

SUPREME COURT OF SEYCHELLES

Reportable

[2020] SCSC 430

CR 85/2019

REPUBLIC

(rep. by Esha Benoiton)

and

FJ

(rep. by Nichol Gabriel)

Neutral Citation: *R v FJ* (CR 85/2019) [2020] SCSC 430 (17 July 2020)

Before: Twomey CJ

Summary: sexual assault – evidential burden – hearsay evidence of third party put to prosecution witnesses – inadmissibility

Heard: 25 May 2020 - 23 June 2020

Delivered: 17 July 2020

ORDER

The accused is convicted of the sexual assault of the complainant.

JUDGMENT

TWOMEY CJ

The charge against the accused

[1] The accused pleaded not guilty to the following charge:

Count 1

Statement of Offence

Sexual assault contrary to section 130(1) read with section 130(2)(d) of the Penal Code and punishable under section 130(1) as read with section 130(4) (a) and (b) of the same (Act 5 of 2012).

Particulars of offence

FJ resident of [. . .] Street, on a date 30 April 2017 at the complainant's grandmother's residence at [. . .], sexually assaulted one namely MA, aged 12

years old at the time of incident, by penetrating the body orifice namely vagina of the said MA with his penis for a sexual purpose. (sic)

The Prosecution evidence

Evidence of MA

- [2] The complainant, now 15 years old, testified under oath that she presently lives with her paternal grandparents and her father at [. . .]. On 30 April 2017, she was staying at her maternal great grandmother's house at [. . .] together with her aunt [. . .] and her boyfriend, her cousin R and her son, F, and her uncles [. . .] and [. . .]. R gave her alcoholic drinks during the day and at dusk her aunty and boyfriend left.
- [3] R called her [son's father] father's son, FJ, (the accused), and he collected them, to go to [...] to collect beers. They returned to [. . .] and they all went upstairs to the bedroom, laid on the bed and went to sleep.
- [4] F woke up and in the process woke everybody else up. R went to the bathroom. Her phone rang, she listened and went downstairs. F called to her from the top of the stairs but she did not respond. The complainant stood up and felt dizzy. She went half way down the staircase to see if she could see R but couldn't. She came back to the room together with the young boy, F. Through the bedroom window, she saw R standing near a red car in which she embarked and left. F went to sleep on a mattress on the floor and she returned to the bed. The TV in the room was on and the accused came onto her. He pressed her down on the bed and tried to kiss her. She tried to get him off her but felt too weak to do so. He took one of her legs and put it up and removed her panty and inserted his fingers into her vagina. Then he removed his fingers and inserted his penis into her vagina. It was painful and he was there for some time before removing himself. He then placed a love bit under her neck.
- [5] She went to the toilet and saw a white liquid leaking from her together with blood. She went back to the room tearfully. Then she heard the door close downstairs and saw R come up the stairs and go to sleep on the bed next to the accused. The next morning when she woke up she was alone on the bed. She went downstairs and R asked her where had she been the night before and then slapped her in the face.

- [6] Her mother, who had legal custody of her, had been on Silhouette at the time and she had been told that her mother was going to scold her when she got back to Mahe. She knew she had done nothing wrong as she had been abused before, so she called her paternal grandmother and asked her to come and get her. Her grandmother gave her the number of a police officer whom she called but who did not seem to show any interest in what she recounted to him and told her to remain at her maternal grandmother's house. However, she decided to go to her paternal grandmother's house at [. . .] instead.
- [7] When she got there she was taken to hospital by her father and police officers where she was examined.
- [8] In cross-examination, she stated that she had previously stayed with her mother and her stepfather but the latter had abused her from the age of nine until she was twelve. She stated that her step father was facing charges for the assault.
- [9] With respect to the present case, on the day in question, there was a party at the house and she was given drink and had got a little drunk; R had bought drink for her. She did recall what happened even though her head was spinning at the time. She neither told her mother nor R what had happened to her. She told her maternal grandmother that she was going to the shop and while there bought phone credit and phoned her paternal grandmother.
- [10] She was kept at the police station until her father came to collect her and she was brought to hospital for examination where sperm residue was found on her together with some scratches.

Evidence of Inspector Agnes Fanchette

- [11] Inspector Agnes Fanchette testified that she had been in the police force for nearly nineteen years. On 4 May 2017 she cautioned the accused and then interviewed him.

Evidence of Police Officer Karine Brigilia

- [12] Police Officer Brigilia is attached to the Police Child Protection Unit and witnessed the statement taken from the accused.

Evidence of Police Officer Carlos Mousmie

- [13] Police Officer Mousmie has been in the police force for four years and on 1 May 2017 received a phone call from one PC M. at 10 am who explained that the complainant had phoned to say that her mother was creating problems and fighting with her. At around 2 pm the same day the complainant's mother came to the police station to report that she had been on Silhouette and had called her daughter to tell her to come to [...] and that she had not done so but that she later received information from the complainant's cousin that the previous night the complainant had been drinking and had escaped from home when everyone was sleeping. She had returned in a car the next morning and there were love bites under her neck. She had informed the police who informed social workers.

Evidence of RG

- [14] The complainant's father testified that on 1 May he received a call from his mother who informed him that his daughter had run away from [. . .] and was at the junction of [. . .] and that he should go pick her up. He brought her home and he noticed that she was not normal. On reaching home, her aunt and mother talked to the complainant and she started to cry. He noticed two love bites on her right breast and she told him that R's boyfriend had put them there.
- [15] He phoned Social Services as the complainant's mother had legal custody of her. He was told they could not do much as it was a public holiday and that the complainant's mother should come and collect her from his house. The police came to collect the complainant and he followed them to the station. He told the police what had happened but they would not entertain him. The complainant's mother arrived and took her [a]way. Later the same day, at about 5 or 6 pm, the police called him and told him to come and collect the child from the police station.
- [16] He collected the complainant who told him that her mother's family had thrown her out of the house. She then told him everything and asked him to make sure that he got custody of her as she did not want to go back to them.
- [17] In cross-examination, he stated that when the complainant was younger at about the age of nine and during her visits to him she would tell him that her stepfather G would touch

her inappropriately. There had been a court case brought against G but it was dismissed. A custody battle had ensued between the complainant's mother and him and the former had won.

Evidence of Bernadette Payet

[18] Bernadette Payet is a senior Social Worker and has been a social worker since 2006. The present case was reported to her on 2 May 2017 by the police. She was present with the complainant's father when she gave her statement. The complainant was depressed, worried and scared at the time. She had several outburst of tears but was eventually able to give a complete statement. The medical examination had been done the previous day.

[19] She has dealt with a lot of such cases and it was her opinion that the child was telling the truth. She was consistent with her statement even when they went back on what she had stated she repeated the same story. She seemed scared of both her father's and mother's reaction to what happened.

Evidence of Dr. Olga Federova

[20] Dr. Federova, an obstetrician-gynaecologist testified that she wrote a report on 1 May 2017 after examining the complainant. Her medical report was produced and contained her findings of a love bite on the left side of the neck of the complainant and another on her right breast near her nipple. The complainant's hymen was not intact and there was a lesion next to the clitoris which looked fresh. According to the complainant she was sexually active before. Dr. Federova took vaginal swabs. The complainant had been accompanied by her mother for the examination and she informed her that her daughter had been staying at her grandmother's house together with her cousin and she had escaped from the house for a few hours at night. The swab came back positive for spermatozoa and was handed to the police.

Evidence of Dr. Louine Morel

[21] Dr. Morel testified that she examined the accused on 11 May 2017 for HIV, syphilis and Hepatitis B and C. The tests were negative but his urine sample was positive for chlamydia.

The Defence evidence

Evidence of the accused

[22] The accused opted to give a statement from the dock in which he stated that on 31 April 2017 he had gone for a picnic at [. . .]. He had received a phone call from his child's mother, R who told him that his son was asking for him. As he was not far away he went by to check on him. There were a few people including the complainant when he got there. He was asked to bring beers to [. . .] to a cousin and did so in the company of his child, R and the complainant. When they got back at around 11.30 pm they all went upstairs to a bedroom. After a while R received a phone call and went downstairs and out into a car. She left him with the complainant and his son. His son went downstairs to go after his mother and he asked the complainant to fetch him back. She did and they both played with the child. The TV was on and after some time R came back and they all slept on the bed. In the morning he got up and went home. He never touched the complainant.

Evidence of Constable Betty May Lesperance

[23] Constable Lesperance is attached to the Child Protection Unit of the Police. She accompanied the complainant and her mother to the hospital for examination. A vaginal swab was taken from the complainant's vagina and was handed over to her and which she kept in her custody. She could not recall if she had handed over the swab to the Scientific Support Unit for examination. She could also not recall asking anyone to conduct a DNA test. She could not find anything in respect of the swab. In cross-examination she admitted that she had also seen that a blood sample had been taken from the accused. She was the investigating officer in the case but could not recall having a DNA test carried out even if she had the swab from the complainant and a blood sample from the accused to confirm if the spermatozoa was that of the accused

Closing Submissions

[24] In closing, Counsel for the Prosecution submitted that the crucial evidence in this case is whether the complaint is credible and truthful. She submits that this is indeed the case and that this fact is corroborated by the evidence of the social worker who maintained that the complainant was consistent in her narrative. Further she submits, the medical evidence corroborates the complainant's evidence.

- [25] With respect to discrepancies in the case she submits that they are minor and that the “the Court must be minded that the complainant had no control over the investigation and the lapse or negligence if any committed could not affect the credibility of the prosecutrix. She adds that none of the prosecution witnesses were discredited and that the elements of the offence have been established beyond reasonable doubt.
- [26] The main plank of Counsel for the Defence’s submissions are that since the accused denied the allegations and since swabs were collected from the complainant’s vagina and the accused’s mouth, it was incumbent on the prosecution to produce scientific evidence connecting the accused to the sexual assault of the complainant especially given the contradictory versions of prosecution’s witnesses’ evidence. He relied on the murder case of *Azemias v R* (SCA 14/2012) [2014] SCCA 35 (12 December 2015) for the proposition that DNA evidence once obtained cannot be disregarded.

Discussion of the evidence with regard to the applicable law

- [27] The accused has been charged under section 130(1) read with section 130(2)(d) and punishable under section 130(1) as read with section 130(4) (a) and (b) of the Penal Code. These provisions read as follows:

130. (1) A person who sexually assaults another person is guilty of an offence and liable to imprisonment for 20 years:

Provided that where the victim of such assault is under the age of 15 years and the accused is of or above the age of 18 years and such assault falls under subsection (2)(c) or (d), the person shall be liable to imprisonment for a term not less than 14 years and not more than 20 years...

(2) For the purposes of this section “sexual assault” includes-

(a)...

...

(d) the penetration of a body orifice of another for a sexual purpose.

(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); ...

[28] In the light of these provisions, the Court observes that the charge and particulars thereof are clumsily and grammatically incorrectly drafted. Although they do not result in any injustice to the accused, the court urges the prosecution to be mindful of such lapses and to employ the English language correctly so as to give better clarity to charges for all concerned.

[29] With regard to the legal provisions above, there is settled jurisprudence that in order to succeed in proving a charge of sexual assault of this nature the prosecution must prove beyond reasonable doubt that the accused penetrated the body orifice of the complainant for a sexual purpose. Consent is not an issue in this case as the complainant is under the age of 15.

[30] The case for the prosecution completely rests on the direct evidence of the complainant. In this respect the Court stated in *R v Albert* (2008) SLR 348, 259

“[C]orroboation is required in sexual offence cases, especially when young children are victims, due to the danger that allegations can be easily fabricated, and it becomes extremely difficult for the accused to refute. However, as a matter of law, such corroboration is not required to be corroborated where the Trial Judge is satisfied, after warning himself of the danger of convicting on uncorroborated evidence, that the victim is truthful.”

[31] I do take into account the factors affecting the child’s testimony, including, her young age, her vulnerable status in giving evidence in respect of embarrassing matters relating to the sexual intercourse and the fact that recounting the same would trigger the ire of her parents – a fear which seems to have been borne out (it seems undisputed that she was thrown out of her mother’s and maternal relatives’ residence for complaining about the accused).

[32] The incidents described are very concerning and speaks of a societal dysfunctionality that ought to be addressed. Why on earth would a grown man and woman unashamedly allow

the complainant to sleep in the same bed as themselves together with another young child especially when it transpires that there was a mattress on the floor in the same bedroom? Why was the complainant plied with alcohol by an older cousin who then left the bed and the house in the middle of the night abandoning the complainant, who was by all accounts and purposes drunk, to the mercy of her ex-boyfriend who also had drink taken.

[33] What convinces me that the complainant is telling the truth lies in the details of the events that took place. She was very clear in the way her leg had been lifted and her panties taken off and how the accused first penetrated her vagina with his fingers and then his penis. I found her evidence cogent and clear. She did not flinch even when cross-examined but answered the questions directly and showed no confusion. The senior social worker, Bernadette Payet, was also seemingly impressed with the complainant's consistent account of the events which took place even when she was repeatedly asked to recount the incident. Having come to that conclusion that the child was telling the truth, the necessity to look for corroboration in any case falls away (*Lucas v R* (2011) SLR 313).

[34] I have given careful thought to the Defence's assertions in respect of the whereabouts of the complainant on the night of the incident, that is, the alleged narratives of the complainant's cousin, R, who had the complainant's charge on the night; and the child's mother, S, as referred to in the cross examination by Counsel for the Defence. Although the hearsay evidence of these two persons were put to the prosecution witnesses, those witnesses were never called by the Defence and such statements were never put in evidence. It is trite that it is not permissible to put to one witness the proposition that the evidence of that witness is contrary to the evidence of other witnesses in order to invite the court or the witness to express an opinion as to whether that witness is telling the truth. Moreover, the hearsay evidence of a third party not called to give evidence is inadmissible (*Reg. v. Blastland* [1986] A.C. 41, 53, *Turner (Bryan)* 61 Cr.App.R. 67). This is undoubtedly because of the most fundamental principles of hearsay that first, the use of a person's assertion as being equivalent to testimony to the fact asserted is prohibited unless the assertor is brought to testify in court, where he may be probed and

cross-examined as to the grounds of his assertion and secondly, that the hearsay admission if made is evidence only against the person who made it.

- [35] I cannot therefore consider the alleged narratives of R and S in favour of the accused so as to create a doubt in the prosecution evidence.
- [36] Further, I have also considered the dock statement of the accused and note that he does not for an instance state that the complainant went out of the house as is allegedly stated by the R and S. There is before the court therefore not a scintilla of evidence to that effect. Neither the complainant's mother nor the cousin were in any case at the house when the offence was committed. Those statements put to the prosecution witnesses by Defence Counsel suggesting that the complainant had left the house on the night in question to have sex with another person are therefore not evidence and are rejected as false and weird fabrications by persons who in any case, one would imagine, ought to have had the best interest of the child at heart. That they would go so far to mask their own wilful neglect of the complainant or cast her in a bad light at the risk of affording a defence for the accused is even more despicable.
- [37] With regard to the lack of DNA evidence to link the accused to the offence, the Court notes the reprehensible behaviour of the investigating officer in the instant case. That she had all the available material before her to request a DNA test and yet failed to do so and further failed to record what happened to the samples taken is beyond belief. However, the case of *Azemia* (supra) is not relevant to the present case. In *Azemia*, the mention of DNA evidence in the trial judge's summing up was prejudicial to the accused as there had been no positive report of the DNA linking him to the crime.
- [38] In the present case, there is no evidence that there was ever any DNA analysis carried out and the DNA evidence is in any case not required where the evidence of the complainant is believed as in the present case and also given the fact that there is no evidence of another possible perpetrator of the offence.
- [39] I therefore find that the prosecution has proved its case beyond reasonable doubt and I convict the accused of the sexual assault of the complainant.

[40] On a final note, I have to point out that although Prosecution Counsel called Inspector Agnes Fanchette and Police Officer Karine Brigilia who cautioned the accused and obtained the statement from him, the statement was never produced. In the circumstances, I fail to understand why their evidence was adduced. However, as the statement would not have added much to the case I do not see it as in any way affecting the conduct of the case.

Signed, dated and delivered at Ile du Port on 17 July 2020.

Twomey CJ