

IN THE SUPREME COURT OF SEYCHELLES**The Republic****Vs****Nigel Auguste****Defendant**Criminal Case No: 2 of 2005

Ms. F. Laporte with Mr. D. Esparon for the Republic

Ms. K. Domingue for the Defendant

D. Karunakaran, J**JUDGMENT**

The defendant above named stands charged before this Court with the offence of “*Sexual interference with a child*” contrary to and punishable under Section 135 of the Penal Code as amended by Act 15 of 1996. This section reads thus:

135. (1) Any person who commits an act of indecency towards another person who is under the age of fifteen years is guilty of an offence and liable to imprisonment for 20 years.

A person is not guilty of an offence under this section if at the time of the offence the victim of the act of indecency was –

(a) fourteen years old or older and the accused had reasonable ground to believe that the victim was over fifteen years old; or

(b) the spouse of the accused.

(3) A girl under the age of fifteen years cannot in law give any consent which would prevent an act being an assault for the purposes of subsection (1):

Provided that it shall be a sufficient defence to a charge under that subsection if it shall be made to appear to the court before whom the charge shall be brought that the person so charged had reasonable cause to believe and did in fact believe that the girl was of or above the age of fifteen years.

The particulars of the charge allege that the defendant on the 4th day of January 2005, at Beau Vallon, Mahé committed an act of indecency namely, sexual intercourse on Angel Auguste, a girl below the age of 14 years.

The defendant denied the charge. The case proceeded for trial. The defendant was represented and duly defended by an able and efficient defence Counsel Ms. K Domingue. The prosecution adduced evidence by calling nine witnesses to prove the case against the defendant. After the close of the case for the prosecution, Learned Defence Counsel submitted of no case to answer. However, the Court ruled that the defendant had a case to answer in defence for the offence charged. He was accordingly, called upon to present his defence, if any. He was put on his elections in terms of Section 184 (1) of the Criminal Procedure Code. The defendant elected to give unsworn statement from the dock and called no witnesses for the defence. Now, it is pertinent to mention that this court did not draw any adverse inference against the defendant from his choice to give unsworn statement. Be that as it may.

The facts of the case as transpire from evidence are these:

Miss. Angel August, the complainant in this matter, is a teenage girl. She is the eldest daughter of the defendant Mr. Nigel August and his wife Josepha Dubel, who fell in love, while both were studying at the Seychelles Polytechnic. Angel was born on 23rd of

September 1991 as the first child out of the union of her parents. She is now 15 and attending Anse Royale Secondary School. She appears to be intelligent, mentally matured and strong for her age. She knows what a condom means. She knows when, why and how it is being used. According to her, she has learnt a lot on this subject from her PSE (Personal Social Education) class, which is part of her school curriculum. It seems that she is capable of understanding all intricacies of sex-life of adults, though it had been a delicate and a hush-hush subject never taught during our schooldays. Angel is religious and a regular churchgoer. She believes that if she speaks lies God will punish her. She has a younger brother Ricco, aged 4 and two other sisters. Since her birth Angel had been living with her father, mother, brother and sisters in their family home at Sweet Escort, Anse Royale. According to Angel and her mother, the defendant is a man of violent disposition. He used to drink alcohol, come home very late, argue and fight with his wife and children. In 2004, the family suffered from violence and poverty. The relationship between the husband and wife became sour and acrimonious. After 12 years of family life, the love that had blossomed at the Polytechnic withered and went out of the window. The defendant left the family and went to live with one of his relatives by name Rene Stephen at Mont Buxton. Having deserted the family the defendant did not even provide maintenance for the children. The mother had to file a case in the Family Tribunal against the defendant. The Tribunal granted the custody of the children to the mother with reasonable access to the defendant. The defendant used to take the children with him for the weekends. Thus, the relationship between the children and their father continued to sail, but the voyage was not very smooth because of their parental drifts.

It was the beginning of the year 2005, a festive season. People were celebrating Christmas and New Year. There were fun and parties everywhere. Gifts were exchanged. Angel had just completed 13 years of age. Like any other child of her age, she was also expecting a Christmas gift from her father. The gift that her father had promised was a Laptop Computer, a gift of her choice and dream. Angel was very much excited and looking forward to receive the gift from her father. On 4th January 2005 sadly, her longing for the dream-gift turned out to be a nightmare of her lifetime. According to her, she was raped in a room of a Guest House at Beau Vallon, having been allured by an empty promise of gift. How did this happen? Who sexually abused her at this tender age of innocence? The defendant himself, in

his statement under caution to the police dated 12th January 2005 in exhibit P4, narrates the story behind her nightmare. The said statement reads thus:

“I am living at Mont Buxton with Rene Stephen who is my relative. Before that, I was staying at Anse Royale with Josepha Dubel, with whom I have four children. Angel Auguste is my eldest child. In September this year she will be 14 or 15 years old; but I cannot recall. Since about two years ago, I have broken up with their mother. But, I am in contact with my children and I see them often. Tuesday the 4th January this year 2005 around 15.00 hrs I had already had lunch at Marine Charter and was going down towards Fried Chicken. When I got to Kingsgate House I met Angel and she was alone. She had on her a small jeans skirt and a blue top. Then we went down together and I did not mention anything about gifts to her. We took a taxi in town near the popcorn bus and I don't remember what time we arrived at Beau Vallon. It's the first time I went at that Guest house with Angel. I talked to a lady supposed to be the owner of the guest house but I don't know her name. There were lots of rains that day. I asked that lady a bedroom and she asked me to pay SR200/- and I gave her the SR200/- before we went in the bedroom. We got inside, me and Angel and locked the door. We sat on the bed, I told her to remove her clothes and she accepted to remove her clothes and she did. I removed my short and underwear and I stayed only in my T-shirt. I put a durex and I did sexual intercourse with Angel, then I woke up on her and I put on my clothes.

I did sexual intercourse with Angel only once. Then Angel also got dressed and we left that place and went. We took a taxi at Beau Vallon and we went to Victoria- We took another taxi at the car park and I took Angel to Anse Royale at the road near the shop. I regret of what had happened. I am asking for forgiveness and I don't know what had happened for me to do this. Only the last taxi I took, I remember the driver's face a bit. I don't know his name and the taxi was coloured grey”

In fact, the Court held a trial within a trial to determine on the admissibility of the above statement as the defendant retracted and repudiated the legality of the procedure adopted by the police for recording the statement. Ms. Agnes Julius (PW4), a police officer, who recorded the statement, testified that she cautioned the defendant, who voluntarily gave the above statement and no force, threat, promise, duress or coercion used to obtain the same. Another police officer Mrs. Neige Raoul (PW5), who was a witness to the statement also testified corroborating the evidence given by PW4 relating to voluntariness and the procedure adopted by the police for recording the statement. On the contrary, the defendant testified that the said statement was obtained by force, in breach of the Judges Rules and his Constitutional rights. After holding a trial within a trial, the Court held that the said statement was admissible in evidence as it found the statement a voluntary one and procedurally flawless. Hence, the Court admitted and marked that statement as exhibit P4 in this case.

The complainant, Angel (PW6) testified that on the day in question, she had been to Town with her mother and little brother Ricco. At around 9 a. m, they went to take passport photograph of her brother at Kimkoon Studio, Kingsgate House. The photographs were not ready for immediate collection. They were asked to come back at 2 p. m. Hence, they spent some time shopping around in Town and at 1. 55 p. m, they went to Pirates Arm building to buy some lunch. Her mother asked Angel to go to Kimkoon, collect the photographs and come back, until then she would be waiting at the Pirates Arm Building with Ricco. Angel rushed to Kimkoon carrying her mother's handbag in her hand. In fact, her mother had kept her purse and mobile phone in that handbag. Angel neither collected the photographs from Kimkoon nor did she come back to her mother. The poor mother waited, waited and waited for about 30 minutes. There was no sign of Angel's return. She crossed the road and checked with Kimkoon. They said that Angel did not come to collect the photographs from them. Angel was nowhere to be seen around. Her mother got worried and when she met some of her friends in Town, she enquired if anyone had seen Angel anywhere in Town. There was no clue. Since her purse had been with Angel, the mother had to borrow some money from her friends in Town, paid for her bus fare and returned home without Angel. What happened to Angel? How did she disappear on her way to Kimkoon? Angel gives a clear picture as to

the sequence of events behind her disappearance. The crucial part of her testimony in this respect runs - in verbatim - thus:

“As I was about to enter Kimkoon, someone touched me on my shoulder. It was my father. He asked me to go with him ... where he stays ...so that he could give me my Christmas gift... I had seen him before (that was) on 31st December 2004. ..He had promised me a Laptop... he asked me to go with him and get my gift... So I just went with him, leaving my mother, who was standing there at Pirates Arms waiting for me. .. I told my father that my mother was waiting for me. He said lets go. There is no problem if you are with me. We went upto where they sell popcorns ... opposite Deepam Cinema. .. He stopped a blue taxi and we went to Beau Vallon. When we reached there he stopped near Boat House Restaurant. It was raining heavily so we ran across the road ... I just followed my father. We reached a chalet ... he asked me to stand there and wait. I stood there. He went to talk to a lady there. I could not hear what they were saying. I saw my father removed two hundred rupees and gave the lady when he finished talking to her. The lady gave him a key... The lady asked me to go into veranda. .. I was a bit wet because of the rain. She asked me if I wanted to change my clothes. I said to her that I did not want to change clothes. We reached inside a room. There was a bed, a mattress, bed sheets on the bed. There was another mattress (kept) sideways to the bed. There was a table and a mirror opposite the bed and another table by the door. He started talking (to me) loudly saying that if my mother is like this today it is because of me....and my mother did not want to talk to him... He continued shouting. He pointed fingers on my face. He was looking nervous... he asked me to remove my clothes on me. I said no. He pushed me on the bed and removed my skirt and removed my panty. He did not remove my blouse. Then he removed his clothes. He removed his shirt. Then he removed his trousers. Then he removed his underwear. There was a table and a mirror. He put on a protection. I did not know where the durex came from. When I saw him like this I tried to run away but the door was locked. I tried to scream but it was raining outside. No one would hear me... He was completely nude... Then he pulled me... He pressed me and I tried to struggle but I could not move. Then he put his penis in my vagina. It was

very painful.... When he was on top of me he penetrated me... the intercourse took place for about 5 minutes... I tried to push him away. I bite him on his hand. After that he got out on me himself. I put my clothes on me quickly. I went into the bathroom washed my hands. I returned in the room and arranged my hair in the mirror. When I came from the bathroom he had already put his clothes on... I was sitting and saw him (sic) (obviously, the photograph of the defendant) in my mother's purse which was in my bag. I took the phone of my mother which was also in the bag. I rang my uncle. Then I kept the phone off and then replaced it in the bag. There is small kitchen in the room. He (my father) was in the kitchen searching my mother's purse. I took my bag and got out. He followed me saying that he had already called a taxi. I went to the bus stop. Then a taxi was passing by and he stopped it... We got in... He told the driver to bring us to Barrel Trading in Victoria.... While in the taxi my mothers mobile rang. As I had buzzed my uncle he was calling back. He asked me where I was I said I was in Town. I could not tell him why I had buzzed him (in front of my father). I said to him that I was busy, I must cut off the phone”

Thus Angel and the defendant reached town around 4 pm. They got out of that taxi at Barrel Trading. Again, the defendant engaged another taxi and accompanied Angel to Sweet Escort, Anse Royale, dropped her in the vicinity of her home and returned in the same taxi. Angel started walking towards her home. She was very tired. She reached home at 6.00 pm. When she reached home, her mother (PW9) noticed that Angel was not normal. She appeared very weak. She was walking very slowly. From Angel's appearance and manner of walking, the mother felt that there was something wrong with her. The minute Angel entered home, her mother asked her what happened and where she had been all the time as she was waiting for her return from Kimkoon. Angel then explained to her mother everything, what has been narrated by her hereinbefore. Shocked by the revelation, the mother called her brother for advice. Around 6 to 7.00 pm, they took Angel to Anse Royale Police station and lodged a complaint. Immediately, Angel was taken to Victoria Central Hospital for medical examination.

Dr. Focktave (PW7), a gynaecologist examined the genital part of Angel. It was around 7.30 pm the same night. The doctor testified that on examination he found in her genital part both small lips - labia minora were swollen, oedematous with superficial abrasions and a small laceration at the posterior entrance of the vagina. The marks were fresh. The hymen was not intact. But there was no fresh cut on it. There was some mucous fluid in the vagina. He took some swab from the entrance and inside of her private part and the pathological examination revealed that there were sperms in the swab taken from inside. According to complainant's mother (PW9), the day following the medical examination, the doctor also contacted her and told her to come to hospital and collect some tablet to be given to Angel as they found some sperms in the swab.

The complainant's mother Ms. Josepha Dubel (PW9) also testified corroborating the evidence given by Angel on matters relevant to the disappearance of the complainant from her custody in town on the alleged date, time and circumstance, as well as on the distressed condition of the complainant soon after the alleged incident.

Mrs. Marguerite Lefeuvre (PW7), the manageress of the Beau Vallon Guest house, which is also known as Beach Villa (the business name) testified that on the alleged date and time, the defendant rented the room in question and took Angel with him into the room. She also stated that the defendant paid Rs200/- for the rent. But, she did not know that day that the couple were daughter and father. Since she was off duty, she did not know what time in the evening the defendant checked out. According to her, the defendant had locked the room and taken the key with him without informing any one. The next day, she gave a statement to the police regarding the incident of renting the room by the defendant and assisted the police to take photographs of the room. As she deponed in court, she also made a positive dock identification of the defendant and photographic identification of the complainant stating that they were the couple involved in the episode of renting the room at the Guest House on the alleged date and time. During investigation, the police took photographs of the room and its contents, as shown by Angel. All those photographs bound in an album was produced in evidence and marked as exhibit P1.

On the other hand, the defendant gave unsworn evidence from the dock. He stated that he never had any sexual intercourse with his daughter Angel. According to him, it is a false accusation, which the mother of the complainant has fabricated against him, since she failed in her past attempts to bring various criminal charges against him. According to the defendant, all those attempts including the present accusation were made out of grudge and ill feelings she had developed against him.

In view of all the above, Learned State Counsel Ms. F. Laporte submitted that the evidence adduced by the prosecution is very reliable, strong, cogent and corroborative. According to her, the prosecution has proved beyond reasonable doubt all the necessary ingredients of the offence against the defendant. The evidence on record including the medical evidence unequivocally shows that the defendant did commit the offence. It did not exculpate him or the commission of the offence. Hence, according to the prosecution, the Court may safely rely and act upon it to base a conviction against the defendant for the offence he now stands charged with.

On the other side, learned defence counsel Ms. Domingue contended in essence, that this Court cannot rely and act upon the evidence on record because of its inherent weaknesses, unreliability, inconsistencies and uncertainty of the medical opinion on the alleged penetration, estranged relationship between the complainant's mother and the defendant, possible fabrication of evidence by the complainant's mother, lack of evidence for corroboration - being a sexual offence - and absence of bodily injuries on the complainant. In these circumstances, she submitted that there is no evidence on record to prove beyond reasonable doubt the essential elements of the offence namely,

- (i) that the complainant has been sexually assaulted; and*
- (ii) that sexual assault was committed by the defendant.*

Therefore, according to Ms. Domingue the prosecution has failed to prove the case against the defendant to the required degree. Hence, this Court cannot

safely convict the defendant in this matter for the offence charged. The defence counsel therefore, sought dismissal of the charge and acquittal of her client.

At the outset, I would state that the ruling given by this Court on the submission of no case to answer dated 5th March 2007, should be read as part of the judgment hereof. I shall now turn to examine the evidence on record in the light of the arguments advanced by counsel on both sides. Before doing so, I should mention that the Court observed the demeanour and deportment of all the witnesses, when testified for the prosecution. They all appeared to be very credible and truthful. I believe them all in every crucial aspect of their testimony. The entire evidence adduced by the prosecution in this matter, is reliable, consistent, cogent, and more so squarely corroborative in all material particulars. Indeed, it is not in dispute that the complainant Angel was a girl under the age of 15 years on the 4th January 2005. Needless to say, the complainant cannot give consent in law, to an act that constitutes an assault under section 135 supra, by virtue of the fact that she was below the age of fifteen at the time the act has been allegedly committed. However, as rightly submitted by learned defence counsel, the following questions arise for determination by this court:-

- (1) *Has the complainant been sexually assaulted?*
- (2) *If so, was it the defendant who committed the sexual assault against the complainant?*
- (3) *Has the prosecution proved the case against the defendant beyond reasonable doubt?*

Obviously, the case for the prosecution completely rests on the direct evidence of the complainant and the confessional statement of the defendant, made under caution to the police. On the issue of reliability, I find no reason to discredit or diminish the evidential value of the complainant's testimony in this case. Besides, the complainant though of young age gave clinching and very reliable and convincing evidence as to the act of sexual intercourse and to the fact that it was the defendant, who committed that act on her. She confirmed under oath that the defendant was the perpetrator of the entire episode and had sexual intercourse with her against her will in a room at the Beau Vallon Guest House. To

my mind, simply based on the unshattered evidence of the complainant alone, this court can safely conclude that the defendant was the one, who indeed, committed the act of sexual assault on the complainant and caused those injuries observed by Dr. Focktave (PW7), on her genital part. I warn myself that in cases, where the accused is charged with a sexual offence, it is not safe to convict upon the uncorroborated testimony of the complainant. However, as *Lord Hewart CJ stated in R Vs Freebody (1935) 25 Cr. App Rep 69*, that if the court is satisfied of the truth of such evidence the court may, after such caution nevertheless convict the defendant. In the instant case, I am satisfied beyond reasonable doubt that the complainant Angel did speak the truth to the court on the crucial facts establishing the commission and nature of the offence as well the offender being the defendant. The Court therefore, can safely rely and act upon her concrete evidence to convict the defendant for the offence charged.

Learned counsel for the defendant further contended that if there had been any forcible sexual intercourse, it would have resulted in some fresh injuries to the hymen and upon the body of the complainant. According to her in the absence of such evidence, it is unsafe to base a conviction. Obviously, the bodily injuries are not always *a sine qua non* to prove a charge of sexual assault or any sexual interference. In any event, a perpetrator of any sexual offence cannot claim innocence merely because the medical report did not disclose any physical injuries on the victims. Let it not be forgotten that we are considering here the case of sexual assault on a girl child aged thirteen years and not on a grown up woman, who might have given a tough resistance to the assailant in such circumstances resulting in significant bodily injuries.

Since the court can completely rely and act upon the truth of the evidence of the complainant in the present case, obviously there is no need to look for any corroboration, *vide R vs. Rose 1972 No: 13 SLR*. In any event, I find that there is a strong and overwhelming evidence of the defendant's confession, which aptly corroborates the evidence of the complainant on all crucial facts. Particularly, pertaining to the alleged act of sexual intercourse and to the fact that it was the defendant, who committed that act on the complainant.

Having said that, I note, the main point of the defence submission rests on the standard of proof required in a criminal case. On this issue, one should bear in mind that “proof beyond reasonable doubt” simply defines the degree of persuasiveness which a case must attain before a court may convict an accused. Especially, in criminal cases, the law imposes a higher standard on the prosecution with respect the issue of guilt. Here, the invariable rule is that the prosecution must prove the guilt of the accused beyond reasonable doubt or to put the same concept in another way, so that the court is sure of guilt. One should remember that these formulations are merely expressions of the higher standard required, which was defined by Lord *Denning J in Miller Vs Minister of Pensions [1947] 2 All ER 372,373* as follows:

“It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt... If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence ‘of course it is possible, but not in the least probable’, the case is proved beyond reasonable doubt, but nothing short of that will suffice”

The law, therefore, precludes a conviction based on suspicion or guesswork or mere satisfaction or even a feeling of being ‘fairly sure’ Hence, **the standard of proof**, bearing in mind that the Republic must prove the charge, is, of course, proof beyond reasonable doubt. If the Court has a doubt as to proof of guilt that fairly arises out of the evidence and that appears to be a reasonable doubt, and if it relates to one of the essential elements of the charge, for example the identity of the accused or the proof of commission of the offence, then the Court should dismiss the case and set the accused free. Is it reasonably possible that the accused is not guilty? Is there a reasonable explanation or theory consistent with innocence? And if any one of those things occurs to the Court as it evaluates the evidence, and if the court finds answers to these questions in the affirmative, then they all mean the same thing, that there is a reasonable doubt. The accused should be acquitted. On the other hand, if the court decides otherwise, it has to caution itself that it must find before deciding upon such conviction, that the inculpatory facts either revealed from direct evidence or inferred from circumstantial evidence are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis other than guilt. Applying

these principles, the court should find whether the prosecution has proved the guilt against the defendant beyond any reasonable doubt or not in this matter.

In my final analysis, I have diligently considered the whole of the evidence. I believe the complainant as a truthful and satisfactory witness. I accept her evidence in toto. I find that she has not concocted this story to incriminate the defendant falsely in this matter. Besides, upon evidence I am satisfied that Angel had no motive for lying against her own father as she has been maintaining a good relationship until she met him that particular afternoon at the entrance of Kimkoon. Having said that, I note, from the outset of the trial it has been suggested by the defence while cross-examining the witnesses that the mother had set the child up to make these accusations because of her personal grudge and hatred against the defendant. It may be true in some cases, when the parents have split up or are in the process and harbour grudge and bitter hatred against each other. But in such cases of those crazy mothers setting up children against their fathers, invariably there will be no physical evidence or conclusive medical evidence nor will there be any independent evidence to corroborate such accusations of sexual nature; above all, there will not be a confessional statement by any sane father. In any event, in the case on hand, there is nothing reliable on the record to substantiate that aspect of the defence. On the contrary, in the instant case, there is overwhelming circumstantial evidence leading to the only inference that it cannot be a case of fabrication or setting up by the mother of the complainant out of grudge. For instance, presence of injuries and semen in the genital part of the complainant, confession of guilt by the perpetrator, despite, separation the mother had been preserving the photograph of the estranged husband (the defendant) in her purse (as was seen by the complainant in the Guest House room soon after the alleged sexual assault) etc. In the circumstances, I find that the prosecution has proved beyond reasonable doubt, not only an offence of sexual assault has been committed against the complainant, a girl under the age of fifteen years, but also the defendant was the one, who committed that offence by having sexual intercourse with her on 4th January 2005 at Beau Vallon Guest House.

I therefore, find the defendant guilty of the offence of *sexual interference* with a child contrary to section 135 as read with subsection 135(3) of the Penal Code and convict him of the offence accordingly.

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D. Karunakaran

Judge

Dated this 6th day of August 2007