ATT: Mrs Pillay. 17/8/06

IN THE SEYCHELLES COURT OF APPEAL

SCA: 1 of 2005

In the matter between

RAYMOND MELLIE *Appellant*

v.s

THE REPUBLIC *Respondent*

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Before: Dr. SJ Bwana, Ag P; JM Hodoul, JA; B. Renaud, JA

Date of hearing: 8 May 2006
Date of judgment: 19 May 2006

Counsel: Mr. F. Elizabeth for Appellant
Mr. Govinden for Respondent

JUDGMENT

BWANA, AG P

1. This is an appeal against both conviction and sentence. The Appellant was convicted of Sexual Assault contrary to section 130(1) read together with section 130 (2) (d) of the Penal Code, as amended by Act 15 of 1996. He was sentenced to serve a 10 year prison term. His grounds of appeal are as follows:

1.1 That the trial judge erred when he failed to rely on the alibi uncontroverted evidence of the Appellant after having ruled that the same is admissible.

1.2 That the learned judge erred when he convicted the Appellant of the offence charged since the Appellant had raised more than reasonable doubt in his case.

1.3 That the learned judge erred in convicting the Appellant since the prosecution had failed to prove their case beyond reasonable doubt.

1.4 The conviction should be set aside on the grounds that under all the circumstances of the case, it is unsafe or unsatisfactory.

1.5 That the sentence of 10 years' imprisonment was manifestly harsh, excessive and out of proportion to the gravity of the offence.

2. To appreciate the issues before us, we briefly restate the facts of the case, as presented before the trial court. The victim of the alleged sexual assault, one Angela Laporte, lived with her mother, one Ivy Laporte,

and her step father, James Nicoire. At the time of the alleged assault, Angela was under the age of fifteen having been born on 27 October 1985. The Appellant was a cousin of James Nicoire. On the 23 March 1999 Mr. Nicoire passed away. Among those who attended the funeral at the deceased residence at Port Glaud, was the Appellant together with his wife, one Therese Mellie. After the funeral, the Appellant and his wife spent the night at the deceased residence, consoling the bereaved family.

3. It is not in dispute that early the following morning, Ivy and the wife of the Appellant left Port Glaud for town. Angela, together with her brother, Richard, together with their partially blind grand mother, stayed back at home. According to the prosecution case, the Appellant also stayed back and was still sleeping when the two ladies left early in the morning to catch the 7 a.m. bus to Victoria via Cascade. The defence case however states that the Appellant also left that very morning for work. In fact, according to his wife's testimony, the Appellant boarded an earlier bus than theirs. He is said (by his wife) to have boarded a bus at 5.45 a.m. via Sans Souci. Further evidence of a job card dated 25 March 1999, was produced during trial to show that the

Appellant did attend work. Therefore the defence case relies mainly on alibi – that the Appellant could have not been at Port Glaud at the residence of the deceased, at the time the alleged sexual assault took place.

4. It was the prosecution case that at around 1. p.m., the Appellant sent Richard to a shop, leaving Angela and the Appellant at home. Angela was in her room and the Appellant was in the sitting room. The grand mother was as well in her room.

5. According to Angela, it is during that time – that is, after Richard had been sent out of the house, that the Appellant went to her room, naked. He asked her to remove her shorts and panty and had sexual intercourse with her. After that act, the Appellant put on his clothes and left the room. Angela noticed blood in her vagina and some blood stain on the bed sheet. While washing herself in the bathroom, she saw the Appellant washing the blood stained bed sheet. Angela reported the matter to her mother some four months later. Asked why it took so long to report, she said she had been threatened by the Appellant not to say

anything on what transpired or else he would beat her up. So she was scared.

6. Armed with that revelation, Ivy took her daughter – Angela - for medical examination. A medical report prepared by Dr. Kausalya Rajay, did indicate, inter alia, the hymen to have an old tear impression, hence Angela was no longer virgin.

7. We must, first of all, note at the outset, that the medical proof that the hymen had an old tear is not conclusive evidence of the fact that it was the Appellant who caused that tear – during the alleged sexual assault. He could have been the one given the evidence of Angela that she never had sexual intercourse before and that after the sexual assault she noticed blood in her vagina. She averred further that she also saw the Appellant washing the blood stained bed sheet. Further corroboration on this fact was however, in our view, necessary. We shall revert to the issue of corroboration later.

8. The Appellant's case before us hinges mainly on the defence of alibi. We should remark here, however, that it is not correct that the evidence of alibi was not

controverted. It was. The key pws on this issue do indicated that the Appellant was at the house on the material day and time that the alleged offence took place. Ivy says that she left the Appellant at home on the material day. She left for town with the Appellant's wife and one Jovanette Laporte. When they left, the Appellant was still sleeping. But when they came back, around 2:30 p.m., the Appellant had left. Richard, the brother of the victim, clearly stated that the Appellant was at home until around 1:00 p.m. when he sent him out of the house. It is around this time the alleged offence is said (by Angela) to have been committed.

On the other hand, the wife of the Appellant (Therese) testified that her husband left earlier to catch the bus that passes via Sans Souci. He is said to have boarded the bus at 5:45 a.m. and that Therese saw him. But then there are clear contradictions in her evidence. While she says that she saw the husband leave at that time, she claims in cross-examination that she left together with her husband to go to town, between 6:30 and 7:00 a.m. This could not have happened! Which is why, we believe, the trial judge refers to Therese in his judgment as doing "her best to mislead the court in order to save her husband from the predicament ... she

undoubtedly told lies to the court to protect her husband."

In so concluding, the trial judge - who had the opportunity to examine Therese's demeanour - drew the necessary inferences and we are reluctant as an Appellate Court, to disturb the trial judge's findings on the issue. We further treat that (spouse's) evidence with the necessary caution for similar reasons as those expressed by the trial judge.

We have also considered the issue of the job card - whether it was admitted in evidence by the trial judge and if so, whether it carried any weight in support of the defence of alibi. After careful examination of the record, it is apparent that the trial judge never admitted it as an exhibit. The job card remained on record as an item. Even if one may argue that it was admitted as an exhibit, the trial judge decided not to place any reliance and veracity thereon for reasons given. It was not tendered in court by the maker. It never answered the crucial question of time - at what time the Appellant reported on duty and at what time he left. Worse, it is in evidence that the said job card was kept by the Appellant for the whole month as was

the practice. It defeats no reason to state that a suspect of a criminal act, serious as the one in the present case, would take all necessary measures to exculpate himself. The job card and "seeing to it" that all the necessary entries are done, would be such an exculpatory tool.

It is a settled principle of law that it is for the prosecution to prove its case beyond reasonable doubt. But it is not for the accused to prove his innocence in like terms. We do however note that the law relating to alibi has developed further in other jurisdictions. One relying on alibi as defence, for example, needs to give sufficient notice to the prosecution to enable it call evidence which may rebut the claim. Yet in other jurisdictions, once the defence of alibi falls, the one relying on it cannot raise any other grounds. He is found guilty of the offence with which he is charged.

We do, however, appreciate the position of the law on alibi as defence in Seychelles. The trial judge seems to have combined both factors as applicable in both Seychelles and in the other jurisdictions referred to, in considering the defence evidence and came to a conclusion which this Court finds to be proper. After

analyzing the evidence of both sides he came to a considered conclusion that the Appellant was indeed at the deceased's house at the material time. In other words, the trial judge did not accept the alibi evidence. We are of similar views, for similar reasons and we proceed therefore, to find that on the material day and time, the Appellant was at Port Glaud, at the residence of the deceased. We see no reason to differ with that finding. Therefore the defence of alibi fails.

9. We would now like to consider the issue of corroboration in the light of the peculiar circumstances of this case. Again, it should be re-emphasized here that corroboration is always required in sexual offences. However, in addition to that, corroboration – which is an independent testimony of some material fact tending to implicate the accused with the crime – will be required only if the witness himself is credible. If the contrary is the case and if there is no other cogent evidence, then the accused should be acquitted even if corroborative evidence is capable of being found. It also needs to be stated here that as a general rule, evidence which itself requires corroboration cannot be used as corroborating the other. The foregoing said, we must be quick not to lose

sight of the fact that there are situations or cases requiring corroboration but that the same cannot be easily available. In such cases, the trial court can still convict an accused on uncorroborated evidence after warning itself. Failure to do so, an accused must be acquitted.

10. In the case before us, we are of the view that there was no sufficient evidence to corroborate the victim's allegations. We do – however, see this as to have been caused by several factors, including the late reporting of the alleged sexual assault. The trial judge nevertheless took all the facts of this case cumulatively and led himself to an irresistible conclusion that indeed the offence was committed and that it was the Appellant who did it. It was submitted by Counsel for the Appellant that the trial judge did not warn himself of the danger of convicting the Appellant on the uncorroborated evidence. We are of the view that the trial judge did warn himself sufficiently. It is not, in our view, necessary that such a warning be in the form of or contain a statement such as "I warn myself ..." or the like. Clear words, indicating that the trial court has taken the necessary precaution before convicting on uncorroborated evidence are sufficient. This court has

observed (in the case of Ibrahim Gilbert Suleman vs R. Cr. App. No. 3 of 1995) that "it is not difficult for us to share the view of the Chief Justice that whatever contradictions there were in the evidence of the prosecution ... these were minor indeed. On the material issue, there were no contradiction of significance." That observation is very relevant in the instant case. All in all considered, we hold that the trial judge arrived at correct conclusions after properly analyzing the evidence before him. His conviction of the Appellant cannot therefore be faulted.

11. As regards the sentence imposed, it is submitted by counsel for the Appellant that it is harsh, excessive and out of proportion. He drew our attention to recent decisions of the Supreme Court in similar cases whereby - in one of such cases - a convict was sentenced to three years imprisonment while in another, a convict got a suspended sentence, together with a fine. As to these revelations, if they are true and while we would like to comment thereon, we do however realize that such cases have not reached their cul-de-sac as long as the court hierarchy in this country is concerned. So we reserve our views if ever such matters are led before this court.

Be that as it may, it is worth noting that offences of this nature carry long term imprisonment. The Appellant who was 56 years old at the time of his conviction, has since lost his wife - so we were informed. The court record does not show that he was given an opportunity to say something in mitigation. We consider this to be a serious omission.

12. We are aware of recent (2005) amendments to the law on offences of this kind. It is obvious that the trend in these frequent amendments send a clear signal that the government and the public at large want severe punishments to such offenders. The said recent amendment to the law however, does not apply to the present case as the offence was committed in 1999, many years before the 2005 law was enacted. The Appellant was therefore rightly sentenced under Act 15 of 1996.

As we have noted, he was 56 years old then. Ten years imprisonment therefore, in our view, is much on the higher side. We reduce it to six years.

13. In conclusion, the appeal against conviction fails and is dismissed. The appeal against sentence partly succeeds. A ten year prison term is set aside and substituted with one for six years. It is accordingly ordered.

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Dr. S. J. BWANA
AG. PRESIDENT

1. I concur:

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J. M. HODOUL
JUSTICE OF APPEAL

2. I concur:

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B. RENAUD
JUSTICE OF APPEAL