

SUPREMECOURT OF SEYCHELLES

Reportable
[2020] SCSC
CR 38/2018

REPUBLIC
(rep. by H Kumar)

and

SJ
(rep. by N Gabriel)

Accused

Neutral Citation: *R v SJ* (CR 38/2018) [2020] SCSC (29 October 2020)
Before: Govinden J
Summary: Sexual assault- Section 130 (1) and Section 130 (2) read with Section 130 (3) (b) of the Penal Code; Virtual Complainant highly credible; no necessity for corroboration warning; conviction of Accused person.
Heard: 25th March – 1st April 2019
Delivered: 29th October 2020

ORDER

The prosecution having managed to prove the charge of Sexual Assault beyond a reasonable doubt, the court convicts him as charged

JUDGMENT

GOVINDEN J

The charge against the Accused

[1] The Accused stands charged as follows:

Count 1

Statement of Offence

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

Particulars of offence

Mr S J, of [. . .], on [....] at [.....] sexually assaulted another namely Ms M C V by inserting his fingers into the vagina of her and by inserting his penis into the anus of her. She is the age of 14 years at the time of the offence.

The charge

[2] At the outset the Court finds that the grammatical make- up of the particulars of the offence appears to be unfelicitous. However, this said, given that there was no objection on the issue of ambiguity or lack of clarity of the charge from the Defence and bearing in mind of the need for the Court to remain independent and impartial, the trial proceeded on the basis of the charge as filed by the Prosecution. The more so that it appears to convey the meaning that it was intended for and all the essential elements of the offence are clearly set out.

The Prosecution evidence

Evidence of Alessandro Bethew

[3] Police Officer Bethew is attached to the Scientific Support and Crime Records Bureau of the Seychelles Police Force. He attended a scene of an alleged Sexual Assault on the 4th of July 2018 and took some photographs. He was assisted in that regard by WPC Tirant. He produced an album of seven photographs as Exhibit P1. They consist of images of the Virtual Complainant and that of the Accused and different locations found in the latter's house as indicated by the Virtual Complainant.

Evidence of MCV

[4] MCV gave her testimony under oath as she understood the nature of an oath and via video link as she was considered as a vulnerable witness. It is her testimony that on the 4th of July 2018 she finished school at 2.40 p.m. From there she came to her residence at Petit Paris and went to her room in order to relax. Only her father was present at that time. After a while her cousin SJ came and they talked. During the conversation they both decided to go to SJ's home, who lived a couple of minute walk, for them to get a calculator and a

compass that she needed. She did that with her father's permission. They left her house at around 3 to 4 p.m. On the way SJ had asked her whether she had lost her virginity.

[5] Arriving at the Accused house they watched TV and he went to fetch the compass and calculator. When he came back he put his hand around her shoulder and he strangled her. She felt faint and the accused then woke up and locked the door. Thereafter, SJ grabbed her and put her across his shoulder and brought her to his bedroom and put her on the bed. He removed her panty and asked her if she wants to put his private part in hers. She refused and he put his two fingers inside her private part and pressed her mouth so that she could not scream. After that he removed his fingers from her private part and asked her to taste it. She managed to let out a scream and upon hearing her scream he became angry and started slapping her and she cried. Then he went and got his phone and filmed her naked whilst telling her to say that she loved what he was doing. Following that the Accused turned her over and had anal sexual intercourse with her. Then he took an umbrella from the shelf and asked her if he can insert it in her and she said no. After a while she got a chance to put on her panty and SJ started to cry saying that he was sorry for what he has done. He then brought her to the shower and washed her private parts.

[6] Afterwards she took her phone and left his house. He followed her and on the way kneeled down near the road and told her that he was sorry and that he did this because his ex-girlfriend has gone back to her ex-boyfriend. She left his house at around 5.30 to 6 pm. He then left her and she went to her house by herself. At her place she asked one of friend's named Aaron Dubel to go and call her father and brother and she went in her room and sat on her bed. Thereafter, her father came and asked her what has happened and she recounted her experience that she has had with SJ and told him that he has raped her. Her father got angry and got a belt, and started to beat her with it. She was later taken to the Seychelles Hospital and she was examined by a doctor. The witness identified SJ in court.

The evidence of DV, the father of MCV

[7] According to DV, he is 41 years old. He lives with his wife and his three children, being two sons and MCV. On the date of the incident as averred in the charge the latter had gone to school and she came home at around 3p.m. He was at home at the time and his

wife was admitted at the hospital. At around 4.30 p.m. SJ, whom he identified in court, came and knocked on the house door and he let him in as always as he was both a family acquaintance and related to his wife.

- [8] The two talked with one another and after a while his daughter ask him permission to go and get a compass and a calculator and they both left together at around 5 past 5 p.m. SJ lives at around 12 to 15 minutes walking distance from his house. MCV came back at around 6.15 p.m. and she was crying and she appeared to be in a distressed state. She complained that the Accused had choked her, assaulted her and raped her. Out of anger he whipped her twice with his belt and then called the police and brought his daughter to the casualty.

Evidence of MsMarina Shamova

- [9] Ms Shamovais a clinical psychologist who had been working for the Ministry of Health. The professional competence of this witness was not contested by the Defence. She remembered assessing SJ. She was asked to first examine him to see if he needed urgent help. Her assessments of him starting from the 6th July 2018. She made a report which was produced as Exhibit P2. According to the witness, she found that the Accused person has specific psychological problems, which are curable with possible psychotherapy. She found that he can, however, realise the consequences of his actions and that he is comprehensive so as to be responsible for his behaviour. He is able to consider and to choose preferable options with his behaviour patterns. He is able to plan his actions, he does not have psychotic or other types of mental disorder, which might impact his level of personal responsibility.

Evidence of Dr Maxwell Fock-Tave

- [10] Dr Fock-Tave is a gynaecologist working at the Seychelles hospital since 1998. His competency as a gynaecologist was not challenged by the Defence. According to his testimony, he examined MCV on the 4thof July 2018 at 10.00a.m. The history of the patient was that somebody known to her had tried to rape her and assaulted her and tried to put his penis in her genital area, being the area surrounding the vulva and around the

anus. Following the examination he prepared a police report, the copy of which he produced to the Court as Exhibit P3. According to the doctor, upon examination he found the Virtual Complainant to be in good general condition and not in distress. There was no fresh lesion on the upper body and the back and the abdomen. There were two small scratches on the lateral aspect of the right thigh about 2 cm long. He saw no injuries on the legs, feet and buttocks. Her vulva were soiled with a mucoid white substance and there was no abnormal discharge from the vagina. Her anal area was normal beside a very small tiny superficial scratch at the posterior aspect. He found that she was not a virgin. Her hymen was not intact, however, there was no fresh injury on it. There was no blood. He took a swab from the vulva and the perineum for forensic purposes which he gave to the police.

The evidence of Ivan Esparon

[11] Ivan Esparon is an Inspector of Police attached to the Digital Forensic Section of the Seychelles Police Force. He is an expert in extracting digital evidence from electronic devices. His competency as an expert was not questioned by the Defence. In this case he has assisted the investigation by extracting evidence from mobile phone of the Accused person handed over to him by the Investigating Officer Travis Pointe. The extraction generated from the phone of the Accused was attached to his final report. The Digital Forensic Examination Report of the witness was produced as Exhibit P7 and the Accused person's phone as Exhibit P5. The extraction shows one SMS and 140 pornographic web search history were present on his phone. Some of the sites had key word as "rape". The SMS was send on the 4th of July 2018 at 18.23. It was send to a number that had the forename of Virtual complainant. The content of the SMS was "sorry, sorry, sorry, sorry, sorry".

The evidence of Travis Pointe

[12] Travis is a Police Officer attached to the Police Child Protection Unit. As part of his investigation he sought for and obtained the Virtual Complainant's Birth Certificate. He produced this document and it was admitted as Exhibit P8(a). He explained that he handed over the phone of SJ (Exhibit P5) to Officer Ivan Esparon for analysis. He recorded a

Statement under Caution from the Accused on the 5th of July at the Male Medical Ward, Seychelles Hospital. The admission of this statement into evidence was contested by the Defence. Following a trial within a trial held on its voluntariness, it was not admitted in evidence.

The evidence of Justin Dogley

[13] This witness is a Superintendent in the Seychelles Police Force. He was the most senior Police Officer at the alleged scene of the crime. He arrived there around 20.15 p.m. on the 4th of July 2018. At the scene he noticed SJ being taken away for medical attention. He then entered the Accused home after the arrival of the police Scene of Crime and Forensic officers. He seized Exhibit P5, the phone of the Accused, which he handed over to Travis Pointe the day after. This witness says that when he saw SJ at the scene he was lying on the floor outside and was bleeding.

The evidence of Lanah Tirant

[14] Lanah is a Police Constable attached to the Anse Aux Pins Police Station. She was on duty on the 4th of July 2018. At around 6.36 p.m she was instructed to proceed to attend a scene where SJ lives. She proceeded first to where the Virtual Complainant was in the company of Special Constable Kenny Barbe. There they met the father of MCV at her house who informed them that the latter has been raped by SJ. She examined MCV and she did not see any visible marks.

[15] Following this, they went to the house of the Accused person. There they met his grandparents. The grand father told her that SJ had locked himself inside the house. She saw that the house door was locked. After a while they managed to open the door, and they searched for SJ inside the house and found the bathroom door locked. The grandfather broke the bathroom door open and Ms Tirant saw the Accused in the bathtub. The water in the tub was red in colour and the Accused was not responding. He was taken out of the bath and placed outside whilst they waited for medical assistance.

[16] The ambulance arrived later and after the paramedics had bandaged injuries on both of his wrists they took him away in an ambulance. Later she went to the hospital to see SJ.

She saw him there and he was arrested and informed of his constitutional rights and the latter just turned away and did not say anything. The witness said that her comments in her written statement that she arrested SJ after having been placed outside the house is a mistake.

[17] With the evidence of police officer Lanah Tirant completed, the Prosecution closed its case.

The Defence Evidence

[18] The Accused, upon being put to his rights in pursuant to section 184 of the Criminal Procedure Code, exercised his rights to remain silent and not to call any witnesses. The Court thereafter invited Counsels to file closing submissions.

Closing Submissions

Prosecution's submission

[19] The Learned Counsel for the Republic referred to what he considered as the facts of the case in support of his submissions, and stated that they consist of credible and trustworthy evidence given by the Prosecution witnesses and hence can be relied upon by this Court against the Accused involved in this case in order to convict him.

[20] The Prosecution further relied upon a decision in the case of **Raymond Lucas -Vs- the Republic**, SCA 17 of 2009, found in paragraph 26 & 28, in support of a submission that there is no longer the obligatory requirement of corroboration warning in this case. In that regard the Court of Appeal had held as follows:

“To say that every complainant in sexual offence case is less worthy of belief than another witness is an affront to their dignity and violates the right guaranteed under article 27(1) of the Constitution. The Corroboration Rule in sexual offence cases certainly does not have its object the amelioration of the conditions of disadvantaged persons or groups. An accused in a sexual offence case cannot be viewed as a disadvantaged person although a victim can. In fact it worsens the

conditions of sexual offence victims when they are the only ones thus targeted without an evidential basis.”

“28. We therefore hold that it is not obligatory on the courts to give a corroboration warning in cases involving sexual offences and we leave it at the discretion of judges to look for corroboration when there is an evidential basis for it as stated earlier”.

[21] Finally, the Learned Counsel submitted that the Accused herein committed the offence contrary to Section 130 (1) of the Penal Code which provides in its proviso that –

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:

[22] Based on these arguments made above on behalf of the Republic, he submitted that the Prosecution has proven the charge in Count 1 against the Accused beyond any reasonable doubt.

Defence’s submission

[23] On the other hand, in a gist, the submissions of the defence are as follows.

[24] The Defence referred to the facts of the case. Which, according to it, are very favourable to an acquittal. In that regard, it is submitted that the only evidence in respect of the actual commission of the offence is from MCV and that this has to be examined at length in the light of the doctor’s evidence. According to counsel, Dr Focktave evidence shows that there was total of absence of injuries, which proves that the offence did not take place. Moreover, it is his submissions that the evidence from the police scene of crime officers and that of MCV has been so manifestly discredited that it should be ignored by the Court. On this basis it is claimed the Republic has not managed to prove this case beyond a reasonable doubt and that, accordingly, SJ should be acquitted.

Analysis and determination

The law

[25] 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.”

[26] In respect of sexual assault offenses, the Court must be satisfied that the Accused person sexually assaulted the Virtual Complainant. The 1st essential element that needs to be proven is the acts of penetration, the physical element. The alleged physical acts of sexual assault in this case consist of the penetration of the body orifices of MCV. The 2nd element that the Court must be satisfied is that the Accused intentionally penetrated the body orifices of the Virtual Complainant for a sexual purpose and that she did not consent to those acts penetrations. Though the offence have been couched as consisting of more than one acts, the proving of any one of those acts, together with the required mens rea would be sufficient to prove the case.

- [27] The charge in this case avers that that the body orifices of the Virtual Complainant were penetrated as follows: by the Accused inserting his fingers in the vagina and his penis in the anus of the Virtual Complainant. The defence of the Accused in this case is one of simple denial. It is his case that the offence as averred by the Prosecution has not been proven, given the reasonable doubts in its case. Those doubts being particularly reflected in the lack of injuries to the private parts of the Virtual Complainant.
- [28] I have given careful attention to the evidence adduced by the Prosecution. I have been especially attentive to the cross-examinations of the Prosecution witnesses, which, together with considering their demeanours, have given me a very good appreciation on their credibility.
- [29] As to the issue of consent, the prosecution also bears the burden of proving that the Virtual Complainant was below the age of 15 at the material time pursuant to section 130 (3) (b) of the Penal Code and as such could not have consented to those acts, which allegedly constitute the sexual assaults, as according to the prosecution she was below the age of 15. If this is proven, it would create an irrebuttable legal presumption that she could not have consented to those acts in law. I have given my careful attention to Exhibit P8(a), being the Birth Certificate of MVC. It shows that she was at the age of 14 years at the time of the commission of the offence. The admissibility and content of the certificate was not contested by the Defence in this case. I, therefore, find that in law the Virtual Complainant could not have validly consented to any of the different sexual acts referred to in the particulars of offence of the charge. Moreover, I also find that MCV has categorically denied that she ever consented to those acts and that at any rate, the Accused did not raise consent as a defence in this case. Accordingly, I find that the issue of whether the Virtual Compliant has consented to the actions of the Accused person is irrelevant and immaterial in this case.
- [30] As to the acts of penetration, the Court had analyse the testimony of MCV at length. Having done so, I find her testimony cogent, consistent and credible. She was a witness of truth throughout her testimony. I find that the Accused did come to her place after school on the 4th of July and upon being enticed by him to go to his place, they went to

his residence so that she could obtain a compass and a calculator. However, arriving at his abode the Accused put his devious plan of sexually assaulting the Virtual Complainant into action. He did that by forcefully inserting his fingers into her vagina and forcefully penetrating her anus with his penis. The fact she left her house in the company of SJ is confirmed and supported by MCV's father.

[31] The acts of the Accused were not accidental. It was intentional and had sexual purpose. His sexual inclination was evident from the start when both he and his victim were on their way to his house and he had asked her out of the blue whether she was still a virgin. His actions were deliberate and concerted and they took place over a long period of time. He strangled MCV, she felt faint and after this he locked the door. He then grabbed her and put her across his shoulder and brought her to his bedroom and put her on the bed. He removed her panty and asked her if she wants to put his private part in hers. She refused and he put his two fingers inside her private part and pressed her mouth so that she does not scream. After that he removed his fingers from her private part and asked her to taste it. Upon hearing her screams he became angry and started slapping her and she cried. He tried to ask for forgiveness for his deeds when MCV was going back to her house. These are intentional acts done deliberately in order to satisfy the lustful purpose of the Accused person. I therefore find as proved that his act was intentional and for a sexual purpose.

[32] Much has been said about the lack of injuries on the body of MCV by the Defence in this case. I have addressed my mind to this issue. Having done so, I am of the view that the Virtual Complainant was not a virgin at the time of the commission of the offence. This is supported by the medical evidence of Dr Fock-Tave. As such, the Court would not have expected to see fresh lesions in her vaginal area or a breach of her hymen during the course of the commission of the offence. As to her anal area, the doctor found a very small tiny superficial scratch at the posterior aspect. This amounts to an injury and Dr Fock-Tave was not examined or cross-examined further on that. It is therefore evidence of an injury in her anal area. At any rate, I am of the view that the absence of injuries would not have meant automatically reasonable doubts as it is being insinuated by the

Defence as the several acts of the Accused could have been committed without living any resulting injuries.

- [33] Having scrutinised the entirety of the evidence as a whole in this case, I find further evidence that supports and confirms the veracity of MCV's testimony. An SMS message was found on the Accused person's phone, which was sent to a person bearing the forename of MCV by him soon after the occurrence of the offence, in which he said "sorry" five times to his victim. This is circumstantial evidence and I treat it as such. Some degree of caution must therefore, however, be exercised. It has been held that circumstantial evidence must always be:

“...narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another. ...It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.” (*Teper [1952] UKPC 15*).

Teper was considered in *Kelly [2015] EWCA Crim 817* in which Pitchford LJ said:

“The risk of injustice that a circumstantial evidence direction is designed to confront is that (1) speculation might become a substitute for the drawing of a sure inference of guilt and (2) the jury will neglect to take account of evidence that, if accepted, tends to diminish or even to exclude the inference of guilt.

However, as the House of Lords explained in *McGreevy*, (*McGreevy v DPP [1973] 1 WLR 276*). Circumstantial evidence does not fall into any special category that requires a special direction as to the burden and standard of proof. The ultimate question for the jury is the same whether the evidence is direct or indirect: Has the prosecution proved upon all the evidence so that the jury is sure that the defendant is guilty? It is the task of the trial judge to consider how best to assist the jury to reach a true verdict according to the evidence.”

- [34] Having considered all these principles I find that the time of the sending of the SMS message strongly coincide with the time of the commission of the offence. And similar

apologies were verbally made to the Virtual Complainant by the Accused shortly after the incident. I find that the SMS was sent to the Virtual Complainant. Having come to this determination I further find that there was no reason for the Accused to be apologetic and remorseful towards her, at this point in time, other than for the reason that he had caused harmed her. The Virtual Complainant was not asked any questions in respect of this SMS message, however, her testimony regarding the fact that the Accused apologised to her on her way back strengthens my conviction that this was a message sent by him in an attempt to make amends for a wrong committed.

[35] The Court also takes into consideration the early complaint made by the victim soon after having been assaulted by the Accused. DV saw MCV in her bedroom in a distressed state, and there and then she complained that the Accused had choked her, assaulted her and raped her. This was one hour post incident. I am of the view that this qualifies as a recent complaint in a sexual assault case. With regards to the ‘recent complaint’ the position is best stated in ***R v Lillyman [1896] 2 QB 167***:

“It is necessary, in the first place, to have a clear understanding as to the principles upon which evidence of such complaint, not on oath, nor made in the presence of the prisoner, nor forming part of the res gestae, can be admitted. It clearly is not admissible as evidence of the facts complained of: those facts must therefore be established, if at all, upon oath by the prosecutrix or other credible witness, and, strictly speaking, evidence of them ought to be given before evidence of the complaint is admitted. The complaint can only be used as evidence of the consistency of the conduct of the prosecutrix with the story told by her in the witness-box, and as being inconsistent with her consent to that of which she complains.”

[36] I find that the evidence of early complaint supports the credibility of the testimony of the Virtual Complainant and the consistency of her conduct.

[37] As to the apparent discrepancies in and between the different police officers testimonies, I find that they are as a result of forgetfulness and not deliberate. Their testimony are credible; cogent and consistent in all respect.

Final determination

[38] For the reasons aforesaid I therefore find that the Prosecution has managed to prove the charge of Sexual Assault as laid against the Accused person beyond a reasonable doubt and I therefore convict him accordingly.

Signed, dated and delivered at Ile du Port on 29thOctober 2020

R Govinden J