

SUPREME COURT OF SEYCHELLES

Reportable

[2020] SCSC 674

CR 24/2020

REPUBLIC

(rep. by Joji John)

and

DL

(rep. France Bonte)

Neutral Citation: *R v DL* (CR 24/2020) [2020] SCSC 674 (21 September 2020).

Before: Twomey CJ

Summary: sexual assault- credibility of witness- corroboration by accused himself-

Heard: 31 July 2020 –16 July 2020

Delivered: 21 September 2020

ORDER

The accused is convicted of the charge of sexual assault.

JUDGMENT

TWOMEY CJ

The charge against the accused

[1] The accused stands charged as follows:

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) of the Penal Code.

Particulars of offence

DL, of Petit Paris, Mahe, on 25 March 2020 at Perseverance, Mahe sexually assaulted a person another namely ML of Copolia by the penetration of a body orifice of another for a sexual purpose namely by inserting his penis into the vagina of ML.

The Prosecution evidence

Evidence of ML

- [2] The complainant, ML, testified that she was 29 years of age living with her partner and two children and that she worked as a chambermaid at the Hilltop Hotel. On the 25 March 2020, she was at a bus stop at Bel Air waiting for a bus to go and pick up her daughter at Sans Souci where she is minded at her sister's place when the accused came along in a car and offered her a lift.
- [3] He suddenly did a u-turn saying that he had got a call from his wife and that he would go there and then come back to drop her. He said that he and his wife had bought some land at Perseverance and that they were going to build apartments and that he had to go there to take a look. He drove to Perseverance and down an alley into casuarina trees. She asked him where was his wife and he said that she would be coming in a short while. He stopped the car and told her that he had been watching her for some time and that he loved her. He said this whilst he was removing his pants. He told her she did not have to be afraid of anything and he put on a condom.
- [4] The witness stated that she was scared and wanted to get out of the car but the car was locked. She told him to stop. He grabbed her hand and pressed against it. She tried to hit him on his chest for him to stop. He pressed against her hand and tried to penetrate her body. She tried endlessly to stop him. He managed to partly put his penis into her vagina. She tried to scream and told him she was going to call the police. He told her to stop and relax.
- [5] He then told her they were adults and to relax and not to get angry, not to go to the police and that he would give her money. She didn't answer as she was still very afraid. She opened the door and got outside the car. He told her that she could go and that she could put her clothes on and that he would give her money. She put her clothes on and sat in the rear seat of the car and he drove towards North East Point and stopped at an ATM where he asked her to get money out to give him. She told him she did not have an ATM card.

He told her if she had children she needed to have an account to have some savings for them in case they ever got sick.

[6] The witness stated that she had no choice after the incident but to get back into the car with the accused as where they had stopped there was only the sea and the bushes and she was not sure where to go and was afraid that he might kill her. The area was about one hundred metres from the road and with no houses around and could not be seen from the main road.

[7] The accused brought her back to town and told her he would go to the shop where his wife was to get her some money and again asked her not to go to the police. He stopped at Orion Mall and she got out and got the licence number of the car. Her phone was discharged and she went to her cousin in Orion Mall and asked her could she borrow her phone. She phoned her friend and told her what had happened. Her friend told her to go to the police station which she did. She made her complaint. She was then taken to the hospital for a medical examination. She was eventually brought home and undressed and gave the police the clothes she had been wearing during the incident for forensic examination.

[8] On the day of the incident, she was wearing a blue blouse and three quarter length pair of jeans and white, grey, and brown floral panties. Her panties got torn because the accused had pulled them off. The accused had not touched the upper part of her body, he only removed her jeans and her panties. In cross-examination, she vehemently denied that she had consented to the sexual act and then because he had not paid her, she had reported the incident to the police. She accepted that there were no scratches and lesions on the upper part of her body but stated that both her hands at her wrists were painful where he had pressed on them.

[9] Her mobile phone number was [. . .] which was registered in the name of NL, her elder sister as she had bought her the SIM card when she was pregnant and couldn't buy the card herself.

Evidence of Maxime Morel of Airtel

[10] Mr Morel testified that he was the Manager for Support, Litigation, and Court Representation for Airtel and had been working for the company for seventeen years. He had been asked to prepare a report on the incoming and outgoing calls and texts on phone number [. . .]. The information retrieved related to the period from the 23 March 2020 to the 26 March 2020. There were no calls or texts from the phone to the number [. . .].

Evidence of NL

[11] The witness testified that she was the complainant's sister and that she lived at Sans Souci. She had bought the SIM card for her sister who had been pregnant at the time and had called her to get the SIM card for her. The number had [. . .] in it but she could not recall it exactly.

Evidence of AJB

[12] The witness testified that she lived at Barbarons and was a sales assistant. On the 25 March 2020, she was working. Sometime before 4 pm she received a phone call from her friend, the complainant, who asked her whether she knew anyone in the police who could help her. She asked her what had happened and the complainant told her just to memorize the number [. . .]. She told her about an incident that had happened to her.

[13] She told the complainant to go straight to the police station. Later the complainant phoned her on a police phone and was with a police officer when she made the call.

Evidence of Woman Constable Bryna Charles

[14] The witness testified that she was attached to the CID office at Bois de Rose and on 25 March 2020 cautioned the accused for the offence of sexual assault. She recorded a statement from him in the presence of her colleague police officer Davis Siméon. In the statement, the accused states that he knew the complainant for about a month and that they often called each other on the phone and when he was not working he would do trips for her in his 'taxi pirat'. He knew her as K and they agreed that even if they had partners they would have a relationship. He often brought her to Mont Buxton and they used to kiss. On Wednesday 25 March 2020, she called him and told him to come to town. He

picked her up at around 2.30 pm at the Barrel Discotheque and told him to take her to Perseverance. She sat in the back as she told him she didn't want her boyfriend to see her. At Perseverance, they started kissing. She asked him for SR 1500 and he told her he didn't have any money. He asked to have sex with him and she agreed. She touched him and lowered the back seat of the car and then she removed her trousers and panties. He put on a condom which she had earlier asked him to bring with him and inserted his penis into her vagina after she had opened her legs. The complainant enjoyed the sex because she moaned with pleasure. Not long after he ejaculated, removed the condom and threw it outside the car. The complainant used her panty to clean herself and put her clothes back on. Then she went to the back seat. She didn't ask him to stop or fight him. Then he went back to the bus terminal and he told her that he would contact her when he had some money. She gave him thirty minutes to get the money otherwise she would not see him again. On the day he had hired a Picanto from someone whose name he didn't know.

[15] The accused gave a further statement after being identified in an identity parade on 3 April 2020. In it, he stated that the lady who pointed to him in the line knew him because they have a relationship together and her name is C.

[16] The witness stated that she had been present at the identification parade when the complainant had pointed to the accused in the line-up.

Evidence of Constable Alexandro Betthew

[17] Constable Betthew attached to the Scientific Support and Crime Record Bureau had been working in the bureau for seven years. He had exhibits in the present case handed to him by WPC Charles and Sergeant Amice.

[18] He had received clothes and swabs, which he had helped to label and seal. These were signed by the complainant. He showed the exhibits to the court including a brown and pink panty which had holes in it and was torn.

[19] He had also attended the identity parade when the complainant had identified the accused.

Evidence of Corporal Stephane Agathe

[20] Corporal Agathe is qualified in the field of photography, fingerprint and crime scene investigation. He had taken photographs of the crime scene with regard to the present case. He had also attended the Identification Parade related to the case and had taken photographs which he produced.

Evidence of Police Officer Sultane Amice.

[21] The witness has been in the police service for twenty-five years and on 25 March 2020 accompanied the complainant to the hospital to be examined by the doctor. After the examination, she took the complainant back home where she changed clothes and gave her the ones she had been wearing during the incident. She handed the complainant's clothes to PC Betthew.

Evidence of other police witnesses

[22] Sub Inspector Hoareau gave evidence that he had arrested the accused on 25 March 2020 at around 17.30 at Perseverance Police Station. Inspector Jenna Nicette conducted the Identification Parade at Anse Aux Pins Police Station and was present when the complainant identified the accused.

Evidence of Doctor Taimi Velasquez

[23] Doctor Velasquez, a gynaecologist at Seychelles Hospital testified that on 25 March 2020 she examined the witness. The vaginal swab was negative for sperm as the complainant said that the man who assaulted her had been wearing a condom. She had removed her panties and she stated that they looked normal.

Evidence of George d'Offay

[24] Mr. d'Offay, the director for Sales and Customer at Cable and Wireless, testified that he had been asked by the police to report on incoming and outgoing calls on phone [. . .]. The phone was registered in the name of DL, the accused. There were no incoming calls or texts from his phone to phone [. . .].

[25] The complainant was recalled to examine the exhibits produced and to confirm that the clothes were indeed the ones she was wearing on the day. She stated that when she was at the doctor's for examination her panties were in a torn state.

The Defence Evidence

[26] The accused opted not to give evidence.

Closing Submissions

[27] Learned Counsel for the Prosecution submitted that sexual intercourse is not disputed in the case as the accused admitted it. The only issue for the court to determine is whether there was consent or not. Counsel submitted that the prosecution had established all the elements of the offence beyond a reasonable doubt. The complainant has denied consenting to the intercourse. There was force used as the complainant's torn panties show. The complainant also testified that her wrists had been painful where the accused had pressed. It is submitted that the complainant stated that her panties were not examined by the doctor which would explain why the doctor had stated that when she examined the complainant the panties looked normal.

[28] The contents of the accused's statement are also damning. He first calls the complainant K but at the ID parade calls her C yet he stated that he had had an intimate relationship with her for a month.

[29] His statement about making calls to each other has also been rebutted by the evidence of Maxime Morel and George d'Offay who produced phone records of the complainant's and accused's phones which reveal no texts or phone calls between the two phones.

[30] In his closing submissions, learned Counsel for the Defence stated that the complainant had consented to sexual intercourse with the accused. The complainant was at Bel Air bus stop going to Sans Souci but had gone to Perseverance which he submitted at least showed consent to be transported out of the way. She only left the car to get help when the accused got out of the car to get money. He also submitted that there was a discrepancy regarding the state of the panties between the doctor's evidence and the

evidence of the complainant. He, therefore, submitted that the prosecution had not established that intercourse had not been consensual.

Discussion of the evidence with regard to the applicable law

[31] The accused has been charged with sexual assault contrary to section 130(1) read with section 130(2)(d) of the Penal Code and punishable under section 130(1) of the Penal Code, the relevant provisions of which 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-

...

(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.

[32] In respect of sexual assault offenses, the Court must be satisfied that the accused person sexually assaulted the complainant. In this case, the alleged sexual assault is the penetration of a body orifice. The two elements that the court must be satisfied with are that the accused intentionally penetrated a body orifice of the complainant with his penis and that the complainant did not consent to the penetration.

[33] It is common ground that vaginal intercourse took place between the accused and the complainant. The complainant’s evidence is that the intercourse was without her consent whilst the accused’s narrative in his statement is that the intercourse was consensual.

[34] The only element that needs proving beyond reasonable doubt by the prosecution is that the complainant who had the freedom and capacity to make a choice did not consent to

the intercourse. One of the difficulties in the definition of consent in the Penal Code is that it only defines the absence of consent. As was stated in *R v S E* (CR 30/2016) [2017] SCSC 413 (18 May 2017) in this regard,

“Crucially missing from the definition are the elements necessary for consent such as voluntariness, freedom and choice to agree, the agreement itself, and ... the capacity to agree... The absence of a definition of consent is especially problematic given the fact that the presence or absence of consent has long been the crucial concept in establishing sexual offences and the fact that consent is and will continue to be inherently ambiguous.”

[35] Learned Counsel for the accused has submitted that the complainant agreeing to take a lift in the car driven by the accused shows an element of consent. I cannot disagree more.

[36] Absent the definition of consent in the legal provisions, the approach of this court, in my opinion, should be one that includes a communicative or affirmative consent standard. Such a standard would require that those engaging in sex demonstrate their consent to one another. Hence consent requires that sexual participants actively demonstrate their consent to one another through actions or words (Pineau, 1989)¹.

[37] Such an approach would go a long way towards putting paid to the myths that consent is proven by the absence of a woman screaming, resisting or fighting off her attacker and remove the attempts to put the complainant on trial as was the attempt by the defence in the present case.

[38] In *Nicholas Brian Julie v R* (Criminal Appeal SCA21/2017) [2018] SCCA 18 (31 August 2018), I stated, in this regard, that it was time to look beyond the traditional male perspective as the prism through which sexual offences must necessarily be viewed.

[39] I also said:

“In respect to what must be proven by the prosecution for a conviction of the offense of rape, the court for example in R v Malone (1998) Cr.L.R 834, held that there was no requirement that absence of consent be demonstrated or communicated in order to establish that element of rape; in other words, the actus

¹Pineau, L. (1989), ‘Date Rape: A Feminist Analysis’, *Law and Philosophy*, 8/2: 217-243

reus of rape did not import a requirement that the complainant demonstrates by words or conduct that there was lack of consent. All that was required for the jury to decide on the issue of consent was some evidence of lack of consent.

In R v Hysa (2007) EWCA Crim 2056, the Court determined that issues of consent and capacity to consent to sexual activity should normally be left to the jury to decide.

In R v Olugboja (1982) QB 320, Dunn LJ of the Court of Appeal held that:

“The jury should be directed that consent, or the absence of it, is to be given its ordinary meaning and if need be, by way of example, that there is a difference between consent and submission; every consent involves a submission, but it by no means follows that a mere submission involves consent.”

In Seychelles, the Judge a quo is the Judge of law and fact and it is he/she who adjudicates on the issue of consent. In my view in such adjudication and in the appreciation of the facts, adopting the modern and holistic view of sex is imperative.”

[40] I continue to hold these views and approach the issue of consent in the instant case with these values in mind.

[41] The matter that should be of concern is whether consenting to a lift is indicative of consent to have sex. In *Julie* (supra) I cited the case of *R v Ashlee*, 212 C.C.C. (3d) 477 in which the Alberta Court of Appeal held that consent must be given to a particular sexual activity and at the time of that activity, and that consent is a continuing state of mind which does not remain operative after a person has become unconscious and incapable of consenting. In this context, the Thames Valley Police video is highly informative (See “Tea and Consent” <https://www.youtube.com/watch?v=oQbei5JGiT8>)

[42] I found the complainant in this case very credible in the evidence she gave. Although her evidence requires no corroboration, many independent strands of evidence adduced by the prosecution further bolster her narrative of events. Her panties were torn – and I pause here to say that the chain of evidence in the production of the panties as an exhibit was not once broken and remained intact throughout. The defence attempted to show that as the doctor had described the panties as ‘normal’ then the prosecution must have either

changed the panties or interfered with them. I saw no evidence of that and find that the discrepancy between the doctor's evidence and the rest of the prosecution witnesses who testified on the subject must be due to the fact that the doctor did not pay particular attention to them. I do not see this evidence as in any way damaging the prosecution evidence.

[43] However, what is damning for the accused are the contents of the two statements he gave to the police. As was pointed out by Counsel for the prosecution, if he had indeed, as he claims had an intimate relationship with the complainant for a month why could he not remember her name, calling her K and then C. Crucially, the phone calls he claimed to have had with the complaint to show this relationship never happened at all.

[44] Counsel for the Defence has also drawn the court's attention to the fact that the complainant did not try to escape. As I have stated above myths about the "normal" reactions of rape victims should be consigned to the dustbin of the history of male perspective myths about rape victims. Submission by a victim is not permission and must not be viewed as such.

[45] I am of the view that the prosecution, in this case, has discharged its burden of proof with regard to all the elements of the offense of sexual assault with which the accused has been charged beyond a reasonable doubt.

[46] In the circumstances, I convict the accused of the offence as charged.

Signed, dated and delivered at Ile du Port on 21 September 2020.

Twomey CJ