IN THE SUPREME COURT OF SEYCHELLES

Criminal Side: CN 19/2017

Appeal from Magistrates Court decision 419/2016

[2018] SCSC 236

GERARD PHILO
Appellant

versus

THE REPUBLIC
Respondent

Heard: 13 November 2017 and 11 December 2017

Counsel: Mrs. Alexia Amesbury Attorney at Law for the Appellant

Mr. George Thachett, Assistant Principal State Counselfor the Respondent

Delivered: 08 March 2018

JUDGMENT

Burhan J

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

Count 1

Recklessness and Negligent Act Contrary to and punishable under Section 229 (g) of the Penal Code Cap 158.

Particulars of offence are that, Gerard Philo, 54 years old a driver residing at La Louise, Mahe, on the 13th day of May 2014, at La Louise, Mahe, being in charge of a

grass cutter, omitted to take precaution against any probable danger to Audrey Esparon while cutting grass.

[2] The Appellant was convicted after trial and sentenced to a fine of SR 10,000/=. It was ordered that a sum of SR 5000/= be paid to the victim as compensation. In default of payment of fine a term of 2 months imprisonment was to be imposed.

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

a. The Learned Magistrate misapplied the burden and standard of proof in the instant case.

b. The evidence adduced by the prosecution does not support a charge under section 229 (g) of the Penal Code.

c. The Learned Magistrate misdirected herself on the law, when she convicted the Appellant in the absence of the vital element of mens rea, thus rendering the offence a strict liability offence.

d. The Learned Magistrate failed to put the amended charge to the Appellant and get him to plead afresh.

[4] The background facts of the case are that on the 13th of May 2015, the Appellant was cutting grass using a grass cutting machine and some of the rubbish had come onto the veranda of the victim's house as they were living next to each other. The victim, a 13 year old girl, Audrey Esparon, had gone to clean the veranda and the Appellant had come closer while cutting grass and a stone had come and hit her eye when she was in the veranda "at the down house". It appears the houses were at different levels. After the stone had hit her, she had gone to tell her grandmother and she had come to look for him but he was not there. She stated she was hurt on the right eye side which is confirmed by the medical report. She was afraid to tell the Appellant anything as he was an arrogant person. It appears from the evidence of her 11 year old brother Ted Esparon, he had seen his sister crying and she had told him that the Appellant had hit her with a stone on her face. He had gone up to the Appellant and asked him, why he had hit a stone on his sister

and he had asked him who told you and he had run away. Dr. Vestna Pillay gave evidence that she was employed as a doctor and she had examined the patient Audrey Esparon on the 13th of May 2015 who had a history of assault and tenderness at the corner of her eye. She had prescribed Paracetamol and ordered an X' ray to be taken to rule out any fractures. Medical report was produced as P1 indicating the patient was examined on the 13 of May 2015 and had tenderness on the temporal side of the right eye.

[5] Police Officer Elodia Medor, produced the statement under caution of the Appellant as exhibit P2, in which the Appellant states, he had nothing to say and will state what he has to say in Court. The Appellant gave evidence and stated he had not seen Audrey at all that day. He had finished cutting grass around 3.00 p.m. and had gone to prepare himself to go to work, when the little boy came and told him, he had hit his sister. He had asked him "who sent him to come and tell him this" and thereafter not bothered with him and continued with his work. He admitted he was cutting grass that day with a machine and wore goggles and gloves for his own protection. He stated the houses are divided by a wall and bush and are at two levels high and low. He stated the victim had not told him she was hit with a stone but admitted the brother had told him. He admitted having a problem with the neighbours.

[6] It is clear from the judgment that the Learned Magistrate had clearly not erred in her burden and standard of proof, in that she has stated, the prosecution has proved its case beyond reasonable doubt in the last paragraph of her judgment after analysing the evidence in the case. It appears that prior to analysing the evidence, she has at the beginning of her judgment stated that " here the evidence adduced falls short of doing this" which in the view of this Court is a mistake as pointed out by learned counsel for the prosecution, as the analysis of the evidence has commenced thereafter. Soon after the analysis, the Learned Magistrate has come to the finding that the prosecution has proved its case beyond reasonable doubt, clearly indicating that the earlier statement in the judgment reading "here the evidence adduced falls short of doing this" is a mistake contrary to the final findings and should be disregarded.

[7] In regards to the ground that the prosecution has failed to prove the vital element of mens rea, the Learned Magistrate has given her attention to this issue and stated as follows *"It*

is trite law that an offence under section 229 (g) of the Penal Code does not require proof that the Appellant intended to cause harm. All that is required to be proved is any person who does any act with respect to, or omits to take proper precautions against any probable danger from, any machinery of which he is solely or partly in charge is guilty of a misdemeanour." She has also referred to the case of ***Republic v Benjamin Lesperance & Ors [1982] SLR 115*** which states *"…. but the prosecution must prove that, when the Appellant did the act which caused injury he was acting consciously, knew what he was doing and realised he had no lawful justification."* In regard to the definition of recklessness and negligence, ***Criminal Law Smith and Hogan 12th edition at 5.2.3,*** distinguishes between the two as follows: Recklessness is the conscious taking of an unjustifiable risk, negligence is the inadvertent taking of an unjustifiable risk. If D is aware of the risk and decides to take it, it is recklessness, if he is unaware of the risk but ought to have been aware of it, he is negligent. It is the view of this court, that the Appellant was aware of the dangers as he himself had used the necessary gear to protect himself and therefore, ought to have been aware of the dangers to those in the close vicinity, while operating the grass cutting machine. I see no reason to fault the findings of the Learned Magistrate on this issue.

[8] The amendment to the charge is a mere change of the year in the date which was done and recorded in open Court, in the presence of the Appellant, therefore the Appellant was aware of the amendment made. In any event, the Appellant admits he was cutting grass on the said date and therefore no prejudice has been caused to him by the said amendment. The brother of the victim who was 11 years old, Aaron Esparon, stated that he did tell the Appellant, he had hit his sister with a stone while he was cutting grass that very day. The Appellant admits this fact which indicates, the act had been brought to his notice immediately and therefore not concocted on a later date.

[9] For all the aforementioned reasons, I am satisfied that the evidence supports the charge framed against the Appellant and the finding of the Learned Magistrate that the charge has been proved beyond reasonable doubt. I dismiss the grounds of appeal against conviction and affirm the conviction.

[10] In sentencing the Appellant, the Learned Magistrate has sought to impose a fine of SR 10,000/= (ten thousand) from which a sum of SR 5000/= (five thousand) is to be paid to the victim as compensation. A term of 2 months imprisonment is to be imposed in default of payment of the fine. Learned Counsel has moved that the conviction and sentence be quashed but not set out grounds as to why the sentence should be set aside. I therefore proceed to affirm the sentence imposed.

[11] Accordingly the appeal against conviction and sentence is dismissed.

Signed, dated and delivered at Ile du Port on 8 March 2018

M Burhan
Judge of the Supreme Court