

SUPREME COURT OF SEYCHELLES

Reportable

[2020] SCSC 436

CR 70/2019

REPUBLIC

(rep. by Carmen Cesar)

and

DV

(rep. by Danny Lucas)

Neutral Citation: *R v DV* (CR 70/2019) [2020] SCSC 436 (20 July 2020)

Before: Twomey CJ

Summary: Charges of two counts of sexual assault- credibility of child witness- corroboration when necessary- opportunity of another person sexually assaulting the complainant - reasonable doubt

Heard: 22 June 2020 - 23 June 2020

Delivered: 23 September 2019

ORDER

The accused is acquitted of the charges of sexual assault.

JUDGMENT

TWOMEY CJ

The charges against the accused

[1] The accused stands charged as follows:

Count 1

Statement of Offence

Sexual assault contrary to section 130(2(d) read with section 130(3) and punishable under section 130(1) of the Penal Code.

Particulars of offence

DV, of [. . .], during the year 2018 sexually assaulted another namely MV by inserting his penis into the vagina of MV, a minor aged 7 years of age.

Count 2

Statement of Offence

Sexual assault contrary to section 130(2)(b) read with section 130(3) and punishable under section 130(1) of the Penal Code.

Particulars of offence

DV, of [. . .], during the year 2018 sexually assaulted another namely MV by inserting his fingers into the vagina of MV, a minor aged 7 years of age.

The Prosecution evidence

Evidence of MV

- [2] After establishing whether the complainant, MV was capable of understanding the nature of the oath and with the agreement of both Counsel, MV gave sworn evidence. She explained that she lived with her mother and two brothers and that the accused had been staying with them for a period of five weeks but she could not recall the year. She did not like him because “every time he [was] around he [was] going to do something that [was] not right”. She went further to state that “It is because when somebody is drunk and becomes intoxicated even if he smokes he would do things that is not right at night for example to my mother and would make her scream at night and make some noise” (sic). He eventually went away because he did “malelve” (bad behaviour) with her. She explained “malelve” by stating - “It is when a man and a woman does “malelve” together that is when they live together. So they do the “malelve” that allows them to be together.”
- [3] She stated that her mother was with the accused and that she had gone to the shop and while she was out the accused called her into the bedroom and removed his boxer and her panty. She climbed onto the bed on which there was a grey towel. The accused climbed on top of her and started the “malelve” and that it was painful. She told him to stop. When he finished a white and yellow liquid was released which he wiped away with the towel. He put his boxer back on and put her panty back on her. She then went to the living room on her mattress to sleep. She covered herself with her bedsheet and he came and laid beside her to watch cartoons. He put his hand through her panty, touched her vagina and put his finger into her vagina. It was a bit painful and he put his finger in and out of her vagina a few times. When he heard her mother coming he stopped. She felt too scared to tell her mother. She thought her mother would beat her and that she would be in trouble.

- [4] In cross-examination, she stated that the accused was with her mother for five weeks and five days. She had counted the days on the calendar. He started living with them in January 2018. The acts were committed towards the beginning of the five weeks. She had never got on well with the accused. The pain she felt after the first act of sexual intercourse went away when she went to the sitting room.
- [5] At the time of the incident she had not told her mother because she was scared she would get angry with her. When she felt ready to talk about it she told her mother and that was after about one month when the accused had left. She was categorical that her mother had not told her to say that the accused had done something wrong. She stated that if the accused said the incident didn't happen he would be lying. She had no pain the day after the incident or in the following weeks.

Evidence of Natasha Jeanne

- [6] Natasha Jeanne, a registration and monitoring officer with the Agency for Social Protection also gave sworn evidence. In April 2018 she was working as a Child Protection Officer and a report was made by the complainant's mother to the police who then called her. She went to see the complainant who had already been medically examined. She was present when the complainant's statement was recorded in the Office of Social Services at Grand Anse Praslin. She was calm but shy when talking about the incident, she had difficulties with certain words because of her age. Her mother was present and signed the statement. She visited the complainant in school to give her moral support. She was like a normal 7-year-old, bubbly and happy.
- [7] In cross examination, she stated that the complainant was the picture of a normal healthy child. She never got the impression that her mother was influential in urging her to make a statement. She was questioned by the police after being prepared by her about what was to take place. The police put questions to the complainant. Sometimes she did not have words to describe what had happened. According to her recollection the incident was reported in the same month in which it had taken place. She was not aware if another person was being investigated in relation to the case.

Evidence of JV

- [8] The complainant's mother, JV, also gave sworn evidence. She said she lived with her son, her daughter, and with her boyfriend and his child.
- [9] The accused had lived with her in 2018 for about three months. They had started a relationship in January 2018 and which had ended in March 2018. The relationship ended because of the incident, the subject of the present case. On the day of the incident she was sleeping together with the accused. Her daughter came to tell her that she was going to watch cartoons in the living room. At around 9.30 am, she told her daughter she was going to the shop. She left her in the house with the accused. She trusted the accused. When she left, her daughter was in the living room watching cartoons. The accused was in their bedroom.
- [10] It was about three days after the incident that she found out. It was her son who told her. She went straight to the police. This was after she had confirmed with the complainant that it was true and after she had recounted everything. She was crying because it was a little painful. At the time the complainant told her about the incident, the accused had already left her home and was staying with another woman. She was with her daughter when she was medically examined and when she gave a statement to the police.
- [11] In cross-examination, she stated that she had known the accused as a friend and after her husband died they started getting closer. He started living with her in November 2017 and stayed until March 2018. She reported the incident in April 2018. She had not reported the incident to get back at him for going with another woman. She admitted that a similar incident with her daughter and a next-door neighbour had been reported to the police. She had not coached her daughter and substituted the accused for the next-door neighbour. She had reported the incident relating to the accused before the second incident with the next-door neighbour had taken place. Both persons had sexually abused her daughter. She was adamant that the incident with the accused had taken place but she did not know the date. Her daughter initially had a good relationship with the accused but then it soured.

Evidence of Jessica Radegonde

[12] Jessica Radegonde is a police corporal who was on duty in 2018 at Baie Ste Anne Police Station. She brought the complainant to hospital to be medically examined. When she was being examined she winced as the doctor touched certain parts of her body.

Evidence of Jean Phillippe Lucas

[13] Mr. Lucas is attached to the Scientific Support and Crime Records Bureau and is a Crime Scene Officer. He took the photos of the crime scene at the residence of JV at [. . .]. He mounted the photos in a photograph album which he exhibited. He also took photographs of the complainant and the accused.

Evidence of Doctor Barun Kumar Saha

[14] Doctor Saha is employed by the Health Care Agency and holds a Bachelor of Medicine and a Bachelor of Surgery. He produced a medical certificate prepared by Dr. Myriam Leon on 25 April 2018 at Praslin. Dr. Leon had been working in Seychelles for about ten years directly under his supervision. He identified her signature on the certificate. He then produced a report from the certificate on 31 January 2019. Dr. Leon found the child to be in normal general condition, there were no marks on her external skin and her perineal area and vulvar area were normal. However, her hymen was not intact which was not usual in a child of seven. He stated that there does not necessarily need penetration for the hymen to be broken and it is very rare for it to be broken by exercise.

[15] He stated that the vagina is lubricated usually once puberty starts around the age of twelve years onwards. It would be unusual for a child of seven to have her vagina lubricated because of sexual arousal. He was of the view that in a child of seven, if sexual intercourse had happened without lubrication she would have lacerations of her vagina or walls and or injuries to the perineal area. There would definitely be tearing or laceration around the external genital area and it would be painful. In answer to the question as to whether it would be painful subsequently for a finger to be inserted into the child's vagina he stated that he could only speculate that it might be painful.

[16] He agreed however, that if the penetration had happened some time before, the lacerations would have healed and would not be visible. He stated that partial penetration could also result in the child's hymen being broken.

Evidence of Police Constable Kevin Francois

[17] In April 2018 Constable Francois was based at Baie Sainte Anne Police Station and on instructions proceeded to [. . .] at a hotel where the accused was working and arrested him.

Evidence of Corporal Selwyn Francoise.

[18] Corporal Francoise was based at Praslin Police Station at the time of the incident. He recorded a statement from the accused and produced it in court. In his statement the accused states that he had been with the complainant's mother and that they had separated four months previously and that he had had nothing to do with regards to the complainant.

Evidence of Betty May Lesperance

[19] Ms Lesperance was the Investigating Officer in the case and was attached to the Child Protection Unit of the Police Force. She had been called for assistance by the police on Praslin in relation to this case as they did not have a Child Protection Unit on Praslin.

[20] She collected the statements made in respect of the case, brought them to Mahe and organised the documents in a docket.

The Defence Evidence

Evidence of the Accused

[21] The accused gave an unworn statement from the dock in which he reiterated what he had said to the police. He had lived with the complainant's mother but he had left her. The child's mother had a problem with him because he was in a relationship with another woman at Baie Sainte Anne. He stated that he also had a daughter of seven years, the same age as the complainant. The police took a mouth swab from him and released him. In 2020 while he was undergoing a sentence of imprisonment at the prison he received a

summons for a sexual assault case. He stated that another man, a neighbour of the complainant's mother had been accused of the same charge against the complainant.

Closing Submissions

- [22] In closing submissions, learned counsel for the Defence stated that the complainant was the only relevant witness and other witnesses did not add much weight to her evidence. With regard to the complainant's mother's evidence, Counsel submitted that it had some serious discrepancies with that of the child. He submitted that the child stated that the alleged act happened towards the beginning of the accused' relationship with her mother. The mother on the other hand reported that she reported the incident three or four days after the incident. The accused according to the mother moved into her home in November 2017.
- [23] He also submitted that another person has also been charged with the offence the accused is alleged to have committed in April 2018. He further submitted that the mother had a motive to report the accused as she had been jilted by him and therefore influenced the child in making the report.
- [24] Further he added, that based on the medical evidence, the child cannot be believed as the serious injuries from the sexual act would have resulted in pain that she would have had to report at the time. It was incumbent on the prosecution to prove that the child was such so as not to have sustained the normal injuries resulting from the sexual act.
- [25] Counsel for the prosecution has submitted that the child's evidence in relation to the offence by the accused was detailed and consistent throughout even when the questions were put to her in different ways by Defence Counsel. She submits that the child's account is corroborated by the mother and the medical report. She further submits that the discrepancy as to the date the incident happened is not fatal to the case. In any case she submits, if the court believes the complainant, there is no reason to seek corroboration.
- [26] With respect to the fact that no marks were seen on the child apart from the broken hymen and that had the sexual act taken place the child would have been in so much pain that would have caused her to seek help from her mother, she submits that the medical

evidence adduced shows that a partial penetration would have been enough to cause the hymen to be broken and may therefore not have resulted in as much pain. She also confirmed and attached the charge sheet that there is indeed another charge before the court regarding the complainant's neighbour but that is in relation to an indecent assault of the complainant in April 2018.

Discussion of the evidence with regard to the applicable law

[27] The accused has been charged on two counts of sexual assault contrary to (1) section 130(2) (d) read with section 130(3) of the Penal Code and (2) contrary to section 130(2) (b) read with section 130(3) of the Penal Code. The relevant 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:

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

...

(b) the non-accidental touching of the sexual organ of another;

...

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

(3) A person does not consent to an act which if done without consent constitutes an assault under this section if-

(a) the person's consent was obtained by misrepresentation as to the character of the act or the identity of the person doing the act;

(b) the person is below the age of fifteen years; or

(c) the person's understanding and knowledge are such that the person was incapable of giving consent.

[28] Although the charges as appear above were not challenged by the Defence, the court points out that the accused has been charged with the definitional section as opposed to

the offence of sexual assault under section 130. He should have been charged with section 130(1) as read with section 130(2) (d) on the first count and as read with section 130(2) (b) on the second count. However, I do not find the charges defective as the “particulars of offence” clearly state the charges against the accused and it is clear from his defence in the ensuing trial that he understood that he faced two counts of sexual assault in which it was alleged that he penetrated the complainant’s vagina with his penis and with his fingers. Hence failure to cite the correct section number of the offence did not prejudice the accused in any way and is not a fatal defect. It would however be desirable to state the charges correctly to give more clarity and certainty to them.

[29] In respect of the sexual assault offences, the Court must be satisfied that the accused person sexually assaulted the complainant. Sexual assault is defined as including inter alia an indecent assault and the penetration of a body orifice of another for a sexual purpose. As I have said, in the present case the charge involves the penetration of the complainant’s vagina with the accused’s penis and with his fingers.

[30] In the circumstances, the act of sexual intercourse itself is the prima facie evidence as the complainant was seven and could not legally have consented to the act. The accused however has denied the charges.

[31] I have taken a cautionary approach to the prosecution evidence given the fact that the accused’s defence is one of fabrication of the incident by the child at the coaching of a vengeful mother who had been jilted by the accused. I am also intensely conscious that a sexual assault case usually leaves little evidence or most often nothing at the scene. The test of the child’s credibility here would be her consistency and other evidence that might corroborate her account. In the present case corroboration of penetration was provided by the fact that the child’s hymen was broken – which the medical evidence suggests was rare in a child so young and could not normally have been caused by sporting activities. There was in any case no evidence adduced to infer that the child was actively sporty or athletic.

[32] Defence Counsel has submitted that had the accused had penetrative sex with a child so young, the resulting damage and pain would have caused her to report the matter. That

submission has however been undermined by the prosecution's submission as supported by the doctor's evidence that partial penetration may have resulted in the hymen being broken. That may therefore not have resulted in the pain as described by the Defence attorney.

[33] In circumstances as in the instant case, where the accused has adopted the defence that the events as reported by the complainant did not happen at all, there is a burden on the prosecution to persuade the court so that it is sure or that it is beyond reasonable doubt that the sexual assault was done by the accused. When it is one person's word against another, the court must necessarily look at the circumstances as a whole, the defendant's character, the time and circumstances in which the complaint was made and how it was made.

[34] I have carefully considered the complainant's evidence and her expressionless description - sometimes monosyllabic - of what took place: being called to the bedroom, a grey towel being laid on the bed and her use of sexualised language (*pike*) at such a tender age. I have also paid particular attention to her mother's testimony to whom the sexual assault was not reported. She gave evidence of a son with a mental disability telling her about the incident. She also accepted that there are other charges of sexual assault by a neighbour against her daughter during a similar time frame. She was anxious to leave court to catch the boat to return to Praslin. She agreed that she was angry that the accused had left her for another woman.

[35] Then there are serious discrepancies as to when the incident took place. Both the complainant and her mother are not able to remember when the incident took place. That in the general scheme of things and in sexual assault cases is not unusual. However, both witnesses are confused as to when the cohabitation between the child's mother and the accused began and ended and that leaves the possibility that there was no opportunity for the incident to have taken place as the accused might already have left to live with his present companion.

[36] I have given anxious thought to all these matters and the evidence as a whole and although it is certain to me that the child was sexually assaulted or interfered with, I have

a lingering doubt as to whether it was the accused who sexually assaulted the complainant. In her closing submissions, Counsel for the prosecution enclosed the charge sheet against another individual for the sexual assault of the complainant in the month of April 2018, stating that that matter had not been brought to her attention. This is a failure on the part of the investigating officer. It is not a failure that the court can ignore given the doubt it creates in my mind.

[37] In the circumstances, I acquit the accused of the offences as charged.

Signed, dated and delivered at Ile du Port on 20 July 2020.

Twomey CJ