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IN THE SUPREME COURT OF SEYCHELLES

CriminalSide: CN 11/2017

Appeal from Magistrates Court decision 213/2015

[2018] SCSC 263

D.L.
Appellant

versus

THE REPUBLIC
Respondent

Heard: 9 January 2017 and 15 January 2018

Counsel: Mr. Nicole Gabriel Attorney at Law for the Appellant

Ms. Emily Gonthier, Assistant State Counsel for the Respondent

Delivered: 16 March 2018

JUDGMENT

Burhan J

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

Count 1

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.

Particulars of offence are that, D L (name withheld) residing at Anse Boileau Mahe, on the 26th of November 2014 at Anse Royale Les Canelles Mahe sexually assaulted --- (name with held) a girl of 8 years of age by penetration of body orifice for a sexual purpose that is by way of inserting your finger into her vagina.

[2] After trial on the 27 March 2017, the Learned Magistrate, convicted the Appellant and proceeded to sentence him on the 16 June 2017, to a term of 10 years imprisonment.

[3] The Appellant appealed against the conviction and sentence but subsequently informed Court, he would be appealing only in respect of the sentence imposed.

[4] The main grounds urged by Learned Counsel for the Appellant are that:

- a) The sentence of ten years imprisonment is manifestly harsh and excessive.
- b) The Learned Magistrate failed to consider fully the sentencing pattern involving similar cases.
- c) The Learned Magistrate took into consideration matters not relevant and not contained in the charge at the time of sentencing.
- d) The Appellant was a first offender and the Learned Magistrate failed to consider the fact that the Appellant was addicted to alcohol.
- e) The Learned Magistrate relied on cases in which the fact were not similar to this case and based her findings on these cases.
- f) Although the Appellant was charged with a single Count the Learned Magistrate took into consideration factors not mentioned in the charge at the time of sentencing.

[5] On considering the reasoning of the Learned Magistrate in sentencing the Appellant, it is apparent that she has taken into consideration the fact that the age of the victim was only 8 years old and that of the Appellant 26 years. She has also taken into consideration the fact that the act of assault was varied and prolonged. She has also taken into consideration the fact that there was penetration by way of a finger being inserted into the vagina of the victim repeatedly.

[6] When convicting an offender it is the duty of the Learned Magistrate, to ensure that all the evidence relevant to proving the elements of the offence must be considered, analysed and accepted by the Learned Magistrate. At the time of sentencing, it is the considered

view of this Court, the Learned Magistrate, is not confined or limited to consider only the evidence referring to the particulars of the offence, he or she is free to consider, other evidence, such as aggravating factors borne out in the evidence, facts put forward in mitigation, including family circumstances and previous convictions. Therefore Learned Counsel's contention that the Learned Magistrate should have confined herself to the facts relevant to the charge at the time of sentencing has no merit.

[7] On perusal of the aggravating facts as borne out in the evidence of the prosecution, it is apparent that the sexual assault on the victim was repetitive in nature and the victim had been threatened to be put on fire and the house burnt, if she did not consent. I also observe that the Learned Magistrate has also taken into consideration the fact that the victim has been traumatized by the assault as she experiences flash backs and has developed anxiety spells for which she is still undergoing counselling. I therefore, do not agree with the contention of the Appellant that the Learned Magistrate had failed to take into consideration material factors and has taken into consideration only facts which were not relevant.

[8] No doubt the sentencing pattern will slightly vary from case to case, depending on the circumstances of each case. The law provides that a minimum mandatory term of 14 years imprisonment or a maximum term of 20 years imprisonment be imposed for such offences. However sentences ranging from 6 to 11 years have been imposed, depending on the circumstances of each case.

[9] In instances where there is no penetration, **R v GP [2017] SCSC 513** and the convict has pleaded guilty expressing remorse, **R v SM [2016] SCSC 517**, the range of sentencing has been between 6 to 7 years. However in cases involving penetration, where there is a big age difference between the victim and the offender **C v R [2015] SCCA 28** and in instances where the sexual assault is of a repeated nature from a person of trust **R v FH [2017] SCSC 293** and threat is also involved, as in this instant case, it cannot be said that a sentence of 10 years imprisonment on such an offender is harsh and excessive. The Learned Magistrate has very aptly referred to the case of **JB v R [2017] SCCA 11**, where an appeal against a sentence of 10 years was withdrawn, when the Seychelles Court of

Appeal mentioned, there was also a possibility of the sentence being increased which indicates the serious view of Courts, in respect of such offences.

[10] In this instant case several of the aforementioned aggravating circumstances exist. The sexual assault was repetitive in nature, the victim was only 8 years old and the convict 26. She was threatened and the Appellant was in a position of trust at the time the offence was committed. His alcohol problem pales into insignificance. In the light of these circumstances it cannot be said that the sentence was harsh and excessive. I have no hesitation in dismissing the appeal and affirming the sentence of 10 (ten) years imposed by the Learned Magistrate.

Signed, dated and delivered at Ile du Port on 16 March 2018

M Burhan
Judge of the Supreme Court