

Republic v Edmond

(2009) SLR 9

Joel CAMILLE for the Republic
Alexia ANTAO for the accused

Judgment delivered on 15 May 2009 by:

PERERA CJ: The accused stands charged as follows –

Count 1

Statement of Offence

An act of indecency towards a child under the age of 15 years, contrary to section 135(1) of the Penal Code (amended by Act 15 of 1996) and punishable under the same section.

Particulars of the Offence

Simon Pierre Edmond of Bel Ombre, Mahe, on 17 March 2004, at Roche Caiman, Mahe, committed an act of indecency towards A, a girl under the age of 15 years, by inserting a finger in the said A's vagina.

The complainant A born on 25 June 1998 was 6 years old at the time of the alleged offence. She was 7 years old when she was called to testify on 28 October 2005. The Court held a pre-evidence inquiry before the complainant testified and was satisfied that she understood the nature of the oath and the duty to speak the truth. Hence she gave evidence on oath.

The complainant testified that she was living at Roche Caiman with her mother, and the accused who is her step father, and also three brothers and one aunt called C. But after the alleged incident she was staying at the President's Village. According to her testimony one night when everyone else was asleep, the accused entered the bedroom where she was sleeping on a mattress on the floor, and removed her panty. Thereafter he got on top of her and inserted his penis in her vagina. He also inserted five fingers of his hand in the vagina. Thereafter there was bleeding from the vagina which stained her panty and a pair of long trousers she was wearing. She saw blood on the hand of the accused as well. The complainant further stated that when he was inserting his penis in her vagina, she screamed, and then he put a pillow over her mouth. When he inserted the fingers she tried to press her legs together, but he opened them. At that time her mother entered the room, and the accused put on his trousers. She told her that the accused had done "bad things" to her. The accused then attacked her mother with a knife.

The following morning, the complainant was taken to hospital by her aunt C. A sample

of urine taken contained blood. Shown a photograph, (P5) she identified the mattress she was sleeping at the time of the alleged incident, and showed the blood stain thereon. The prosecution also produced the panty and the trousers she was wearing that night which also had bloodstains. The photographs were admitted through the evidence of Det L/C Jane Barbe the photographer, and Mr Jean Louis of Photo Eden, who developed and printed them.

On being cross-examined, the complainant stated that she was sleeping with the lights off on a mattress on the floor without a bed sheet. The complainant also stated that the accused licked her vagina the next morning. Her mother saw that and asked him to stop, but he did not obey. It was put to her by counsel that she had not mentioned anything about the insertion of the penis and fingers in the vagina and the subsequent licking in her statement to the Police. She replied that what she was stating in Court was the truth. However on being re-examined, she stated that the licking incident was on another occasion before the present complaint.

Dr Dilip Harjanis testified that he examined the complainant on 17 March 2004.

Re: Miss A, D.O.B. 29/06/1998, Medical Report

A, 6 years old was referred to me by Dr Michel on 17/03/2004 with history that this young girl was bleeding per vaginum after an alleged sexual assault.

The young girl was scared, apprehensive and understandably un-cooperative. Therefore I decided to examine her under general anaesthesia, which was performed on the same date.

The findings were as follows.

1. SUPERFICIAL LACERATION ABOUT 0.5 cms, ON THE INSIDE OF HER LEFT INNER LIP (LABIA MINORA) as drawn. This laceration was not actively bleeding.
2. ABRASION OF THE HYMEN AT 5 O'CLOCK POSITION, as drawn.
3. The hymen as such is intact.
4. I performed a swab test to detect SPERMATOZOA from the vagina but NONE were found.
The injuries she had sustained did not require any surgical repair and the same were cleaned aseptically.

The patient was discharged from the hospital on 18/03/2004.

Dr Dilip testified that the injuries on the vagina could be caused by many ways, one of

which was manipulation with fingers and causing abrasion with the finger nail. As regards other causes, Dr Dilip stated that the injury on the hymen was consistent with any manipulation with an erect penis or any object like wood or metal.

Detective Inspector Neige Raoul testified that she was called to the Victoria Hospital after the medical examination. The complainant was in a state of distress and fright. She interviewed her mother and aunty C. When she went to the residence, she was shown the mattress where the complainant was sleeping. She was also given the panty and the pair of shorts she was wearing. There were blood stains. A machete which allegedly was used by the accused to frighten the mother of the child was also given to her.

Inspector Raoul also recorded the statements of the complainant, her mother and aunty, as well as that of the accused.

B, the mother of the complainant testified that she had a relationship with the accused for about 5 years, and that he visited her off and on. She has one child with him who is 3 years old. Sometimes he stayed with her for a week or few days. He drinks alcohol, uses obscene language and comes home late at night.

On the day of the incident, she was away. She went around 3 pm on 16 March 2007 and came home around 1 am on 17 March. The alleged incident had happened that night. When she came, her sister C who was near the road, told her to get a police officer, as the accused had threatened her with a knife. However she decided to confront him. As she entered the house she heard the complainant scream. When she went to that room, she saw the accused standing naked with his pair of shorts in his hand. The complainant was crying. When she asked him what he had done, he stated "I have done some harm to you and your daughter". When she asked the complainant, she told her that the accused had pressed a pillow on her face and "urinated" on her. Then the accused grabbed her and kicked her. However, she went to bed with the accused that night. The complainant was sent downstairs to sleep with the other children, and C slept with a neighbour. She examined the complainant by opening her legs, but did not see any blood or scratches. She herself had taken 4 beers that night, but claimed that she was not drunk at the time she got home.

The following morning, C asked her to examine the child. When she did, she saw blood and some scratches on her vagina. When she questioned the complainant, she told her that the accused had touched her vagina with his hands. She then asked C to take the complainant to the hospital, as she was too depressed to go and also as she had to look after the other children at home. The accused was also still at home. After the doctor had examined the child, she was called to the hospital. A further examination was done by Dr. Michel in her presence after she signed a consent form. By then Police Detective Officer Neige Raoul and another woman police officer were present.

When she returned home, the accused was still there. Then, when the police officers came in search of him, he climbed to the ceiling and hid himself, but was arrested.

As regards the condition of the accused at the time of the alleged incident, the witness stated that when she saw him standing naked, "he was drunk, he did not understand anything". In her cross-examination she stated "or deta", that is "he was paralytic drunk". She assumed that he was drunk to that extent, as he lifted her, threw her on the ground and kicked her. When he is sober he does not act like that.

The witness stated that usually, the complainant does not sleep on a mattress on the floor of that room. She admitted that as the mattress was close to the door, anyone could trip and fall when the room was dark. However she and the accused slept on the double bed in that room with their baby, who was about 3 months old at the time of the incident. She stated that the accused could not have made a mistake and urinated on the complainant, as he tried to choke the child with a pillow before committing the alleged offences.

C, the sister of B, and the aunt of the complainant testified that her sister went out around 3 pm that day. Around 11.30 am that night the accused came home drunk and asked for B. He appeared to be angry. The complainant was sleeping on the mattress on the floor of the room in which both her sister and the accused slept on the bed. He chased her with a machete. B came home around 12.30 pm – 1 am that night. She fought with the accused, and she (the witness) heard the sound of a machete hitting the wall. C's boyfriend was also in the house. Both of them went to his house to sleep. Next morning when she returned, B was crying. She had seen some blood on the panty of the complainant. She also examined the complainant and saw the blood. The vagina was also red and swollen. She took her to the hospital, where she was examined.

At the end of the prosecution case, the Court ruled that a prima facie case had been established, and consequently called up to the accused to present a defence. He first opted to testify on oath. However upon entering the dock, he became emotional, and hence the case was adjourned for a short time. Upon resuming the proceedings, he changed his option to the right to remain silent, but to rely on the evidence of two witnesses who would testify that they were drinking that night with the accused. However, upon being shown that the two prosecution witnesses B, and C had already testified about the State of drunkenness of the accused at the time of the alleged incident, counsel for the accused decided not to call these witnesses, but to make a legal submission. She submitted that in the offence the accused is charged with, specific intent is an essential element, and that hence evidence of the state of drunkenness rendering the accused incapable of forming such an intent should be taken into consideration in order to determine whether he had in fact formed the intent necessary to constitute the offence. A sexual offence of any form made punishable by the Penal Code must constitute both mens rea and actus reus, As Lord Goddard CJ stated in *Harding v. Price* [1948] 1 KB 695, *actus non facit reum nisi mens sit rea* (an act is not punishable without a mental element). Hence unless a statute either clearly or by necessary implication rules out mens rea as a constituent part of a crime, the Court should not find a man guilty of an offence unless he has a guilty mind.

In the case of *R v Heard* [2008] QB 43, the Court held that sexual offence cases could not be labelled as one of either basic intent or specific intent and that it had to be judged objectively. The Court also held that drunkenness did not destroy the intentional character of the offence.

Counsel for the accused sought to negative mens rea on the basis of the evidence of B, the prosecution witness who stated that the accused was “paralytic drunk”, and “did not understand anything”. As was held in *R v Zoolfikar* 16 WR Cr 36,

Drunkenness is an excuse, and an act which if committed by a sober man is an offence, is equally an offence if committed by one when drunk, if the intoxication was voluntarily caused.

Section 14 of the Penal Code of Seychelles provides that “(1) save as provided in this section, intoxication shall not constitute a defence to *any* criminal charge”.

Intoxication shall be a defence to a criminal charge if at the time of the act or omission, the person did not know that such act or omission was wrong or did not know what he was doing, but only if that state of intoxication was caused without his consent by the malicious or negligent act or another, or by reason of intoxication he was insane temporarily or otherwise at the time of the act or omission. Hence the defence of intoxication as a ground for diminished responsibility fails.

Although the Court can convict on the sworn uncorroborated evidence of a child, it must, after warning itself of the danger of convicting without it, express itself to be convinced of the truth of the child’s story notwithstanding that danger (*Jean-Baptiste v R* (1961) SLR 262). Hence there is no requirement that the sworn evidence of a child should be corroborated as a matter of law. However, it is still prudent to find corroboration as there is the possibility that a child, who understands the nature of the oath, would still have been “coached” and hence truth may be distorted. In the case of *R v Baskerville* [1916] 2 KB 658, it was stated as a principle that no piece of evidence amounted to corroboration unless it came from a source independent of the witness to be corroborated, and confirmed not merely the general truthfulness of the child’s evidence, but also the truth of that part of its evidence which implicates the accused with the offence. However medical evidence that the child has been sexually assaulted does not usually amount to corroboration where someone other than the accused could have committed the offence. But where the accused admits that he was with the child, but denies committing any offence, the medical evidence would be very relevant.

In the present case the Court finds corroboration of the complainant’s testimony that the accused inserted his fingers in her vagina causing bleeding, in the medical evidence. The complainant was examined the day following the alleged incident, and on examination Dr Dilip found vaginal bleeding and a superficial laceration of about 0.5 cms on the inside of the left inner lip of the vagina, and also an abrasion of the hymen at 5 o’clock position. There is also evidence that there were blood stains on the mattress, the knickers and the trousers of the complainant. The hymen was however intact.

These injuries are consistent with the particulars of the offence in the charge. Dr Dilip has also observed that the complainant was scared, apprehensive and uncooperative, to the extent that the examination was done under general anaesthesia. The evidence of the mother, B as regards the distressed state of the child is thereby corroborated.

The Court is satisfied that the complainant was speaking the truth. On a consideration of the totality of the evidence, the Court is satisfied that the prosecution has proved its case beyond a reasonable doubt. Consequently the accused is convicted as charged.

Record: Criminal Side No 38 of 2004