

IN THE SUPREME COURT OF SEYCHELLES

Reportable
[2019] SCSC ...
CS125/2017

In the matter between

Anna Karabash
(rep. by Frank Elizabeth)

Plaintiff

and

1. Ravind Soudhoo
(rep. by Samantha Aglae/ Laura Valabhji)

2. Zil Pasyon Resorts Limited
(rep. by Basil Hoareau)

3. Mr Francis Savy
(rep. by Basil Hoareau)

4. Mr Kishore Buxani
(rep. by Basil Hoareau)

Defendants

Neutral Citation: *Karabash v Soudhoo & Ors* [2020] SCSC CS125/2017
Before: Twomey CJ
Summary: claim of damages for sexual assault – proof of delict - liability
Heard:
Delivered: 3rd February 2020

ORDER

The suit is dismissed with costs.

JUDGMENT

TWOMEY CJ

Background

[1] The Plaintiff alleges that on 4 May 2017, the First Defendant sexually assaulted her at knifepoint during her stay at Zil Pasyon, Felicite Island. The First Defendant at the material time was employed in housekeeping at the Resort. This matter was tried in a criminal case (CR No. 15/2017), wherein the First Defendant was acquitted. The Plaintiff avers that the First Defendant's actions amount to a fault in law, for which the Second, Third and Fourth Defendants are vicariously, jointly and severally liable. She claims SR8, 000,000 in moral damage. The Second, Third and Fourth Defendants are also being sued in their personal capacities. The Defendants deny the averments and have raised a joint plea that this matter is frivolous and vexatious.

[2] The issues to be decided, as agreed by counsel in this case prior to the hearing, are as follows:

1. Did the First Defendant on Felicite Island sexually assault the Plaintiff on 4 May 2017?
2. If so, does this constitute a fault in law?
3. If so, was the First Defendant acting in the course of his duty and employment with the Second Defendant at the material time?
4. If so, are the Second, Third and Fourth Defendants vicariously liable for the acts of the First Defendant?
5. If liability is established, what is the quantum of damages to be awarded?

The Evidence

Evidence of the Plaintiff, Anna Karabash

[3] The Plaintiff gave evidence that she is a journalist and PR Specialist from Moscow. She was hired by Olga Fler to write an article about the Zil Pasyon Resort on Felicite Island. She arrived there on 1 May 2017 and stayed at villa #11. She stated that she had not met

the First Defendant before he came to her villa to sexually assault her. She stated that on 3 May 2017, she walked from Olga's villa to hers, which was about a five-minute walk, wearing a dress and sneakers. She said that she went to bed after 11pm.

[4] She gave evidence that while she was sleeping, she realised someone was in her bed. She opened her eyes and saw a 25-30cm full-metal knife by her neck and a naked man on top of her. She started to shout but was told to be silent. She said that the man was talking to her a lot. She described his demeanour as "crazy", "furious" "unpredictable" and "aggressive". She believed he was under the influence of drugs and that he was intoxicated. She was told that he was going to rape her. She said that she tried to fight for the first half an hour, but she is not a man and she was sleepy, so it was not possible. She stated that she realised she was out of power and cried. She said that she told him many times to stop what he was doing and to let her go.

[5] She stated that she was totally naked on the bed by this point. Later, in cross-examination, she clarified that she was wearing only a panty. The Plaintiff further stated that she tried to run away twice, but the man grabbed her, brought her back to the villa and raped her numerous times. He said he would rape her then kill her, because he knew he would go to prison. Plaintiff also stated that he told her he would kill her then kill himself too. She said the ordeal lasted almost two hours and she described it as the most horrible event of her life.

[6] She gave evidence that she told him she would need two minutes to shower. By this point, she had given the man a strong sleeping pill, the last of her stock, in his glass after persuading him to take a shower, as she felt this was the only way she could escape safely. She added aspirin to the glass so the fizzing would mask the sleeping pill in the water. She asked him to wear a robe after his shower because she did not want to see his nakedness again and he drank the pills. She stated that the sleeping pill was called Seroquil and she took it once a month to help her sleep during her work-related travels. She anticipated that it would take about 20 minutes to take effect.

[7] Afterwards, she had the First Defendant sit outside on the outdoor bed or sofa and spoke to him until he fell asleep. Once he was asleep, she ran as fast as possible. She dressed

first in her sneakers and dress and took her phone with her so she could use the torch function as it was dark. She was afraid the man would catch her and kill her. She stated that she ran to the restaurant area to look for security personnel; when she did not see anyone, she was frightened. She said she was too afraid to shout for help in case the First Defendant heard her. She entered an office or reception by a window and tried to make a phone call from there to the police, since it would be too expensive to make a call from her phone, but no one picked up and she could not fathom how to make an external call from the landline. She tried to use the computers as well. She was found by a security guard and they were later joined by another man once she told him that she had been raped.

- [8] The men took the Plaintiff in a buggy back to the villa to see if the perpetrator was there. The Hotel Manager, Lizzy, joined them after half an hour to interrogate the Plaintiff. The Plaintiff drank some alcohol to steady her nerves and said the Hotel Manager never offered her anything to drink. She stated that the Manager then left her alone in the crime scene to find the Plaintiff another place to sleep that night. She messaged her friend Olga and boyfriend, Andre, via Whatsapp in the interim. Eventually, the Manager returned for the Plaintiff, who packed some cosmetics, a purse and her iPhone. It was sunrise when she was taken to another villa. There, she took a shower and went to sleep. When asked about her injuries, the Plaintiff replied that there were no bruises on her.
- [9] At 7:00 am on 4 May 2017, she took another shower and went to the restaurant. She said nobody came to help her, though she accepted that Lizzy came to collect her and her friend Olga to take them to the office of the General Manager. She said she was examined by the nurse of the Hotel who commented on the lack of bruising. She was made to wait outside in the hot sun while the police inspected the villa. She stated that no one offered her anything to eat or drink while she was waiting. She interacted with Mrs. Valabhji who she claimed asked her whether she received pleasure the night before.
- [10] She was taken later to La Digue, where she was examined again. She gave her statement to the police on La Digue and left the country that same night to return to Russia. There, she went to a doctor on 6 May 2017 and began her anti-HIV treatment. She stated that

she is undergoing therapy for her psychological trauma and she takes herbal anti-depressant medication sometimes.

[11] In cross-examination, the Plaintiff stated that sometimes during her stay at the hotel staff stopped in their buggy to ask her if they could help her get somewhere or to say hello, but she does not remember those people. She stated that she does not know if the First Defendant stopped beside her to talk to her, but she cannot recall having any conversation with him. The Plaintiff further stated that her villa was tidy when she went to bed that night and that she used a magnetic card to enter the room. She cannot remember if any window was open or whether the air-conditioning was on or off. She stated that her room was dark and that she turned on a small light by her bed. She further said that the First Defendant cut her panty with a knife, and stated that he spoke to her in English. She later added that her panty had been cut with a knife while she was sleeping, and that it had already been cut when she woke up. She said the panty was partly on her body when she opened her eyes.

[12] She stated that when he was asleep and she left the room, she saw the knife on the floor at the entrance to the villa. She said she scratched him on the back during their struggle and that she was proud to have seen photos of the same during the criminal trial. When shown photos of the man's back, she said she could not remember where she scratched. When counsel commented that they were light scratches, the Plaintiff replied that it was not a big fight.

[13] Further, in cross-examination, she stated that she made the First Defendant shower because he was dirty and sweating too much. She said that he monitored her movements. She said that she removed the pill from her cosmetics bag that was also on the bar table. She said he drank the water that she prepared for him on the terrace. She further stated that he lost the knife on the floor somewhere by that point and she did not notice it. She said the door leading outside was closer to him than it was to her while he was showering. She said before bed she had brought the water bottle and glasses to the bar by the shower. When counsel commented how convenient it was that the aspirin, sleeping tablet, water bottle and glassware were on the bar by the shower, the Plaintiff responded

that she was lucky. She said that the sleeping tablet was pale pink in colour and did not dissolve in water. She stated that she offered the First Defendant a cigarette while they were on the terrace where the day bed was and she was waiting for him to fall asleep so that he did not sexually assault her again. She said that at that point they were both wearing bathrobes.

[14] She said that she never went into the cabana that was on the grass; she said she never used it. She denied having intercourse with the First Defendant outside in the cabana. She admitted that she knew there were two phones in her villa and that she had used them before, but stated that she did not use it to call for help. She said her goal was to run away as she was afraid of the man in her room.

[15] She stated that when she returned to the villa with the security guards, she did not see the First Defendant sitting outside. She went onto the terrace to smoke a cigarette and did not recall asking the First Defendant to return her cigarettes and her lighter. She did not see the knife.

[16] Further in cross-examination, she stated she was not sure whether the man was under the bed cover with her when she awoke to find him on top of her, as the events had transpired a year and a half ago. She stated that the room was dark when she woke up. She further said that she was raped several times in the bed and several times outside the bed. She stated that she managed to escape once he had started to rape her on the bed and she jumped on the floor and ran away. She managed to get 15 metres away from the villa, naked and barefoot, before he caught her and brought her back. She said that she fell down a lot during the night, but she cannot recall if she fell down whilst trying to run away. She later accepted that she said in the criminal trial that she fell on her right knee when she tried to escape.

[17] She further stated that the First Defendant raped her again upon their return to the villa on the floor after he pushed her down. He then pushed her back on the bed and continued to sexually assault her there. She cried and told him repeatedly to stop and tried to resist him penetrating her, but she was exhausted and had no power to fight him anymore. She further stated that she managed to escape him a second time because he was slippery with

sweat, but she was again caught 15 metres from the villa. Counsel pointed out that the door she used closes automatically and that they would not have been able to re-enter without a key card. The Plaintiff suggested that the First Defendant blocked the door with something before chasing her to prevent the door from closing.

[18] The Plaintiff further clarified that she put aspirin in two glasses, one for her and one for the First Defendant, but she only put the sleeping tablet in his glass. Counsel demonstrated in Court that an aspirin tablet that is dissolved in a glass of water will fizz momentarily then the water clears once the liquid has settled. The Plaintiff did not disagree that the water will clear once the fizzing has stopped.

[19] Counsel suggested to the Plaintiff that if he had given the First Defendant a sleeping pill, he would not be smoking outside when she found him later. She responded that it was not her expertise to understand his behaviour. Similarly, counsel suggested to the Plaintiff that if the First Defendant had raped her then realised that the Plaintiff had escaped from the villa, he too would have fled. Instead, he went outside to smoke a cigarette. She replied that the effects of the sleeping pill could explain his behaviour. The Plaintiff maintained that she “was sexually assaulted many times at knife point”.

[20] The Plaintiff was shown a photograph of her toe injury (Exhibit D1 (8)), which she stated she incurred during her fight with the First Defendant. She stated she occasioned no further injury during the sexual assault. Counsel reminded the Plaintiff that in the criminal trial she stated that she had not occasioned the injury to her toe during the assault; instead, she had been injured before the incident. The Plaintiff maintained that she was injured during the assault. Counsel further suggested that in light of her pale complexion, a violent rape experience as described would have resulted in noticeable bruising. She denied the same.

[21] When questioned about her wording in the Complaint concerning her having allegedly been raped at knife point repeatedly, the Plaintiff clarified, “I was repeatedly rape[d] and a man came with a knife. That is my claim.”

- [22] Counsel further pointed out that the Plaintiff claimed her iPhone could not make calls because it was too expensive to do so, but in her criminal trial she testified that her phone was broken and she had left it in the villa when she fled. She clarified that the screen was broken and stated that she may have missed some details because the event was traumatizing. She said she used her phone's torch function because it was dark outside.
- [23] The Plaintiff clarified when presented with photographs that the torn sachet photographed by the police on the terrace was for the aspirin she used (Exhibit D1 (19)). She stated that she presented the sachet to the First Defendant to show him that she had given his aspirin. She denied having put the two bottles on the terrace outside, as photographed in Exhibit D1 (20). Counsel pointed out that in the criminal trial she had said that she and Lizzy drank from those water bottles on the terrace.
- [24] The Plaintiff further stated that she dressed herself once the First Defendant fell asleep because it was not comfortable to run in a bathrobe. She stated that the dress she changed into was knee-length. She stated that she did not run to her friend Olga because she did not think her friend could defend her against a rapist; she was looking for a male security officer. She said that she did not go to the villa next door because she wanted to run as far away as possible. She maintained that she saw the First Defendant's knife on the floor in the villa before leaving, but did not think to pick it up because she saw no reason to do so. She confirmed that she was left alone in the crime scene while Lizzy tried to find her alternative accommodation for the night. She agreed that she was on her own in the villa for a long time, perhaps 40 minutes. Counsel reminded the Plaintiff that she had informed the Hotel staff that if they could not secure another villa for her then she would sleep in the same villa as long as they changed the bed sheets.
- [25] Counsel suggested that the medication prescribed to the Plaintiff on the date of her arrival in Moscow were to treat a mental disorder, which manifested before the date of the incident. The Plaintiff denied this but also accepted that she had anxiety with flying.
- [26] Email correspondence between the Plaintiff and Mrs. Valabjhi dated 5 and 6 May 2017 were adduced into evidence as Exhibit P3. In one email, sent while the Plaintiff was at home in Moscow, she stated that she "started to talk to [the First Defendant] in a warm

manner and after he was a bit more relaxed, [she] managed to give him super strong sleeping pill [she] had with [her]. [She] told him it is good to prevent probable hangover” (sic).

[27] Further, in the same chain of correspondence, the Plaintiff stated that Lizzy wrote down the Plaintiff’s account but the Plaintiff never signed the document. Counsel pointed out that in the criminal trial, Plaintiff alleged that Lizzy had forced her to sign the said document. The Plaintiff explained the discrepancy by saying that she was traumatised. Counsel also stated that the Plaintiff lied in the criminal trial about having lost the recording of her conversation with Mrs. Valabjhi once she had sent a copy to the police, following the Plaintiff’s assertion that the recording was bad quality and that there was no sound so she deleted it.

[28] Counsel further identified in the email correspondence above that the Plaintiff had, upon arriving in Moscow immediately claimed the sum of one million Euros from the Hotel, citing, “probably you and other co-owners do not want to get the story worldwide, public and go to the Seychelles Court, then we could discuss one million Euros compensation for the damages I had from this dramatic accident. I could provide you with my bank details. If this money compensation is not guaranteed to me until 11pm Moscow time next Monday 8th May, newstories will be released and we will start filing the suit against Zil Pasyon in Seychelles’ Court. Let me know what you and your partners decide...To learn better who I am in Russian media, you could find my publication via the links [Tatler, Forbes] ...” (sic). The Plaintiff accepted that she wrote these words and said that this was a mistake.

Evidence of the Plaintiff’s former boyfriend, Andre Braginski

[29] The witness confirmed that he has known and been in a relationship with the Plaintiff for several years. He stated that she is a well-established journalist and that she very frequently visits 5-star hotels around the world to give reviews for various publications.

[30] He gave evidence that he was due to arrive in Seychelles to join the Plaintiff on 4 May 2017 and was expected to leave on 10 May 2017. He stated that Olga made arrangements

for the Plaintiff's travels. He confirmed that he was in regular communication with the Plaintiff via WhatsApp when she was on Felicite.

[31] He said on 4 May 2017, in the middle of the night, he received a short message from the Plaintiff saying that she had been raped, then he received a phone call from Olga, followed by one from the Plaintiff. He said both ladies seemed shocked, stressed and frightened. He cancelled his ticket once it was agreed that the Plaintiff would return home immediately. He met the Plaintiff at the airport on 5 May 2017 and she seemed frightened and stressed. He added that she was trembling and was pale.

[32] In cross-examination, the witness accepted that the Plaintiff was due to leave Felicite Island on 4 May 2017 as per her booking arrangements, irrespective of the alleged rape incident. He could not recall where they had planned on staying. Counsel pointed out that the Plaintiff's travel documents revealed that she was expected to depart from Seychelles regardless on 4 May 2017, to which the witness replied that the Plaintiff was going to change her ticket and extend her stay until 10 May 2017.

[33] The witness denied having any record of the message the Plaintiff sent to him concerning the alleged rape because he deleted it. He stated that the Plaintiff cried in the car from the airport.

Evidence of Bernd Pillay, former security guard.

[34] This witness was an on-duty security guard on the date in question on Zil Pasyon. He gave evidence that after midnight he witnessed during his patrol the Plaintiff, wearing a long dress, walking with "a bit of speed", but not running, towards the front office area. He observed her climbing through the window. She seemed relieved to see him, and told him that she was brutally raped by a housekeeping staff with a knife. She told him that the man was on the beach bed outside her villa, that she had given him a sleeping pill, and that she had told him she was going to have a shower before she left the villa. He described her demeanour as one of relief to have found someone to talk to, and that she seemed "excited", but she was not crying. She told him she wanted a drink.

- [35] He collected the chief security guard, namely Sanjeewa, and together they drove in a buggy back to the villa. He and Sanjeewa left the Plaintiff in the buggy when they reached the villa. He entered the villa through a door, which was unlocked and described the lighting in the room as bright. He held an umbrella to defend himself in case he was attacked. He approached the outdoor cabana, using his phone torch to illuminate the way, and found the First Defendant sitting in the cabana and smoking a cigarette. The First Defendant was dressed only in pants and seemed shocked to see the witness there; he did not say anything to the witness, nor did he try to run away.
- [36] The witness collected a pile of clothes in front of the cabana in the grass and he used his umbrella to collect the clothing and deposit them onto a stool inside the villa. He stated that the clothing comprised of a white boxer, a white bra, a red top and a grey panty. He stated that the photographs of the panty adduced into evidence as D1 (2) revealed that it had been torn on the side, which is not the condition in which he found them when he was first on the scene. In cross-examination, he maintained that he did not inspect the items of clothing one by one, but there was sufficient light in the villa for him to see that the panty was not torn.
- [37] When the First Defendant was brought into the villa by Sanjeewa, the Plaintiff was also there. The witness observed her saying that she did not want to see this guy anymore and to bring him out. He also observed her asking the First Defendant whether he had her cigarette packet or lighter. He did not respond to her.
- [38] The witness gave evidence that he and Sanjeewa escorted the First Defendant from the villa and the Plaintiff remained inside the villa on her own for about 10-15 minutes until the Resort Manager joined them.
- [39] The witness gave a statement to the police, which was admitted into evidence as Exhibit D1(5). He stated in cross-examination, in reference to his statement, that he could smell alcohol on the Plaintiff. He further stated that there was a little blood in the middle of the bed. It was clarified in re-examination that the side door could not be unlocked from the outside if it had been locked from the inside. He stated that when he arrived, the door was

unlocked. He stated that at no time was a knife pointed out to him by the Plaintiff, nor did he see a knife.

Evidence of First Defendant, Ravind Soudhooa

[40] The First Defendant, a 38-year-old Mauritian National, was initially called on his personal answers. It was clarified therein that he was dismissed from his employment with Six Senses Resort on Zil Pasyon, Felicite Island, because he fraternised with a guest. He further clarified that he had relations with a guest while he was off-duty. Later, in examination-in-chief, he stated that he worked as a Housekeeper on Felicite at the material time. He stated that he met the Plaintiff while on duty on 2 May 2017 while he was en route in a buggy from villa #5 to the laundry room. He stated that she was walking on her own on the road when he first saw her. He paused to speak to her for less than two minutes to see if she needed any assistance. He said that the Management of the Hotel always advised staff to ask the guests whether they require any help. At first, she said no, then he asked her whether everything was going well and said yes. He stated that she then asked about the activities on La Digue, then introduced herself and said he could visit her at villa #11 at any time. He stated that only Management staff have access to the list of guests and their respective room numbers staying at the Hotel; he was not privy to this information.

[41] He stated that on 3 May 2017 he was off-duty so he went to Praslin for the day. He returned at around 7:00pm to Felicite. He stated that Security checked his bag upon his return, and that it was not permitted to bring alcohol in one's bag. He sat and talked with a friend named Ashvin for a long time. He had a rum and coke with the friend. Afterwards, he walked to the Plaintiff's villa, which was about a 13-minutes' walk from his accommodation. He stated that the lights were still on at the Plaintiff's villa, and he knocked on her door. He said that the Plaintiff opened the door for him wearing only a white bathrobe. She told him to wait, closed the door, then re-opened it to let him in. They sat down on the terrace and smoked cigarettes together. The Plaintiff asked him to get a bottle of water for her from the minibar and he did, along with two glasses. He stated that the Plaintiff went to the bathroom and came back with two pills, which she

placed in his glass. She told him that the pills would enhance his performance during sexual intercourse. He drank them.

[42] He stated that the Plaintiff said he could stay with her until 7:00am the following morning, but he replied that he would have to leave that night otherwise he would be kicked out. Subsequently, they re-entered the villa and engaged in sexual relations on the bed. He did not use any protection, nor did the Plaintiff ask him to. He stated that she was not wearing any clothing underneath the robe. He stated that the lights were on in the villa during this time. He denied forcing himself on the Plaintiff, and stated that during the intercourse she asked him to stop because she was tired and he immediately did. He stated that the Plaintiff then reinitiated sexual relations and they engaged in further intercourse on the bed.

[43] Later, they went to smoke another cigarette on the terrace then proceeded to the cabana, where they had further sexual intercourse. He was wearing a blue pair of shorts and a blue t-shirt when he went outside to the cabana. Following such, the Plaintiff informed the First Defendant that she was going to take a shower. She left her cigarette packet and her lighter with him. He did not have a shower at any time in the villa.

[44] He said he sat and waited for the Plaintiff for 20 minutes before the security guard approached him with a torch. He was shocked to learn from the guard that the Plaintiff had claimed she was raped. When they passed the villa, he saw many things had been thrown about on the floor but he did not know who had thrown them. He saw the Plaintiff and she told the guard to ask him to return her cigarettes and her lighter. He remained at the security office until the police came.

[45] He stated that the pills he took made him feel light-headed, so he does not recall getting any injuries. He stated that he did not have those marks before he went to the Plaintiff's villa. He denied carrying a knife, using a knife to cut her panty, nor did he find a knife in the villa.

[46] He stated on 4 May 2017 he went to La Digue police station and cooperated with the police by allowing them to do all the necessary tests. He gave evidence that his employment with the Resort was terminated because he went against Policy.

Evidence of Officer Jean-Phillip Lucas

[47] The witness gave evidence that he was an Officer from the Scientific Support and Crime Record Bureau. He went to photograph the scene of the crime on the date in question. He stated that he arrived on Felicite around 11:00 am. The crime scene was not cordoned off, but he believed the villa was locked by Hotel Management prior to the arrival of the police. He stated that the Plaintiff had informed him that she had injured herself while running from the scene, but he did not recall seeing any blood on the shoes, nor did he photograph them. He further stated that the mosquito net was surrounding the bed and it was not damaged. He opined that the material of the netting was thin and could easily tear if someone was to force his way through it. He further confirmed that there was an empty packet of sleeping pills in the villa; all 10 pills were missing from the packet.

[48] He stated that the grey panty was not intact when he photographed it. He stated that he entered the villa and was joined after a few minutes by the Plaintiff and another CID Officer. He said the Plaintiff was “a bit traumatised” when he saw her and she was not speaking. She spoke mainly to a female police officer. She was crying “a little bit”. When asked to clarify about her demeanour, he stated that she seemed frightened and was reluctant to speak about what had happened. She otherwise cooperated with the police. He stated that she told him she had been raped, and that she had been subjected to vaginal and anal sex. He further stated that the Plaintiff informed him that she had consumed wine from the mini fridge.

[49] The Plaintiff identified certain features around the villa for him, including the clothes on the stool. He stated that the grey panty was found on the floor, not on the stool. The witness gave evidence that she had informed him that she had put something in that glass for the First Defendant to drink. He stated that the glass was found inside the villa close to the bed, not outside on the terrace.

[50] He photographed the Plaintiff at the Grand Anse Praslin Police Station and indicated the injury on the big toe on her left foot. He confirmed that the Plaintiff did not reveal any other injuries to him. He photographed the First Defendant at the La Digue Police Station and depicted his injuries on his abdomen, his back, his arm, and his thigh. When he asked the First Defendant how he got those injuries, he replied that he fell down from a bicycle on either Praslin or La Digue some time before. The witness agreed that the injuries were minor scratches.

[51] The witness stated that he and his fellow officers combed the villa and the rocks leading to the sea outside the villa; no knife was found. He stated that the First Defendant was cooperative with the police and consented to have his photograph taken, for a mouth swab to be taken from him, and for him to be medically examined.

[52] He accepted that his account in the criminal trial would be more accurate than the evidence he gave in the present case.

Evidence of Deputy Registrar-General, Fred Hoareau

[53] The witness produced certificate of incorporation of the Second Defendant (Exhibit P5), as well as the Memorandum of Association thereof (Exhibit P6), and confirmed that the Third Defendant is a shareholder in the said company (Exhibit P10).

Evidence of Assistant Registrar of the Supreme Court, Sumitha Andre

[54] The witness produced a charge sheet in an unrelated criminal case in respect of the First Defendant (Exhibit P13). Two bundles of photographs produced in CR 15/2017 was further entered into evidence in the present case (Exhibits P15 and P16).

Evidence of the Plaintiff's Psychotherapist, Natalia Petrova

[55] The witness stated that she is trained in psychotherapy, having graduated from University in 2014 and practiced for 7 ½ years in the field while conducting her own research for her final diploma. Her certifications were produced in Russian but were translated with the aid of the translator. She gave evidence that she is properly licenced to practice as a

psychotherapist. She stated that she started therapy with the Plaintiff about a year ago, once the Plaintiff presented to her with accounts of severe trauma. She met with the Plaintiff for one-hour sessions every week. The witness likened the Plaintiff's experience to having almost been killed, and stated that her background of working with addicts and disabled children are relevant to her treatment of the Plaintiff's "incurable trauma".

[56] The witness stated that the Plaintiff was still having trouble sleeping, still feeling nervous and occasionally labile.

Evidence of the Plaintiff's friend, Olga Fler

[57] The witness gave evidence that she arrived at the Resort on 1 or 2 May 2017 with the Plaintiff, though she was not certain of the date. She stated that she and the Plaintiff were staying in different villas. On 4 May 2017, she checked her phone messages and was shocked to find one from the Plaintiff between 4:00 am and 6:00 am saying that she had been raped. She went to the restaurant at 8:00 am and waited for the Plaintiff, whom she had messaged to meet her there. She described the Plaintiff when they met at the restaurant as seeming shocked and feeling "really bad". The Plaintiff did not want to talk and said that they should leave the Hotel and return to Russia. The witness then called the police and subsequently they went to the General Manager's office.

[58] When asked whether she went to the villa with the police, the witness stated as follows:

"Actually, they did not let anybody in but I went up with the Police and actually with my eyes what I have seen on the entrance, so on the entrance I saw the bed with a small things of blood on the sheet and I saw the cut panties. Cut with a knife panties near the door"(sic).

[59] Later in cross-examination, there was the following exchange:

Q: But you said the panty was cut by knife; how do you know that?

A: So, I saw the panties they were not torn. They were beautifully [cut] so they were like knife [cut] so they were not [torn].

Q: How do you know it was by knife that is my question?

A: I cannot confirm this.

- [60] The witness could not clearly recall the distance of the panty from the entrance of the room where she stood and its distance from the bed. She does not recall seeing a chair beside the panty. She maintained that she only stood at the door and was not allowed into the villa. However, she stated that she saw the blood on the bed sheets and the panty, which had been cut by a knife. She further stated that the Hotel staff had entered the room a few times before the police arrived and suggested that they could have tampered with the scene. She said that she saw the Hotel staff inside the room when the police arrived.
- [61] She agreed that the Plaintiff had mentioned a knife to her in her message, but the witness herself had not seen any knife in the villa.
- [62] Following the incident, the witness stated that the Plaintiff returned to Russia but she went on to Maldives for work. She stated that she had invited the Plaintiff to Felicite Island. She stated that the Hotel staff, particularly the General Manager, was extremely rude and unhelpful to her and the Plaintiff following the incident.

Evidence of Hendrick Leon, Assistant Superintendent of Police

- [63] The witness gave evidence that he had worked for twenty-seven years in the police force, that he held a Masters in criminology with criminal psychology and with a first degree in psychology. At the time of the incident, he was attached to the Family Support Unit with the Criminal Investigation Department. Together with Corporal Sheila Arnephy he travelled to La Digue to take over the investigation.
- [64] He noticed a lot of fluctuation in the Plaintiff's mood - from silent to talkative. She preferred to write her own statement and volunteered it immediately without any coaxing which he stated rarely happened with rape victims. She did not want to answer questions and said "I am done" when he tried to put questions to her. After she had left she communicated with him on a few occasions by phone asking whether the First Defendant had been charged and whether he had confessed to raping her.

[65] The witness stated that he also effected the formal arrest of the First Defendant. He seemed stoned or high and “out of it”. He was not at all aggressive, quiet and calm and recounted his version of the incident, that is, that he had had sexual intercourse with the *Plaintiff* but that it was consensual and that there was no ejaculation.

[66] The witness also stated that he had requested video footage from the hotel but it had never come into his possession. He had spent five days on Felicite and had not observed any cameras at Villa 11.

Discussion of the evidence with regard to the issues raised and the applicable law

Issue 1. Did the First Defendant on Felicite Island sexually assault the Plaintiff on 4 May 2017?

[67] The evidence in this case is set out above extensively. I have also examined the documentary evidence including the photographs produced by the parties in this case. It is not in dispute that the Plaintiff and the First Defendant engaged in sexual intercourse. What is in dispute is whether the sexual intercourse was consensual or not. The two accounts of events in this case are diametrically opposed. It is the Plaintiff’s position that the intercourse was not consensual, thereby amounting to an unlawful assault and constituting the basis for her claim in delict. The Plaintiff’s account of the alleged sexual assault was, in brief, that the First Defendant used force against her, after entering her villa uninvited, and sexually assaulted her repeatedly on the floor and on the bed inside the villa. It is her narrative that as a result of this assault she has suffered damages. If believed by this court it certainly gives right to claim for damages as Article 1382 of the Civil Code of Seychelles provides that:

“Every act whatever of man that causes damage to another obliges him by whose fault it occurs to repair it.

[68] In this regard, it is trite law that he/she who asserts must prove.

- [69] The Plaintiff's evidence is in contrast to the First Defendant's account, which provides that he was invited to her villa, that she opened the door to allow him to come inside, and that they had consensual intercourse on the bed and in the outdoor cabana.
- [70] It must also be pointed out that both parties agree that they smoked cigarettes together and that the Plaintiff gave the First Defendant pills to drink, which he did. However, while the First Defendant believed the pills would bolster his sexual performance, which would imply that the pills were given before the sexual intercourse commenced, the Plaintiff claimed that she gave him the pills after the sexual assault, and that she told him the pills would ward off a hangover, while in reality she had slipped him a strong sleeping tablet.
- [71] In *Lespoir v R Cr. A 3 /1989 CA 9/1989, LC 13*, this Court held that it was trite law that fraud, force or threats vitiate consent. It was reiterated in *Pascal Fostel v Republic SCA 19/2012* (per Msoffe JA) that consent to a sexual act obtained by force is not consent.
- [72] In *Holman [1970] WAR 2* at 6, Jackson CJ held that a victim's consent to intercourse may be, "... hesitant, reluctant, grudging or tearful, but if she consciously permits it (providing her permission is not obtained by force, threat, fear or fraud) it is not rape."
- [73] In the Australian case of *Case Stated by DPP (No 1 of 1993) (1993) 66 A Crim R 259* at 278, Duggan J held:
- "Whether or not consent has been freely given is a question of fact for the jury to determine, having regard to all the circumstances. The question is not concluded against the accused simply by reason of the fact that there was an initial refusal to consent to intercourse. Even following such a refusal there may be a freely given consent after further dealings between the parties."*
- [74] The case law cited above has informed the Court on the approach to the issue of consent in this case. The Plaintiff has to show on a balance of probabilities in this context that the sexual intercourse which is not denied by the Defendant took place, was non-consensual.

- [75] The Plaintiff stated that during her third escape from the villa, this time when the First Defendant was asleep, she dressed quickly and ran to the restaurant zone for help. She did not think to use the two landlines in her villa, stating that she did not want the First Defendant to notice, nor did she use her mobile phone because international calls had been deactivated on account of being too costly. Bernd Pillay, who was on-duty at that time, witnessed the Plaintiff walking quickly by the restaurant area and seeming “excited”. He said she seemed relieved to find him. She informed him that she had been brutally raped.
- [76] The Plaintiff’s friend, Olga, met with the Plaintiff in the restaurant a few hours after the incident after the Plaintiff messaged her that she had been raped. She stated that the Plaintiff wanted to leave the country immediately and to return to Russia. She said the Plaintiff seemed shocked. Andre, the Plaintiff’s boyfriend, was in Russia at the material time but confirmed that he received a message from the Plaintiff about the alleged sexual assault.
- [77] Of the many discrepancies marring the Plaintiff’s version of events, the position and state of the panty that she wore on the fateful night following the alleged assault are the most pertinent and glaring. The Plaintiff claimed that she wore the panty when she went to bed, but when she awoke, she found that it had been cut on the side with the First Defendant’s knife. The panty then features in the evidence of the security guard, namely Bernd Pillay, who stated that he found it, along with a white boxer, a white bra, and a red top, outside by the cabana in the grass. The Plaintiff was adamant that she had not ventured into the outdoor cabana in the grass at any time, so it is unclear from her evidence how her items of clothing came to be there. Next, Bernd Pillay gave evidence that he picked up the clothing by the cabana and placed them on a stool inside the villa.
- [78] The First Defendant, on his part, claimed that the Plaintiff greeted him at the door wearing nothing but a white bathrobe. She was naked beneath the robe. Following their sexual intercourse on the bed, he went to smoke on the terrace. He stated that he was changed by then in a blue t-shirt and blue pants. He stated that he and the Plaintiff had

further intercourse in the cabana, which would explain how the items of clothing described above came to be there, if his version is to be preferred.

[79] The state of the panty is the next dilemma. The First Defendant denied cutting or tearing it. The Plaintiff was insistent that it had been cut by a knife. The Plaintiff stated that the First Defendant cut her panty on the side before she woke up to find him on top of her. Her friend, Olga, who saw the panty from her vantage point by the door the following morning, stated that it was definitely cut by a knife. The security guard, Bernd Pillay, who was first on the scene, stated that the grey panty was intact when he picked it up from outside the villa and placed it inside on a stool. When shown a photograph of it being cut or torn, he stated that it was not in that condition when he found it.

[80] When questioned about the knife, the Plaintiff said that it was about 25cm in length and was fully metal. The First Defendant allegedly held it against her neck and threatened to kill her with it. She said the knife was lost while she was being sexually assaulted, but she recalled later seeing it on the floor by the entrance to the villa. She did not pick it up when she fled because she did not see the need to. She did not see the knife again, nor did any other witnesses see any knife on the premises during their inspection and search. The First Defendant denied ever carrying a knife on that night or having a knife in his possession. He stated that the villa was well-lit when he arrived.

[81] Other more minor discrepancies include the positioning of the glass which was used to give the sleeping pill to the First Defendant, and the sachet which was found on the table outside on the terrace although the Plaintiff maintained she slipped the pills into the glass in the bathroom while the First Defendant was showering. Furthermore, the Plaintiff's account of why she did not use her mobile phone to call for help changed between the criminal trial and the present case; in the criminal trial she said her phone screen was broken, but in the present case she stated that she could not make calls from her iPhone because it would be too expensive to do so, so the option had been deactivated.

[82] Although not on its own compelling, the lack of any bruising on the Plaintiff's body following her account of repeated violent behaviour and fights with the First Defendant, repeatedly falling down during the ordeal, and being pushed by him onto the floor and

being sexually assaulted there, is a relevant consideration. There is no requirement for physical injury as a matter of law during a sexual assault, but under the circumstances the absence of it is noteworthy. The Defendant in contrast had a few minor scratches on his person. He initially informed an officer that he had sustained them during a bicycle accident previously, but then said during the hearing that he did not know how he got them; he could not remember incurring those injuries.

[83] When the Plaintiff was brought back to the villa, in the company of two security guards, she eventually spoke to the First Defendant and asked him to return her lighter and cigarette packet. The First Defendant never made any attempt to flee. He was found sitting in the cabana, smoking a cigarette. By all witness accounts, he was cooperative with the authorities and seemed shocked by the developments. His behaviour immediately following the alleged assault was not consistent with the Plaintiff's descriptions of him as being aggressive, crazy, unpredictable and furious.

[84] The First Defendant claimed to have met the Plaintiff the day before the event while she was walking on the road on her own. According to him, they exchanged pleasantries, she introduced herself and told him he could visit her whenever he wanted to. During the cross-examination, the Plaintiff accepted that Hotel staff did stop her to offer help but she did not remember those people. The First Defendant was acquitted for the offence of sexual assault in the criminal trial (CR No. 15/2017).

[85] In several cases (*Saunders v Loizeau* (1992) SLR 214, *Marie and ors v Cafrine* (unreported) CS 64/2012, *Morel v Simeon* CS 57/2012) [2018] SCSC 123 (12 February 2018), the Court held that evidence of a previous conviction is admissible only to prove that a defendant committed the offence. Once admitted for this purpose, the burden of proof shifts in a civil trial to the defendant to prove the conviction was erroneous and a failure to do so results in a defendant being treated for all purposes as having committed the offence for which sentenced.

[86] In *More* (supra), the Supreme Court explained that an acquittal in a criminal trial cannot be relied on to preclude a finding of liability in a subsequent civil suit. In *Marie* (supra), in a claim for injury arising from a road traffic accident, the Court stated:

[25]“...Mr. Lucas, submitted that since the Third Defendant was acquitted by the Magistrates Court on 3 July 2013 of negligent driving, that finding estops the retrial of the issue in the Supreme Court, albeit in a civil case. That submission is not sustainable as it is not the law in Seychelles. I explained the probative distinction between a conviction and an acquittal in the case of *Marie and ors v Cafrine* (unreported) CS 64/2012.

[26 Further, section 29 of our Evidence Act provides in relevant part:

(1) In a trial the fact that a person, other than, in the case of a criminal trial, the accused, has been convicted of an offence by or before any court in the Republic shall be admissible in evidence for the purpose of proving, where to do so is relevant to any issue in the trial, that that person committed the offence or otherwise, whether or not any other evidence of his having committed that offence is given.

(2) In a trial, other than in a civil trial for defamation, in which by virtue of this section a person, other than, in the case of criminal trial, the accused, is proved to have been convicted of an offence by or before a court in the Republic, he shall be taken to have committed that offence unless the contrary is proved.

...

(5) Where evidence that a person has been convicted of an offence is admissible under this section, then without prejudice to the reception of any other admissible evidence for the purpose of identifying the facts on which the conviction was based

(a) the contents of any document which is admissible as evidence of the conviction; and

(b) the contents of the information, complaint or charge sheet on which the person was convicted, shall be admissible in evidence for that purpose.”

[27] Section 29 expresses statutorily the concept in common law which prevents a party in court proceedings from contradicting a finding of fact or law that has already been determined in previous court proceedings between the same parties.

However, equally applicable is the distinction between criminal convictions and acquittals in subsequent proceedings. In Marie (supra), I provided jurisprudence on this issue to show that an acquittal on a criminal charge does not have the same evidentiary impact on a subsequent civil proceeding as a conviction has and it does not estop an issue in the subsequent proceeding.

[28] I also stated that the specific wording of the provision of section 29 also makes it clear that the probative value accorded to a conviction does not apply to an acquittal of a defendant. The Third Defendant's acquittal in the Magistrates' Court cannot therefore be relied on to fully exonerate the Fourth Defendant's vicarious liability in the present case.

[87] The Defendants therefore cannot solely rely on the acquittal of the First Defendant in his trial for the alleged sexual assault of the Plaintiff to defeat the Plaintiff's present action. However, the highlighted discrepancies between the Plaintiff's evidence in that trial and in the present suit can be relied on to attack the credibility of her evidence.

[88] The discrepancies outlined above in the version of events as narrated by the Plaintiff cast doubt on her truthfulness, particularly in light of the demand made to Mrs. Valabhji immediately after the alleged rape for the sum of one million Euros in exchange for her silence about the incident. The Court finds this demand tantamount to a threat or even blackmail. It even lends to the reprehensible possibility of a set-up by the Plaintiff.

[89] In any case, the evidence reveals that it is more probable than not that the intercourse was consensual at all times. Further, by the Plaintiff's own admission, she was on her own in the villa for "a long time", perhaps "40 minutes", while the security guards escorted the First Defendant away and the Hotel Manager was trying to find her alternative accommodation for the night. The First Defendant noted that when he was being escorted past the villa, he saw things on the floor which had not been there before. Her possible interference with the crime scene could explain the panty's sudden change in appearance.

[90] Further, the Plaintiff's evidence about running away twice from the villa and being dragged back and repeatedly assaulted is also not credible given the undisputed evidence of the automatic closing and locking mechanism on the villa door, that is, once it is

closed it has to be reopened by a magnetic card. I find it hard to believe that either she or her pursuer would have remembered to take the magnetic card with either of them once the alleged chase ensued outside the villa.

- [91] I also do not in any case find any credibility in Olga Fler's evidence. The distance from where she stood and to where either the bed linen or the panty was as described by the other witnesses and as can be observed from the photographs in no way corroborates her narrative of the state of either the bed linen or the panty. The blood spotting from the photographs appears miniscule. As for the panty it would have to be held up for the tear or the cut to be observed. Her credibility in this respect is seriously undermined.
- [92] I also cannot believe Andre Braginski's evidence that a prescription for tablets for anxiety would be given over the phone to an alleged victim for sexual assault, even less so when that that victim had not been examined and was travelling in a car after only landing at an airport. I also do not believe that someone who would be so traumatised after such an incident could in the space of such a short time write a threatening e-mail asking for one million euro in damages "or else..."
- [93] Moreover, the Plaintiff's histrionics in court made her evidence unconvincing; the discrepancies in her evidence in the two trials and the lack of credibility of the evidence of her two witnesses who only heard of the events through her all add up to the Court's belief that the Plaintiff has made all this up to make some money. Her apparent shameful and deceitful behaviour does little to advance the cause of women who are sexually assaulted and already find it hard to be believed.
- [94] Ultimately, this Court finds that the Plaintiff has not proved on a balance of probabilities that a sexual assault occurred. Therefore, it follows that an action in fault cannot proceed. The case is accordingly dismissed with costs.

Signed, dated and delivered at Ile du Port on 3 February 2020

Twomey CJ