

**IN THE SUPREME COURT OF SEYCHELLES**

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**Reportable**

[2019] SCSC 302

CA32/2017

(Appeal from Magistrate's Court

Arising in C No: 992/15 /2015)

**S E**

*(rep. by Nichol Gabriel)*

**Appellant**

versus

**REPUBLIC**

*(rep. by Evelyne Almeida for Attorney General)*

**Respondent**

**Neutral Citation:** *S E v R* (CA32/2017) [2019] SCSC 302 (21 March 2019).

**Before:** Dodin J.

**Summary:** Sexual Assault- sentence of 6 years imprisonment. Appeal against conviction and sentence.

**Heard:** [15 February 2019]

**Delivered:** [29 March 2019]

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**ORDER**

**On appeal from** C No: 992/2015 Magistrates' Court, Seychelles (Magistrate Jessica Kerr and Magistrate Vipin M. Benjamin).

The appeal is dismissed. Conviction and sentence upheld.

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**JUDGMENT**

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**DODIN J.**

[1] The Appellant S E stands convicted of one count of sexual assault contrary to Section 130(1) read with Section 130(2)(d) of the Penal Code and has been sentenced to a term of 6 years imprisonment.

[2] According to the evidence adduced before the Magistrate's Court, on the early morning of 25<sup>th</sup> January 2015, the complainant, an off duty police officer left the Katiolo night club after she had had some drinks with friends and was walking home alone when she was accosted by a man from behind who grabbed her shirt at the right shoulder and pushed her to the ground. The person told her "You're the police officer. You have previously placed me in jail." She struggled and screamed and he tore off her leggings and shirt and the man asked her if she had children then told her to give him "some vagina". At that moment she realised that the man had a knife in his hand and by the lights of passing vehicles she recognised the man as S E, the Appellant.

[3] The complainant testified that she knew the Appellant well because they had lived in the same area of Anse Aux Pins and she recalled the day when she was on duty and he was brought to the police station by other officers and she placed him in a cell. The man then had sexual intercourse with her without protection and when he was done, told her not to make any noise or she would get into trouble with him. The complainant put on her torn clothes and returned to Katiolo night club for help whereby she was taken to the police station where the investigating and medical procedures were initiated.

[4] The Appellant put forth an alibi defence. He made a dock statement maintaining that he was at home with his wife and relatives where there was a party for his grandmother. After the party, he and his wife slept in the living room until early morning when the police came and arrested him.

[5] The Appellant now appeals against both conviction and sentence raising the following grounds of appeal:

Against conviction:

- i. The learned Magistrate erred in relying on the evidence of the medical Doctor when the medical report itself did not specifically indicate sexual assault.
- ii. The learned Magistrate erred in law and in fact by dismissing the defence alibi that he was at home with his girlfriend.

- iii. In all circumstances of the case the conviction of the Appellant was unsafe and unsatisfactory.

Against sentence:

- i.. The sentence of six years given on the Appellant was manifestly harsh and excessive and wrong in principle.
- ii. The learned Magistrate failed to consider fully the sentencing pattern involving similar cases before handing down the sentence that he did.

[6] On the first and third grounds of appeal shall be taken together as they deal with medical and DNA evidence. Learned counsel for the Appellant submitted that in order to prove sexual assault of the nature the complainant testified about, the prosecution must prove that there was penetration of the body orifice of the complainant for sexual purpose. Learned counsel submitted that the evidence of the medical doctor did not disclose any such evidence. In the third ground of appeal the Appellant submitted that although there was notice that DNA evidence was to be adduced, the same was not adduced and no expert for DNA appeared in Court.

[7] These grounds of appeal seem to suggest that the doctor who testified must have been positive that there was penetration of the vagina of the complainant in order for the element of penetration to be proved and that there must be DNA evidence establishing that the Appellant's DNA was detected on a part of the complainant's body or in her body orifice. Learned counsel appears to be asking the Court to disregard the evidence of the complainant and that without physical signs of penetration or presence of the Appellant's DNA on the complainant, the element of the penetration cannot be established. Should the Court adopt this approach, that is, unless there is injury to the private part of the complainant or some residue resulting from sexual intercourse such as semen, a conviction cannot ensue. This approach is certainly unacceptable and impractical and would be a serious regression in the process of administering justice for offences of a sexual nature.

- [8] The evidence adduced showed that the complainant had been subjected to certain assault. There were injuries to her body and her clothes were torn, consistent with her having been in a struggle. The evidence of the complainant also established that she stopped struggling once she saw that her assailant had a knife and before the sexual intercourse took place. The evidence also showed that the complainant being 29 years old and a mother of two children was unlikely to sustain injury to her vagina as a result of sexual penetration despite the said sexual act being done against her will.
- [9] The learned Magistrate therefore clearly believed the complainant. Corroboration is not a requirement to establish any of the element of the offence. These grounds of appeal are therefore misconceived and have no merit.
- [10] The second ground of appeal in respect of the Appellant's alibi is also seriously flawed. The Appellant only made a dock statement that he was at home with his wife and child and a couple of his relatives who used the bedroom whilst he and his wife slept in the living room. His wife could not testify because she had passed away at the time of the trial but she never even made a statement to assist the Appellant at the time. None of the relatives who were at the Appellant's house also testified in support of his alibi. Clearly the learned Magistrate placed less credibility on the dock statement of the Appellant and rightly so since such statement was not tested by cross-examination as the testimony of the complainant had been. Secondly, the witnesses who testified having seen the Appellant earlier did not testify to the whereabouts of the Appellant at the time of the commission of the offence. It cannot be said therefore that their testimonies corroborated the alibi of the Appellant also merely because they had not seen him at the time of the commission of the offence. I therefore find this ground of appeal to be devoid of merit and cannot be sustained.
- [11] Consequently I uphold the conviction of the Appellant and I dismiss the appeal against conviction in its entirety.
- [12] In respect of the appeal against sentence learned counsel submitted that the sentence of 6 years is harsh and excessive and that the learned Magistrate failed to fully consider the sentencing pattern imposed for similar offences.

[13] Section 130(1) of the Penal Code states:

*“A person who sexually assaults another person is guilty of an offence and liable to imprisonment for 20 years”.*

Section 130(4) provides for the matters to be considered by the Court in determining the sentence that would be appropriate for the offence:

*“(4) In determining the sentence of a person convicted of an offence under this section the court shall take into account, among other things-*

*(a) whether the person used or threatened to use violence in the course of or for the purpose or committing the offence;*

*(b) whether there has been any penetration in terms of subsection (2)(d); or*

*(c) any other aggravating circumstances.”*

[14] In this case, the evidence adduced showed that the Appellant knew the complainant and also knew she was a police officer and rebuked her for having once incarcerated him whilst she was on duty. He had a knife in his possession. He threatened the complainant both before and after the commission of the offence. The complainant’s clothes were torn. All these are aggravating factors which the learned Magistrate should have considered in imposing sentence. As rightly submitted by learned counsel for the Republic, to simply state that the sentence is harsh and excessive without stating the factual and legal reasons why is not sufficient to establish a ground of appeal.

[15] Secondly, the sentence imposed was well within the range of sentence provided by law which is a maximum of 20 years imprisonment. Having noted some of the aggravating factors above, I find in fact that the learned Magistrate was extremely lenient in the circumstances.

[16] Furthermore, an appellate Court should not interfere with a sentence imposed by a lower Court unless

- (i) the sentence is not justified by law, in which case it will be interfered with not as a matter of discretion but of law;
- (ii) the sentence has been passed on a wrong factual basis;
- (iii) some matter had not been properly taken into account;
- (iv) the sentence was wrong in principle or manifestly harsh and excessive or inadequate.

See *Michel v Republic* [1999] SLR 139

[17] Having carefully considered the reasoning for the sentence imposed, I am satisfied that the sentence was unduly lenient and definitely not at all harsh or excessive. Both grounds of appeal against sentence are dismissed accordingly.

[18] This appeal is therefore dismissed in its entirety.

Signed, dated and delivered at Ile du Port on 29 March 2019

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Dodin J