

**Republic v Matombe
(2006) SLR 36**

Basil HOAREAU for the Republic
France BONTE for the Accused

Judgment delivered on 27 November 2006 by:

GASWAGA J: The accused was originally charged with two different but related offences as follows:

Count 1: Sexual Assault contrary to Section 130(1) of the Penal Code read with Section 130(2) of the same code and punishable under the said Section 130(1). It was alleged that Jacques Matombe, on 8 August, assaulted A, a girl, under the age of 15 years. In the alternative to Count 1 he is charged with committing an act of indecency towards A, a person under the age of 15 years contrary to Section 135(1) of the Penal Code and punishable under the said Section 135(1). He pleaded not guilty and the prosecution called three witnesses to prove its case, as required by law, beyond reasonable doubt. However, at the closure of the prosecution case and following a submission of no case to answer by the defence the accused was acquitted on count 1 and instead put on his defence in respect of the alternative count under Section 184 of the Criminal Procedure Code Cap 54.

According to the prosecution's evidence giving rise to the said charge, it was deponed that B came to the Seychelles together with his daughters A (PW1), the complainant herein and C. On the evening of 8 August, 2004 the family were joined by some relatives for a dinner dance at the Alamanda Hotel, Anse Forban, Mahe. The hotel guests danced to the music that was being played by the band. On several occasions the accused was seen dancing with the complainant. They also talked while seated in the sofa and the accused offered her a glass of wine. Prior to this she had taken some martini bought by her father. Later on, as the complainant and her sister were walking out of the toilet someone, who was at the time standing by the entrance of the men's toilet grabbed her arm. It was the complainant's evidence that the man told her that he wanted to show her something before he put his hand on the wall and left her in the middle and then tried to kiss her on the lips. She however kept turning away but the man was still at it. That it was at this point that B arrived, shouted and swore at the accused. The following questions and answers offered thereto by B as extracted from the record are pertinent:

- A I saw a gentleman who had his arms against the wall. My daughter was in front of him, it looked to me and I was pretty certain that he was trying to kiss her on the mouth. She was turning her head but he had his arms against the wall.

Q You said that it looked to you that he was trying to kiss her. Why do you say it looked to you? Why do you say it looked to you, what was he doing?

A He was trying to kiss her because I have done these sorts of things myself. So I know and I understand when a man is trying to kiss.

Q What was he doing, tell the Court what was he doing?

A He was pinning her against the wall in my view as a father and as a man. In my view, he was trying to molest the child.

Q Tell us exactly what he was doing, apart from having his hands against the wall. What was he doing for you to say that he was trying to kiss her?

A He was pointing his mouth.

(Witness shows this demonstration.)

Q What was A doing at that time?

A She was trying to get away.

Q You said that A was trying to avoid the kiss and the accused was trying to kiss her. Was there any contact?

A Yes.

Q What kind of contact?

A His arms were preventing her, he was holding her arms.

Q There was no face contact?

A Yes, he was kissing her on the mouth and it was not a friendly kiss. I live in France."

On the same aspect, the complainant had this to say when being cross-examined:

Q He did not touch you because both hands were on the wall?

A Yes.

Q He was only trying?

Mr Bonte demonstrates to Court in a manner he described how the witness said it happened.

A Yes.

Q I put it to you that Jacques was standing like that. You were standing in front of him and he had a glass in one hand and another against the wall? I am telling you that he was not standing like you said, you were standing freely?

Mr Bonte shows another demonstration to the Court.

A I do not know.

And in re-examination:-

Q Yes, one hand against the wall and another was holding a glass, which version is correct. Tell the Court?

A I think my one is, I remember a glass smashing. I do not remember if it was my dad's or his. I was panicking.

From this evidence it is clear that the father's testimony sharply contradicts that of the daughter (complainant) in some material particular instead of lending credibility and corroboration. For instance, although the complainant says that she was worried and scared of Jacques nowhere in her testimony did she state that there was a body to body contact between her and the accused. She even categorically said that the accused did not kiss her though he was trying to do so. But her father, who started his testimony with the same position kept changing course, tending to incriminate the accused, as he went further into the examination in chief by saying that he saw the accused kissing the complainant and pinning her on the wall, holding her arms and therefore preventing her from leaving. D (DW2) who had been in the toilet and at the scene together with the complainant at the material time said that after A and her sister had finished smoking and fixing their hair they went out of the toilet leaving her behind. On her way back to the bar she passed by the accused, whom she knew very well talking, to the complainant while holding a glass in one of his hands. That "there were people around and she was free, she could go but they were talking naturally, normal, everything was normal." The accused said he was looking for the complainant to ask her to go and dance with him. Indeed the contradictions were grave in nature as they significantly affected the material issues. See *Ibrahim Gilbert Suleman v R* Criminal Appeal No. 3 of 1995.

It was the testimony of the accused that he had only one of his arms placed against the wall and not both of them as deponed by the complainant's father and further that the glass that smashed was the one he was carrying in his hand. B claimed that it was his

glass. As for the complainant she said she did not know whether the glass was for her father or the accused. The Court is left in a situation whereby it is convinced that the accused had a glass in one of his hands but not sure whether the complainant's father also had one and, if they each had a glass, which one of the two was smashed. It is a settled principle of law that whenever doubt is cast on any issue before the Court the same must be resolved in favour of the accused.

It therefore follows that if the accused was holding a glass in one of his hands he could not have been able to pin the complainant against the wall with both of his hands and prevent her from leaving let alone hold her arms. Had this been the case then C who was walking two steps ahead and talking to the complainant would have at least noticed a change; that her sister had been seized. It should be noted that the aspect of consent is out of question in such cases. Although no birth certificate was exhibited, the person who was present during the birth of the complainant, her father (B), corroborated the complainant that she was born on 3 February, 1991 and at the time of the incident she was only 13 years old. But generally speaking her demeanour especially during cross-examination was wanting while the evidence by B was tainted with some falsehoods and therefore unsafe to wholly rely on. Admittedly, he was over-protective of the daughters as a responsible father. In a situation of this nature he would do his best to bring to book whoever interacts with the daughters in such unclear circumstances to him as those that prevailed at the time.

As a cardinal requirement of the law for the prosecution to secure a conviction in a criminal trial it must prove its case beyond a reasonable doubt. That is why the Court of Appeal in *Raymond Mellie v Republic* SCA 1 of 2005, held that an accused person is not to prove his innocence but the prosecution is to prove his guilt beyond reasonable doubt. The evidence adduced herein is so weak to sustain the alleged offences and accordingly the charges must fail. The same is hereby dismissed and the accused acquitted.

Record: Criminal Side No 7 of 2005