

SUPREME COURT OF SEYCHELLES

Reportable/Redact
[2019] SCSC ..633
CO 53/2017

In the matter between:

THE REPUBLIC

(rep. by Khalyaan Karunakaran)

Republic

and

PD

(rep. by Alexia Amesbury)

Accused

Neutral Citation: *Republic v De* [REDACTED] (CO53/2017) [2018] SCSC (26 July 2019)

Before: Burhan J

Summary: Sexual Assault. Failure of the mother to take any action immediately on what the children said as she believed the accused, does not exculpate the accused from the acts he had committed on them.

Heard: 10th April 2018, 11 May 2018, 23 May 2018, 06th December 2018. 11 February 2019 and 8th April 2019.

Delivered: 26 July 2019.

ORDER

Accused found guilty and convicted on all four Counts.

JUDGMENT

BURHAN J

[1] The accused in this case has been charged as follows:

Count 1

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

Particulars of offence are that, accused (name withheld), 46 year old male ----- of [REDACTED], on 13th May 2017, at [REDACTED], sexually assaulted one 8 year old girl namely (name withheld) by the penetration of the body orifice, namely the vagina, of the said----- with his finger, for a sexual purpose

Count 2

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

Particulars of offence are that, accused (name withheld) 46 year old male ----- of [REDACTED], on 13th May 2017, at [REDACTED] sexually assaulted one 8 year old girl namely (name withheld) by licking the vagina of the said ----- and also forcing the said ----- to touch his penis.

Count 3

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

Particulars of offence are that, accused (name withheld), 46 year old male ----- of [REDACTED], on 13th May 2017, at [REDACTED], sexually assaulted one 6 year old girl namely (name withheld) by the penetration of the body orifice, namely the vagina of the said ----- with his finger, for a sexual purpose.

Count 4

Sexual Assault contrary to Section 130 (1) of the Penal Code read with Section 130 (2)

(a) of the said Act and punishable there under.

*Particulars of offence are that, the accused (name withheld) 46 year old male -----
of [REDACTED], on 13th May 2017, at [REDACTED], sexually assaulted one 6
year old girl namely (name withheld) by licking the vagina of the said ---- and also
forcing the said ----- to touch his penis.*

[2]

The first witness called by the prosecution was the social service worker Marinella Antoinette Leitner. She stated the mother (name withheld) of the two girls (name withheld) 6 and 8 years old, had come to meet her in her office on the 9th of October 2017. The mother had informed her that the two girls, her daughters had been sexually abused and inappropriately touched by their stepfather the accused. The children had informed their mother on the 7th of October 2017 that if their step father was coming back they were scared and told her about an incident that had happened some months back. They had said that when she was not present at home their stepfather had licked and touched their vagina after removing their clothes and putting them on the bed. Thereafter witness stated that the statements of the children were recorded by the police in the presence of her colleague Julia Alphonse another social service worker. They were also subject to medical examination. Witness admitted under cross examination that she had not mentioned the words sexual abuse or inappropriate touching in her statement nor had she mentioned penetration but what she stated amounted to sexual abuse. She stated that the children had told their mother about the incident only in October which was 5 months after the incident.

[3]

Child X, 6 years old, gave evidence stating that the accused had put his finger very hard between her legs and it was painful and she cried. This had occurred on the day her mother had left for a picnic. While she and her sister were watching cartoons, the accused had told them “lets us all go and take a bath.” They had not wanted to go and he had dragged them. In the bathroom he had asked her to touch his penis which she had not done and then he

had removed her clothes and licked in between her legs. Then he had wanted them to come to the bedroom and had taken them to the bedroom and put his finger in between her legs. Witness X further stated the accused had also done the same to her sister. Under cross examination she stated that same day her mother had come back in the night drunk and she had told her what had happened and her mother and the accused had a fight and her mother had broken a flower pot. She further stated that the accused had left the house and her mother was angry and her mother had spoken to her and her mother had told her to tell the story of what happened. She admitted her mother had come from work and prepared her on what she should tell Court the next day.

[4] The next child witness Y, 8 years old, stated that she and her sister X lived with their mother and the accused in the same house. She stated that on the 16th of May her mother had gone to a party and left her and her sister with the accused. She too referred to the incident where they were watching cartoons and the accused had taken them to the bathroom even though they refused to go and removed their clothes. He had asked them to touch his penis. He had then taken them to the bedroom and licked between their legs. He had done the same things to her sister as well. She stated she was angry and it hurt when he licked her vagina. He had also put his finger in their vagina and asked them to lick his milk. He had asked them to watch a film that was not appropriate a "Maleive" film. He had then said that he had gotten two women. He had not touched them thereafter.

[5] Under cross examination she admitted her mother would beat her with a belt. She stated that when her mother came home that night, she was aware she had come but had not told her of the incident. She had gone back to sleep. The next day she too had told her mother the accused had taken them to the bathroom and they had not wanted to go and the mother had said she will ask the accused when he comes home. She stated the accused frightened them not to tell the incident to the mother and said that if he dies he will come back and play with them in the night. She also stated that she had waited until October as she was also afraid he would beat her. She denied her mother had asked her to make up the story.

[6] When one considers the evidence given by their mother she stated that she had lived with the accused for a period of 5 years. She had 3 children but none with him. At the beginning

their relationship was okay but subsequently there were arguments fights and shouting. She stated the children referred to the accused as daddy. She further stated the accused had left her on the 13th of September 2017. It appears a quarrel had occurred between them and the accused had threatened her with a machete which resulted in the police intervening. She stated on the 7th of October 2017, her daughter X had told her that when she and her sister were sitting in the living room and watching cartoons in the living room, the accused who was dressed in a green towel, had asked them to come to the bathroom to have a bath. The accused had taken them to the bathroom, removed their clothes and forced them to touch his penis. They had not wanted to and she stated he had taken their hands and placed it on his penis. They had then left the toilet and gone to watch TV. He had called them to the room but they had not gone. He had come and taken them and removed their clothes and put his face between their legs and started licking and with his finger played with their vaginas. Her children had told her he had been drinking at the time. It appears all these intricate details were told to her by her children around the 7th of October 2017 as they feared the accused would beat them and in fear of the threat he would come back from the dead to play with them.

[7] The mother of the children further stated she recalled the incident would have happened on the 13th of May which was a Saturday as she had left the children alone with him that day and gone on a picnic. When she came back he had been playing music and had been drunk. The next day morning her child had told her that daddy had told them to take a bath in the bathroom and then said he had got two women. She had asked the accused when he came home about the children having a bath together with him had he had replied they were the ones who had been watching him when he was bathing. Thereafter the children had not spoken of it until the 7th of October. She had noticed during that period between May and October that they would not take their usual baths and they would complain their private part was hurting.

[8] On hearing what her children said on the 7th of October 2017, she had phoned the accused but he had not answered and she had then called and told his mother and she had hung up. She had phoned the accused on Monday and the accused had answered the call and she had told him what he had done. He had listened to her and then told her if he goes to jail, he

will kill her. She had informed him she was going to the social services to file a report and had done so. She had gone to the social services and statements were recorded from her children and they were subject to medical examinations.

[9] Under cross examination, she stated that her child X had ~~not~~ told her about the incident in May and she had wanted to question the accused in respect of it. After the accused had denied it saying it was the girls who were looking at him when he bathed, she had not gone to the police. She stated that she did not take the children to a doctor as she thought they were not scrubbing their private parts properly and they had complained about it only once. She said she had chosen not to further question the children of the incident in May as they were "kids" but had asked the accused and when he denied it, she had believed him to be telling the truth. She admitted the accused had left ~~on~~ the house on the 13th of September. She further stated that the children told her about the incident in October had told her that the accused had been frightening them after the incident in May. She further stated that she had asked the accused to leave as he had threatened her with a machete and the police too had to come. She admitted that she had not mentioned the machete attack in her statement in this instant case.

[10] The next witness Karen Brigillia, a constable attached to the Child Protection Unit stated she had arrested the accused and recorded his statement. The statement was produced as P1. Dr. Setara Brioché produced the medical certificates of the two children as P1 and P2. Both reports referred to the fact that the hymen of both children were not intact. Mr. Nigel Confrance the Civil Status Officer produced the birth certificates of the children as P4 and P5. Thereafter the prosecution closed its case.

[11] The accused (name withheld) gave evidence under oath. He stated that he is 47 years of age and mentioned his occupation. He stated that his first relationship was with one [REDACTED] he had had one child from her and when he left her, his daughter was 16 years old and there was no allegation that he had abused his child. He next had a relationship with the mother of the children in this case who had 4 children at the time he met her, two girls and two boys. He further stated that at the time he met her the girls were 5 and 7 years old. He denied the fact that he had abused any of the girls. He stated he had heard the

evidence of the two girls that he had abused them. He stated that the mother of the children had never confronted him with such allegations and the first time he heard of allegations was when he was arrested in October. He produced a 15 sheets of text messages as item D1 from the mother of the two children in this case sent to his sister AD (name withheld). The text messages were dated 1st, 2nd, 3rd and 6th October 2017. It appears, on a summarising of the text messages that the mother of the abused girls had been complaining that the accused was drinking and smoking a lot, telling lies and hiding things and therefore they had to part. She had also stated in her texts that she is tired of the fighting and swearing that was going on and that the accused was still giving money to his former wife MD (name withheld). She also refers in her text dated 2nd October 2017 that the accused had done something deplorable to her children and the children had confessed to her. The accused stated the reason for her to bring this allegation against him was because he had separated from her. He stated that the mother of the children was always drunk and always swearing at him.

[12] Under cross examination he stated that the mother of the children had told his sister these things by text, to try to get her speak to him and convince him to get back to her. When he did not, she had made up these allegations against him. He denied beating the child Y. He denied the allegation that he had sexually assaulted the two children. It also transpired that since leaving the mother of the children, he has been with another woman named Agnes. He stated by referring to the deplorable act it was not in reference to him beating the children.

[13] The other witness AD stated that her brother was the accused. She stated she knew the accused her brother and the relationship with the mother of the two children. She stated she was aware that the child Y would pee in her pants due to being assaulted by the mother. She stated her brother was a caring father who would look after them, feed them and bathe them. She stated that she was first alerted by a cousin in [REDACTED] that the mother of the children was going to make a police report against her brother. Her cousin had received messages from the mother of the children and forwarded it to her. She had forwarded the messages to her sister RD before losing her phone. However RD was unable to come to Court as she was undergoing [REDACTED]

[14] Witness CD another sister of the accused called as a defence witness, stated that she knew the mother of the children as she had been staying with them for a period of 10 to 11 months in the same house at [REDACTED]. She stated that from the time the children got up at 5.am their mother would beat them. They would be beaten to take a bath, eat their breakfast. The child Y would pee in her pants and would be beaten from the bus stand to the house. The accused would protect them. They looked forward for him to return from work. She stated that she was aware that the accused and the mother of the children had separated several times but when the mother called they would get back together. Under cross examination, she stated that during vacations, the children would be at home and there were times when she took leave she would also be in the house with them. It is clear that other than these instances, she was not present at all times in the house to observe what happened.

[15] RD, another sister of the accused, stated that she knew the mother of the children as she had met her once. She stated she had received the texts from her cousin in [REDACTED] whose wife was a [REDACTED] friend of the mother of the children. Her cousin had sent it to her sister who had forwarded it to her. The text according to her memory referred to the accused ex-wife and a picture of the accused [REDACTED]. She identified the texts produced as D1. She stated what was sent to her were screenshots not messages. The other witness MD stated that she was the wife of the accused and had a child from him a son who was 17 years old. She had three daughters. They had separated and got together again and the accused would take care of all the girls even the girls who were not from the accused. They were 5, 11 years and 15 years old. She stated she had gone abroad and left the three girls with him and he had taken care of them. She stated that the accused had separated from her as she had an affair with someone else which he could not tolerate. She stated that when she heard about what had happened to the accused, she could not believe it. She admitted under cross examination that the accused was supporting their son who was with her and she would use the money for all three children and he had paid her for the current month as well. Thereafter the defence closed its case and both parties made written submissions.

[16] The main defence of the accused is that the mother of the children had coached the children to make up a false story amounting to sexual abuse when the accused, having had a quarrel

with her, left the house in September and refused to come back to her again in the month of October. The main ground relied on by the defence is that even though in her evidence she had stated that she knew about the incident from the children on the 7th of October 2017, in a message sent to a relation the wife of the cousin of the accused, she had stated on 2nd of October 2017 that the accused had done deplorable things to the children. Therefore the defence contends that the version of the mother that the children told her about the incident only on the 7th of October is a fabrication and she was instrumental in coaching the two children to make false allegation against the accused, as she was angry that “the love of her life” had left her. Firstly, the mother states in her evidence, she was told to her by child X when she came back from the picnic about the incident, though there was no mention of intricate details. When she confronted the accused with it when he came back from work, he had denied it and told her the children were the ones who would look at him when he took a bath. Her evidence indicates that she chose to believe him at that stage. The child X, also in her evidence states that she told her mother when she came back and there was a fight. Even child Y states she told the mother about the incident in May. Therefore the mother was aware of an incident from the month of May but chose to believe the accused over her children which she admits in her evidence under oath. Even the text dated 2nd October 2017 D1, relied on by the defence, supports the fact that she was aware even before the 7th of October that the accused had done deplorable things to the children.

[17] Therefore it cannot be said that in her evidence she stated she was aware of the incident only on the 7th of October. Further even though the mother of the children may have believed the explanation given that day by the accused and not taken any action on what the children said immediately, it is the view of this Court that this does not exculpate the accused from the acts he had committed on them. Child X in her evidence clearly states she told the mother of the incident in May when it occurred, but it appears that though aware of the incident since May, the mother had chosen not to go immediately to the authorities or police but to believe the explanation of the accused. *Pascal Fostel v R (CR SCA NO. 19 of 2012)*, which also involved an offence of sexual assault, the Court found that –

“(...) past history and the failure to report immediately after the incident were side issues which did not go to the root of the case against the Appellant. What was in the trial was whether the Appellant committed the offence in question on the material day and time, without more or less.”

No doubt when the children heard the possibility of the return of the accused and his earlier threats, they once again expressed their fears of the accused to their mother as borne out by the evidence of child Y.

[18] Several witnesses were called by the defence to show that the accused had been in charge of other children and had not committed any such abuse on them. What is relevant is to decide on whether the accused committed the acts of sexual abuse on the victims in this case and not the absence of evidence of assault on other children. Understandably, the witnesses who deponed to such character were his own family members and his former wife whose children he is now maintaining. It is also clear from the evidence that the accused and his former wife are on good terms again and this was one reason for the breaking up of the relationship between the accused and the mother of the children. The contention of the accused that the mother got the children to make up this story in October as the accused had left her is unacceptable, as it is clear from the evidence of the children X and Y that their mother was aware of the incident since May and therefore the incident was not a spur of the moment fabrication, to get revenge from the accused for leaving her. Even the child Y in her evidence, speaks of threats from the accused and that he had threatened them that he would come back from the dead and play with them which appears to have terrified her more than the beatings of the mother. It is also clear from the evidence that though there was a complaint of pain in the private part after the incident, it was not taken seriously by the mother as she put it down to improper washing and the complaint of such pain was made only once.

[19] For the aforementioned reasons, I proceed to reject the defence of the accused.

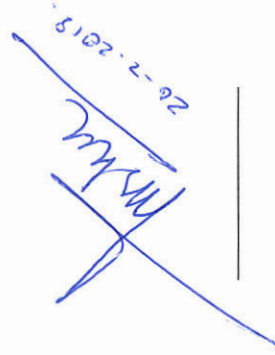
[20] On consideration of the evidence of the prosecution, I am satisfied beyond reasonable doubt that the children were not lying about the incidents of sexual assault on them described by them and committed by the accused. Even though their mother had not acted promptly in going to the authorities, they had mentioned it to her soon after the incident occurred to them but the mother had not sought details of what happened and had been

satisfied with the denial and the explanation of the accused that they were making things up. Even if the mother decided to make it a police matter only when the accused decided to leave her as borne out by the texts D1, this does not exculpate the accused from the sexual abuse acts done on the minor children.

[21] It is understandable that children of such tender age would be somewhat confused on dates and events when giving evidence over a year later. However, I observe there evidence is very similar to each other in the description of the acts done to them which were done on both in the presence of each other. There is no doubt in their identification of the accused as the perpetrator of the said acts. Considering the very tender age of both children, I find it difficult to accept that they could be made to lie over such incidents. I therefore am satisfied that the children are not lying or telling a story which their mother has invented. In the case of *Lucas v Republic (2011) SLR 313* it was held that corroboration is not necessary when Court is satisfied that the children are not being untruthful.

[22] For all the aforementioned reasons I proceed to accept the evidence of the prosecution and reject the evidence of the defence. I am satisfied the prosecution has proved beyond reasonable doubt all the elements of the four charges against the accused, I proceed to find the accused guilty on all 4 Counts and convict him of same.

Signed, dated and delivered at Ile du Port on 26 July 2019



Burhan J