still find it implausible that given her skin tone and what she was wearing he simply failed to see marks or bruises on her neck or elsewhere that were or should have been expressly pointed out to him."*

[10] It is the contention of the Appellant that these findings of the Learned Magistrate, indicate she had serious doubts as to the veracity of the accounts of the incident by the prosecution witnesses. The Appellant further contends that considering the fact there were no serious injuries seen by the doctor, an independent witness, his evidence is more in line with the defence of the Appellant that as she raised her hand to slap him, he had held her by the shoulders and shaken her and that is when she had fallen down and injured herself.

[11] The fact that the victim did have injuries even though minor, is corroborated by the evidence of Dr. Ranmohan Rao Elori and Corporal Claudia Dogley two independent witnesses. When one considers the evidence of the prosecution, it is clear from the version given by the victim G P, her son J P and T V that the Appellant had after pulling the hair of the victim resulting in her falling to the ground, caused bodily harm to the victim by assaulting her by kicking and stomping on her whilst wearing shoes. The Learned Magistrate had come to the conclusion that the witnesses were exaggerating the details of the assault based on the fact that the injuries sustained by the victim were minor

in nature. Be that as it may, the fact that the victim was assaulted by the Appellant is clearly established by the evidence of the witnesses for the prosecution referred to above.

[12] In respect of the nature of the injuries, the Learned Magistrate was correct to rely on the evidence of the medical personnel or doctor in that the injuries were minor in nature. As to whether the doctor may have failed to observe certain injuries due to not properly examining the victim or the injuries namely bruises were not manifest at the time of examination which was immediately after the incident are not relevant as the Learned Magistrate had based her findings, on what the doctor had seen and not on what he had not seen. In whatever manner the assault may be described by witnesses, the resulting injuries on the victim in this case as borne out by the evidence of the doctor and Corporal Claudia Dogley are not grievous or of a serious nature.

[13] I am therefore satisfied that the Learned Magistrate cannot be faulted for finding the Appellant guilty of the offence, as the prosecution evidence clearly establishes beyond reasonable doubt that the minor injuries suffered by the victim were as a result of an assault by the Appellant on the victim. The mere fact that the Learned Magistrate has held that the victim has exaggerated the facts in their evidence does not mean the witnesses should be totally disbelieved. The Learned Magistrate has correctly in such a situation, only accepted the evidence which stood corroborated by the medical evidence thereby coming to the correct finding.

[14] I will next proceed to consider the defence of the Appellant. His defence is that the victim his ex-wife G P accompanied with witness T V and their child J P had come into the matrimonial home which he was in occupation and begun clearing the garden without his permission. He had asked them to leave and in the ensuing exchange of words, she had raised her hand as if to slap him. It was at this stage that he had held her shoulders and shaken her and he admits she had fallen down. She had attempted to get up in her flip flops which she was wearing, in order to get away from him, but had fallen and was eventually assisted by her son and taken to the vehicle.

[15] It is the view of this Court that even if the evidence of the accused be accepted, the Appellant had over reacted and used excessive force when he had held the shoulders of the victim and shaken her resulting in her falling, when she had only raised her hand

which he interprets was to slap him. There is no evidence of him warding off the blow aimed at his face. Even if his evidence be believed, it is apparent the Appellant had jumped to the hasty conclusion that he was going to be slapped and used force which in the view of this Court was excessive in nature, resulting in the victim falling and sustaining injuries due to the fall. In this respect, I would refer to the landmark case of **Palmer v R [1971] A.C. 814** where it was held:

"It is both good law and good sense that a man who is attacked may defend himself. It is both good law and common sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances. Of these a jury can decide. It may in some cases be only sensible and clearly possible to take some simple avoiding action. Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack, it would not be common sense to permit some act of retaliation which was wholly out of proportion to the necessities of the situation."

[16] Therefore it is the view of this Court that the retaliation was wholly out of proportion to the necessities of the situation, therefore defence of self-defence fails.

[17] Further, I note that learned counsel for the Appellant in cross examination has suggested the following, *"Mr. P is not denying he pushed you, Not denying there was this scuffle which arose out of your bitterness. That was all. Unfortunately when he pushed you, you fell and got these bruises and cut your lip that was it. Isn't that correct*? It is also an observation in the lower Court that the Appellant was of very big stature, compared to the victim and therefore it is plausible that a push or a rough shaking of the victim as admitted by the defence, resulting in the fall of the victim, did result in injuries to her and as the defence of self-defence has been rejected, would amount to an assault occasioning bodily harm. Therefore when one considers the admissions made by the Appellant in his unsworn statement in defence and the suggestions made in cross examination by his learned counsel, it is clear the offence against the accused is established as the defence of self-defence of the Appellant in his unsworn statement, is not acceptable for reasons stated herein. I further hold that the Learned Magistrate was correct in holding that provocation is not a defence in a case of this nature **Mathiot v R 1992 SLR No 50.**

[18] For all the aforementioned reasons, I dismiss the grounds of appeal against conviction and affirm the conviction.

[19] I will next proceed to consider the appeal against sentence. Despite being aware that the offence is an excepted offence and the provisions relating to suspended sentence does not apply, as per section 282 (1) read with section 287 and the Seventh Schedule of the Criminal Procedure Code, the Learned Magistrate chose to impose a suspended sentence. I am of the view that considering the nature of the injuries and the fact that the Appellant and the victim are divorced and not living together, the necessity to impose a suspended term of imprisonment, considering the circumstances peculiar to this case, does not arise. I therefore proceed to quash the suspended term of imprisonment.

[20] In respect of the fine of SR 5000/= and the additional compensation order of SR 2000/=, I am of the view that the total amount of 7000/= is excessive considering the fact that the incident occurred on the property of the Appellant and the injuries were minor. I therefore quash both orders and substitute it with a fine of SR 5000/= (five thousand). I make order in terms of section 151 (1) (b) of the Criminal Procedure Code, a sum of SR 3000/ (three thousand), be paid to the victim G P as compensation from the said sum, considering the pain and trauma suffered by the victim as described by her. In default of payment of the fine the Appellant is to serve a term of 3 months imprisonment.

[21] Accordingly, the appeal against sentence is allowed.

Signed, dated and delivered at Ile du Port on 5 March 2018

M Burhan
Judge of the Supreme Court