IN THE SUPREME COURT OF SEYCHELLES

Reportable
[2019] SCSC 738
CR 39/2019

REPUBLIC — **Prosecution**
(rep by Gulmette Leste)
and

JA — **Accused**
(rep. by Nichol Gabriel)

Neutral Citation:	*Republic v JA* CR 39 of 2019 [2020] SCSC.....delivered on 08 October 2020
Before:	**Vidot J**
Summary:	Sexual assault, corroboration, vulnerable witnesses, identification
Heard:	20-07-20, 23-07-20
Delivered:	08 October 2020

ORDER

JUDGMENT

VIDOT J

[1] The Accused stands charged with sexual assault related offences as follows;

Count 1

Statement of offence

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

Particulars of Offence.

JA of [redacted]e, Mahe, on a date unknown to the prosecution during the school holidays of the month of April 2019, sexually assaulted another person namely DL who was under the age of 15, by penetration of a body orifice for sexual purpose, namely by inserting his penis in the vagina of the said DL

Statement of Offence

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

Particulars of Offence

JA of [redacted], Mahe, on a date unknown to the prosecution during the school in the month of April 2019, sexually assaulted another person, by the non-accidental touching of the sexual organ of that person, namely DL who was under the age of 15, by sucking the vagina of the said DL.

Evidence

[2] DL, the virtual complainant testified that she used to live at Roche Caiman with her sister, grandmother, mother and father. During the school holidays as there was no one to supervise her and her sister, the Accused would come over and would cook and look after them. She testified about an incident that happened during the April 2019 school holidays, whereby when the Accused came over, he would come to their bedroom, remove the cover from them and get into bed with them. She went to the shower and the accused came in, undressed and went in the shower. She got out and in the process, hurt her toe. She went to the bedroom and thereafter when she was on the bed the Accused came, got on top of her and placed his private part against her private part. At that time she was wearing a dress, but he lifted it up and had removed her panties. When he came into the room he had a towel around him but he had removed it before getting on top of her and when he saw a lady from the stairs he got off and went away. She further testified that the Accused sucked her private part. She reported the incident to her mother. She said that when the incident happened she

cried and shouted for help. [redacted] came and he asked the Accused to get off her. The former reported the matter to her grandfather, [redacted] and he told the Accused that he would report the matter to her mother.

[3] She further testified that in the afternoon of the day of the incident she had gone to the shop with one [redacted] and she had recounted the incident to [redacted] who had told her that she had to report the same to her mother because if she did not, he would.

[4] After the mother had been informed, she called Mrs. [redacted] of the Social Services. She was taken to Mrs. [redacted] office. Thereafter, she was taken to the hospital to see a gynaecologist.

[5] The mother, EL testified that she used to live at Roche Caiman with her daughters; DL and [redacted] and her grandmother. During the April 2019 school holidays she left her children with her grandmother when she went to work. When she would come back from work, the Accused was there. He would come to help out as her grandmother was sick. Sometimes around the 05th May 2019, a girl by the name of [redacted] reported to her that she *'saw things"* with her children. She somehow also mentioned that her daughters also reported the incident of abuse to her. However that was in April 2019. As a result she reported the matter to social services on 08th May 2019. This is confirmed by social worker, [redacted] The latter assisted them by ensuring that the children undergo medical examination. She also got the matter referred to the Police for necessary investigation. She accompanied her children to the Social Services and the doctor.

[6] Dr. Taimi Velazquez Calzadilla is the gynaecologist who examined DL. Actually on the 14th May 2014, she examined both DL and her 12 year old sister who complained of having been sexually assaulted by a 63 year old uncle. Both girls were not very co-operative. They refused to answer any questions save for alleging sexual assault. She mentioned that the other sister was not very co-operative to the point that she could not produce a report pertaining to that sister. She produced a medical report which she compiled which was marked as exhibit (exhibit P4) before the Court. She noted that DL's abdomen was soft with no palpable abnormality. The external genital area was normal. There was presence

of a white discharge which was not smelly. The hymen was not intact and the anal area normal. She prescribed clomitazol for the discharge.

[7] The accused elected not to give any evidence and no adverse inference shall be drawn from the Accused election to exercise that right. However, the accused defence is that the assaults did not take place. It is nonetheless not denied that the accused visited the home where the virtual complainant resides and that in the April 2019, he was present at the house

The Law

[8] Sexual assault is a crime that requires both actus reus and mens rea. It is also held in **R v Edmond [2009] SLR 9**, sexual offences cannot be labelled as requiring basic intent or specific intent, and must be judged objectively. However, once the actus reus has been established, the Court needs to consider the mens rea. The Accused has been charged with the offence of sexual assault in that he (a) for sexual purpose inserted his penis in the vagina of the virtual complainant (therefore penetrating a body orifice of the latter) and (b) by the non accidental touching of the sexual organ of DL by sucking her vagina.

[9] Section 130(1) of the Penal Code provides as follows;

"Any 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 section 2(c) or (d), the person shall be liable to a term of 7 years and not more than 20 years

....."

In the present case DL was aged 12 years and therefore she could not have given consent. This is provided for under section 130(3) which states that if the person is below the age of 14 years, that person cannot give consent. Therefore, if the accused is found to have committed the unlawful act, that defence of consent will not be available to the accused.

[10] Therefore, in this case, the Court needs to determine if the sexual acts as described in the Particulars of Offence did indeed take place. That act could include just a non accidental touching of the virtual complainant's sexual organ. That would satisfy the requirements laid down in the second count. The first count requires the penetration of the person's vagina by the accused. The standard of proof that the prosecution needs to establish that is beyond reasonable doubt. It was held **Heard [2008] QB 4**, that this requires no more than evidence that the penetration was deliberate.

Evaluation of Facts and Law

Corroboration

[11] This Court reminds itself that, as was held in **R v Wilfred Volcere (2016) CR 68/2014** (unreported) that in case of sexual assault, corroboration is not an absolute necessity. However, in **R v Makanjuola [1995] 1 WLR 1348** and **R v Easton [1995] 2 Cr App R 469 (CA)** it was held nonetheless that the Judge has a discretion to warn the jury if he or she thinks that it is necessary. Lord Taylor CJ giving the judgment of the Court, said that they had been invited to give guidance as to circumstances in which , as a matter of discretion, a judge, in summing up ought to urge caution in regard to particular witness and the terms in which that should be done. He stated thus;

"The circumstances and evidence in criminal cases are infinitely variable and it is impossible to categorise how a judge should deal with them. But is clear that to carry on giving 'discretionary' warnings generally and in the same terms as were previously obligatory would be contrary to the policy and purpose of the 1994 Act. (The Criminal Justice and Public Order Act of England). *Whether as a matter of discretion, a judge should give a warning, and if so the strength and terms must depend upon the content and manner of the witness's evidence, the circumstances of the case and the issues raised. The judge will often consider that no special warning is required at all,. Where, however, the witness has been shown to be unreliable, he or she may consider to urge caution. In a more extreme case, if the witness is shown to have lied, to have made previous complaints, or to have bear the defendant a grudge, a stronger warning may be thought appropriate and the judge may suggest that it would be wise to look for some supporting material before acting on*

the impugned witness's evidence. We stress that these observations are merely illustrative of some, not all, of the factors which judges may take into account in measuring where a witness stands in a scale of reliability and response they should make at the level in their directions to the jury. We also stress that judges are not required to conform to any formula and this court will also be slow to interfere with the exercise of discretion by a trial judge who has the advantage of assessing the manner of a witness's evidence as well as its contents."

[12] In **Lucas v Republic [2011] CA 14/2009** (delivered on 02nd September 2011, it was held that *"it is a matter for the judge's discretion whether a corroboration warning is appropriate in respect of a complainant of a sexual offence case as indeed in respect of any of the other witness in whatever type kind of case. There would be need for an evidential basis for suggesting that the evidence might be unreliable. Such basis does not include mere suggestions in cross examinations by counsel. Where some warning is required, it is for the judge to decide the strength and terms of that warning."* In the present case, I feel that some form of warning should be given, particularly due to the evidence available to Court and the demeanour of the virtual complainant when testifying.

Count No. 1

[13] In this case and as in any sexual offence cases generally, there isn't any eye witness normally who would have seen the act of sexual assault being committed. The Court therefore, needs to looks at surrounding, mostly circumstantial evidence to determine whether the offence actually took place. The fact that there are no eye witnesses does not necessarily mean that the offence was not committed. In this case as far as the first count is concerned the medical evidence from the gynaecologist, Dr. Caldazilla clearly does not establish the act of sexually assault having been committed. That could well be because the incident happened in April 2019 and DL was examined only on the 14th May 2019. The fact the hymen was intact does not establish what caused the rupture to happen and it certainly does not establish that the accused caused the tear of the hymen. There is reference that there were eye witnesses. These were a lady who came to the stairs and [redacted] who saw

the alleged crime being committed. However, these eye-witnesses were never called to testify.

[14] Therefore, the only evidence available to consider is that of the virtual complainant herself. I remain conscious that to say that every complainant in a sexual offence case is less worthy of belief than another witness is an affront to their dignity and violates their right guaranteed under Article 27(1) of the Constitution; vide **Lucas v Republic** (supra). It is in this spirit that the evidence of the virtual complainant will be evaluated. In regards to the first count, DL complained that after the accused had entered the bedroom and got in bed with her, he had removed the towel that was around him, had removed her panties and had gotten on top of her, at which point he put his private part with her private part. She never mentioned any penetration of his private part into hers. There was a lot of effort exerted for her to state that there was. She was given breaks while being questioned but her answer remained the same. Counsel for the Republic, in her submission invited Court to consider the fact that she testified that she felt pain under her belly which made her cry as indicative that there was penetration. It was further argued that due to her tender age and immaturity, she was not able to explain exactly what happened. I do appreciate and seriously considers argument put forth by Counsel for the Prosecution. However, even then, there is serious doubt due to DL's testimony if there really was a case of penetrative sex. Even at one point in examination in chief (p10 proceedings of 13th December 2019) the interpreter had misinterpreted her answer by saying that she had said he put his private part in her private part, she was asked to repeat and the answer was that the accused placed his private part with her private part and at some point said that he placed his private part on his private part (p11 of proceedings).

[15] This Court cannot at all cost close its mind to the well established principle that the benefit of any doubt should resolved in favour of the accused, particularly if the overall picture arising from this creates a reasonable doubt as to the guilt of the accused. I find that the Prosecution has not established this Count beyond reasonable doubt and it fails. Therefore the accused is found not guilty of this first Court. Whether or not the court could have found him guilty of a lesser offence of non-accidental touching, would be explained at paragraphs 21 and 22 below.

Identification

[16] The defence touched on the issue of identification. Normally when identification is in doubt, the court has to give a Turnbull warning. Counsel for the accused has suggested that it was other person named [redacted] who inflicted these assaults on DL. The latter responded that it was the accused and not [redacted] who committed that particular assault. Both men are known to her and the accused is a person who frequents the home where DL resided. I am of the opinion that in this case identification was not an issue. It is explained in Archbold 2012 Edition. P 1537 14-20, states that a *"witness may know the name of the person he asserts is the offender either because he has had personal experience of the offender using or answering to the name or because he is aware of the offender being known by that name by a plurality of people ..... in the first case there is no question of hearsay, in the second case, there is hearsay but it is admissible pursuant to common law ... The issue is whether or not the witness has correctly identified the defendant as the offender, not whether he knows his name, in order to judge this the tribunal of fact will want to know how well the witness knew the defendant."*

Count 2

[17] The second count is that the accused sucked DL's vagina. She admitted that she had suffered the similar assault from [redacted]. She explained that [redacted] had sucked her vagina as well but on a different occasion. She testified that when the incident with the accused happened she shouted and cried out for help. As a result of that her uncle [redacted] came in the bedroom. [redacted] asked the accused to get off DL. It appears that at the material time her grandmother and her sister were at home too. She testified that [redacted] reported about the incident to her grandfather [redacted]. The latter spoke to her about the incident and told JA that he would report the incident to her mother. [redacted] told the mother about it on the same day of the incident.

[18] This Court remains sensitive to evidence given by children and vulnerable witnesses, particularly those affected by sexual assault. Their evidence might lack clarity and be shaky in some area. This could be because they are shy and embarrassed or that it could be traumatic to relive and in shame of such bad experience. In dealing with witnesses, the

following was stated in **Vilakazi v The State (636/2015)[2015] ZASCA 103** (10 June 2016);

"In Woji v Sanlam Insurance Co. Ltd 1981 (1) SA Diemont JA provided a helpful guide to approaching the evidence of young children. The guide highlights, as the focal point, the trustworthiness of the evidence. At 1028A-E of the judgment, the learned judge said:

"the question which the trial court must ask itself is whether the young witness; evidence is trustworthy. Trustworthiness is pointed out by Wigmore in Code of evidence para 568 at 128, depends on factors such as the child's power of observation, his power of recollection, and his power of narration on specific matter to be testified. In each instance, the capacity of the particular child is to be investigated. His capacity of observation will depend on whether he appears "intelligent enough to observe. Whether he has the capacity of recollection will depend again on whether he has sufficient years of discretion 'to remember what occurs, while the capacity or narration or communication raises the question whether the child has "the capacity to understand the question put, or to frame and answer intelligent answers" (Wigmore on Evidence Vol 11, para 506 at 596). There are others factors as well which the court will take into account in assessing the child's trustworthiness in the witness box. Does he appear to be honest – is there consciousness of a duty to speak the truth? Then also, "the nature of the evidence given by the child may be of a simple kind and may relate to a subject matter clearly within the field of its understanding and interest and circumstances may be such as practically as to exclude the risk arising from the suggestibility."(per Schreiner JA in R v Manda [1995](3) SA 158 (A). At the same time the danger of believing a child where evidence stands alone must not be underrated."

[19] In evaluating the evidence in this case, I am also guided by the South African case of **Ricky Ganda v The State [2012] ZAFSHC 59** which held that *"The proper approach is to weigh up all the elements which points towards the guilt of the accused against those which are all indicative of innocence, taking into account of inherent strength and weaknesses, probabilities and improbabilities on both sides and having done so, to decide*

whether the balance weigh so heavily in favour of the state as to exclude any reasonable doubt about the accused's guilt."

[20] I note that DL was evasive and continually refused to answer some question put to her. She appeared somewhat unease when being both examined and cross examined. Maybe, I can put this down to her being nervous and embarrassed in having to talk about such intimate matters, particularly if it is true that she was sexually assault. The gynaecologist also testified as to DL unwillingness to provide information as to what happened, save to say that the Accused assaulted her. When dealing with children and vulnerable witness the Court has to be sensitive and consider that such manner of reaction does necessarily impute that the witness is a liar. That makes the task of the judge twice as hard. Sexual assault is very invasive and destroys a person to the core in many ways; mental, physical, psychological, etc. It is more alarming when children are the victims. Unfortunately, it is fact and a growing concern of mammoth proportion that in our society there are many paedophiles lurking around and preying on the weak and vulnerable to satisfy their disgusting and heinous behaviour. That cannot be condoned.

[21] However, despite the above, I do not believe that I was getting a clear picture of what happened. Firstly, I note that there was evidence adduced that both DL and her sister was sexually abused by the accused. Thus the reason why they were both taken to the social services and the gynaecologist. However, the accused is not charged with assaulting DL's sister. DL testified that when the incident happened she was at home with her grandmother, sister and the accused. She shouted and cried when the incident happened. She said that an uncle [redacted] came to assist her. He demanded that the accused to get off her and that he reported the incident to her mother. At some other point in her evidence she said a lady came upstairs to see what was happening and the Accused climbed off her. Despite evidence suggesting that [redacted] told the mother about the incident. The mother never mentioned anything about being so informed by [redacted] [redacted] apparently reported the incident to her grandfather, [redacted] who reported it to the mother. That was done the same day of the incident. The mother informed the accused that she was going to report the matter to social services. DL testified that she too reported the matter to her mother. Yet, I find it strange that the mother stated that it was on the 05th May 2019 that [redacted] told her

about the incident and it was only on the 08th May 2019 that she contacted the social services. DL said that she reported the incident to one [redacted] the same day who informed her mother. That is not reflected in the mother's testimony

[22] I have difficulty in believing that the incident as serious as the offence levelled against the accused, is reported to the mother in April she fails to do anything about it immediately. I believe that any concerned parent would have acted immediately. She would not have waited until being told by [redacted] on the 05th May 2019 and then only contacted the social services on the 08th May 2019. This is a flaw that I cannot make sense of. I have already held that corroboration is not necessary in cases of sexual assault. Nonetheless, in cases where the evidence was at times incoherent, it would have assisted if [redacted], [redacted] and [redacted] were called to testify. They were not. A perusal of the trial docket indicates that no statements were recorded from them. At times when asked if the accused did anything wrong to her, DL stayed totally silent. [redacted] is alleged to have witness the incident. If that was the case his evidence would have been of major assistance to Court.

[22] I am sure that something happened to DL but I cannot say what it was. I believe that there is a cover-up of the actual incident that happened. If I am correct that the adults adopted a cover-up, these adults have failed DL.

[23] One of the primary duty of the court is to dispense justice to both the accused and the virtual complainant. That justice will be derived from evidence and law. The matters referred to in the last 3 paragraphs leave a lingering doubt in my mind, a doubt that is reasonable. Such doubt should be resolved in favour of the accused. The Prosecution has therefore failed to prove his case beyond reasonable doubt.

[23] Therefore, I dismiss the case against the accused.

Signed, dated and delivered at Ile du Port 08 October 2020

Vidot J