SEYCHELLES / JUDGMENT

R v AL (CO 30 of 2023) [2024] SCSC 226 (15 July 2024)

[2024] SCSC 226

COURT
Supreme Court

BEFORE
Submission of no case to answer.

CASE / FILE NUMBER
CO 30 of 2023

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SUPREME COURT OF SEYCHELLES
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In the matter between:	THE REPUBLIC (Represented by Mrs Luthina Monthy) and A (Represented by Mr Guy Ferley) Redact co 30/2023 Prosecution Respondent Neutral Citation: Rep vs L Adeline J
Before:	Submission of no case to answer.
Summary:	5th June 2023,7th November 2023 and 14thNovember 2023.
Heard:	

Delivered: 15 July 2024
(CO 30/2023) (15 July 2024)
FINAL ORDER
Criminal prosecution for the offence of sexual assault - Section 130 (1) read with Section 130 (2)
(d) and Section 130 (3) (b) of the Penal Code ~ Burden of proof lies on the prosecution ~ Standard
of proof, beyond reasonable doubt - Submission of no case to answer at the close of the
prosecution's case is upheld based on the finding of this court that the prosecution has not shown
a prima facie case against the accused, having failed to adduce sufficient evidence to prove the
essential elements of the offence against the accused beyond reasonable doubt. The accused is
therefore acquitted of two counts of sexual assault.

RULING

Adeline, J [1] This is a ruling on a submission of no case to answer made by learned counsel for the accused, Mr Guy Ferley, at the close of the prosecution's case. The accused, of La Digue, Seychelles is indicted with two counts of Page 2 of 13 Sexual Assault contrary to Section 130 (1) as read with Section 130 (2) (d) and Section 130

(3) (b) of the Penal Code allegedly committed against a female child named DT who at the time was 10 years old. [2] As I focus on the task in hand which is to make a determination as to whether the accused does or does not have a case to answer based on the evidence laid before this court by the prosecution, to put the evidence in perspective, at the outset, there is a need to spell out the law under which the accused has been indicted. Section 130 (1) of the Penal Code as amended by Act 5 of 20 12 reads as follows; "130 (1) Any person who sexually assaults another person is guilty of an offence and is liable to imprisonment for 20 years. 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 assaultfalls 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. Provided also, that if the person is convicted of a similar offence within a period of 10 years from the date of thefirst conviction, the person shall be liable to imprisonment for a period of not less than 28 years. Provided further, that "whereit is the second or a subsequent conviction of the person for an assault referred to in sub section (2) (d) on a victim under 15 years within a period of ten years from the date of the conviction, the person shall be liable to imprisonment for life ". [3] Section 130(2) (d) of the Penal Code reads as follows; "130 (2) d. For the purpose of this Section, sexual assault includes

(d) the penetration of a body orifice of another for sexual purpose". [4] Section 130 (3) (b) reads as follows; "130 (3) (b). A person does not consent to an act which if done without consent constitutes an assault under this Section if the person is below the age offifteen years, " ...

Page 3 of 13 THE LAW [5] The well-known case law authority of our jurisprudence when determining whether or not a submission of no case to answer should succeed, is the case of Republic vs Steven l Ti l SLR, 9. In Steven (supra), the court held, inter alia, that at this stage of the criminal proceedings there arc two things that the court ought to consider, namely; (i) Whether there is, or there is no evidence adduced by the prosecution to prove the essential elements of the offence of which the accused is being tried, and (ii) Whether the evidence for the prosecution has been so discredited or is so manifestly unreliable that no reasonable tribunal would safely convict. [6] The case of Republic vs Olsen 1973 SLR, 5 and page 189, instructs us, that whether or not there is a case to answer depends not so much on whether the adjudicating tribunal would at this stage convict or acquit, but on whether the evidence is such that a tribunal might convict. TIllS approach was reiterated in the case of David Sopha and Another vs The Republic SCA 2 of 1991, in which case, the COUlt also held, that in considering a submission of no case to answer, the Judge must decide, "whether the evidence taken at its highest could lead a properly directedjury convicting the accused. If so, the case should be allowed to go to the jury. " That is to say, the case should be allowed to continue by calling for the defence's case. [7] If the prosecution's evidence taken at its highest is such that ajury properly directed could not properly convict, the court is duty bound to stop the case at this point without calling for the defence's case. (See also R liS Shippey & Ors (1988) Crim L. R 767, Sangit Chaitlal v the state 1985 39 WLR 295 ami Kernelsealey liS The State Cr App No 2 of 2009) [8] When determining whether an accused has a case to answer, or no case to answer, the English jurisprudence is very instructive on the law. One ofthose English cases that comes to mind is the case of Galbraith 1981 WLR 1039. Others include, for example, Queen v Jahnoy Waiters EC SC Crime-case No 5 of 2009, and Daley v R [1993J 4 ALLER 86. In the Galbraith case, (supra) the court formulated two tests; Page 4 of 13 (i) Firstly, whether there is 110 evidence of the crime alleged to have been committed by the accused. This is likely to be the case, where.for example, the essential evidence has not been called such as when the witnesses have not come up to proof' (ii) Secondly, whether there is some evidence but it is of a tenuous nature. That is to say, it is of inherent weakness or inconsistent with other evidence. [9] In Riley v Barran 1965 8 WLR 164 (Plzillips JA applying Parker CJ ill Practice Note [1962]1 ALLER 448, stated the following; "Apart from these two situation, a tribunal should not in general be called upon to reach a decision as to conviction or acquittal until the whole of the evidence which either side wishes to tender has been placed before it. If, however, a submission is made that there is .. no case to answer, the decision should depend not so much on whether the adjudicating tribunal af compelled to do so) would at that stage convict or acquit, but on whether the evidence is such that a reasonable tribunal might convict on the evidence so far laid before it, there is a case to answer. " (The underlined emphasis is mine) [10] Therefore, based on case law authorities, a submission of no case to answer should only succeed when there is no evidence to prove an essential element of the offence charged, or the evidence is so weak that no reasonable jury or judge, properly directed could convict. If there is some evidence in the form of prima facie evidence, which at face value establishes each element of the offence, the case should continue by calling for the defence's case. [11] Obviously, therefore,

the prosecution in a criminal case carries the burden of proof (with the exception of affirmative defences which the defence must prove). The implication, is that, at this stage of the proceedings, the prosecution has to present evidence of a prima facie case that the accused is guilty of the offence charged. If, however, the prosecution cannot present credible evidence supporting each element of the offence, the accused must be acquitted even without having presented any evidence. A prima facie case, is an early screen for the court to determine, whether, the prosecution can go forward to try the Page 5 of 13 accused fully for the offence charged. As such, the standard of proof that the prosecution must satisfy the court at the prima facie case stage, is lower than that for the proof that the accused is guilty that requires proof of each of the elements of the offence beyond reasonable doubt (see Green v R [1972] No 6.) SUBMISSIONS BY LEARNED DEFENCE COUNSEL [12] In his submission of no case to answer, learned defence counsel's first issue of contention, is its proposition, that the prosecution has failed to tender before this court at the trial of the accused sufficient evidence to prove one of the essential elements of the offence of which the accused is being tried, that is to say, "that the accused has penetrated the vagina of the alleged victim with his penis, and orfinger". Learned counsel sought to support its proposition by referring the court to the evidence of the expert witness called by the prosecution, Dr Setareh Brioche ("Dr Brioche"). [13] In evidence, Dr Brioche had stated, that the alleged victim's hymen was not intact, and then went on as to say, that there are many other reasons why this is the case besides penetration of the vagina. Dr Brioche stated, as an example, that participation is SPOltS activities may be one of those reasons why the hymen is not intact. Learned defence counsel, reminds the COUlt, that in her evidence earlier, the alleged victim, PWl, had testified, that she has been involved in sports activities, notably, athletics gymnastics and ballet dancing. [14] Therefore, although the alleged victim, PWl's hymen was not intact, no conclusive expert evidence by Dr Brioche was put before this COUlt to establish that there has been penetration of the alleged victim, PWl's vagina, by an erected penis of the accused or by fingering into the vagina by the accused. As to the laceration of the hymen found upon examination, Dr Brioche deponed, that the same appeared to be old and that it could have been days, weeks, months or even years back, and that it could have been the consequence of the alleged victim, PWl, participating in those spotting activities. [15] It was also the submission of learned defence counsel, that the evidence of the prosecution as deponed by the prosecution witnesses has been so discredited, and or is so manifestly Page 6 of 13 unreliable, that no reasonable court could safely convict. In support of this proposition, learned defence counsel referred the court to the alleged victim, PWI 's evidence in chief as weJl as to the answers she gave in reply to questions that were put to her in cross examination, which it submitted, were largely inconsistent and incoherent. It was submitted by learned counsel, that there were inconsistencies between what the alleged victim, PW1, told the court and what she told the police in her statement. Few examples of those inconsistencies are borne out ofPWl 's evidence in answers to questions put to her in criss examination, for example; Question: 111 your statement to the police, you said that at the end of this incident, you then took your little brother to your grandmother, is that correct? Answer: Yes. It was put to PW1, that she

did not say that in her statement to the police. Her answer was "yes". Under cross examination, PWI denied that the first person she spoke to about the alleged incident was her mum, But when it was put to her that had stated in her statement to the police, that on the 23rd April 2022 in the afternoon, she an e were in the room with her and that they were talking about an incident that has occurred on La Digue her answer was "yes".

[16] When PWI was asked what was that incident which her mum spoke to her about, PWl's answer was the following; "She told us things that small girls like us are not supposed to do, that we must not do". [17] It was also put to PWl, that her mum did tell her what happened to her, and her answer was "yes", and then she went on to say, that she could not remember what her mum told her. When it was put to PWI that told her what (the accused) did to her in the past, her answer was, "that she told me that r removed his clothes and stood naked infront o ". [18] In cross examination, the alleged victim, PWl, was asked whether the accused inserted the whole of his erected penis inside her vagina, her answer was, "yes". When she was asked Page 7 of 13 how many people she spoke to about that incident, her reply was, her two cousins, aunty and others, a total of 7 persons. [19] In her evidence, PWI did confirm, that she used to do athletics, particularly running and that since last year she has stopped. PWI also stated, that way back she used to do gymnastics and ballet dancing and that she is no longer doing those activities. [20] Under cross examination, the alleged victim, PW1, confirmed, that she spoke to her grandmother about this incident and that was when her mother called. Under cross examination, PW1 did say, that it wa who told her mum that once removed his clothes in front of her. [21] In cross examination, it was also put to the alleged victim, PW1, that in her evidence in chief, she had told the court, that the incident which she said happened on a Saturday, was when the accused inserted his whole private part into her private part and then inserted his private part into her anus. Her answer was "yes". When it was put to her that this is not stated in the statement she gave to the police, she could not provide a satisfactory answer as to why. It is also worth noted, that Dr Brioche, PW4, did say in her testimony, that she found no extemal mark and that the anal area was normal, with no signs of trauma.

[22] Another witness who was called by the prosecution to give evidence against the accused was one PW2, who gave unSW0111evidence. It was the submission of learned defence counsel, that PW2 has been equally incoherent and inconsistent in her testimony, and that was more evident in her answers to questions that were put to her in cross examination, including the following; Question: You stated that you were on the stairs, what happened? Answer: When 1was on the stairs D (the alleged victim, PW1) had gone to get some water from the kitchen and then 1saw pressing D on the sofa and his hand on her mouth and was trying to remove her clothes, as soon as he saw me he stopped and ran to his room. The question that followed, was, where is his room? Answer: Downstairs. Page 8 of 13 Question: Can you tell us what happened? A nswer: I forgot. [23] Social worker, Angelic Azernia, PW6, was another witness who was called to testify against the accused. Her testimony, was that she was present when the alleged victim, PW I, was being examined by Dr Brioche PW4. According to her testimony, PWI was scared, and was crying when the examination was taking place,

and was reluctant to open her legs. Ms Azemia, PW6, told the court that DT, PW1, who did not want to open her legs for the examination, did ask her if the doctor was going to do "like did to her".

[24] Ms Azemia confirmed, that on the 15th May 2023, she did give a statement to the police and when she was shown a statement, she confirmed, that it was the same statement she gave to the police. When asked why is it that she did not include in her statement that PWI was reluctant to open her legs when she was being examined by the doctor, and that she asked whether the doctor was going to do like did, her answer was that she did not write that in her statement to the police.

[25] Another witness who was called upon to testify as a prosecution witness, was one , PW3. In her evidence, PW3 stated, that "the first person to bring the case forward was , PW2, not PW1, and that if it was not , would have remained quiet about the incident. PW2 knows whom she said is her sister. She also knows her brother. In her evidence, Ms , PW3 testified, that it was on a Saturday afternoon at around 4pm, that she received a phone call from her sister who told her what has happened. It was the testimony ofMs , PW3, that the following day, because had gone to her dad crying, her sister first spoke to her sister and mum about the incident. In cross examination, the following question was put to Ms ; Question: So your sister what did she tell you Answer: Because actually, I was telling her about a dream in the morning, and then around 4 pm like that, she called me and told me that she knows what my dream was about, and then she is telling me like and and was telling y if she should Page 9 of 13 not tell, was saying yes, and she told them if there is something to be said better say it now. [26] In cross examination, it was put to Ms , PW3, that this was a conspiracy to get (the accused) arrested. Her answer was "Why should we?". It was also put to Ms that the conspiracy began after (the accused) had made a complaint to the police that her brother, has been stealing money from him, and that was when the animosity started in the family. [27] Under cross examination, Ms did not deny that the accused had made a complaint to the police against her brother to that effect. But she took that opportunity to accuse (the accused) for not wanting the police to take finger prints of possible suspects. Ms also confirmed, that there was this ongoing issue between them and (the accused). [28] In cross examination, Ms was also asked, whether, before this issue arose about Urey stealing money from she did see the alleged victim, D PWI. Her answer was mostly everyday and sometimes over the weekend, and that she never noticed anything wrong with the alleged victim. According to Ms 's testimony, she (looked like a n01111alchild who did not look distress, and who never complained to her about pain in her private part, nor in her anus. Ms also testified, that nothing about such complaint was made to her, nor heard her saying anything about such complaint that is now before this court. In cross examination, more questions were put to Ms as follows; Question: Before that, did you notice anything wrong with her? Answer: No, she was a normal child. Question: You did not see any distress with her. Answer: No. Question: You have never heard her complaining about pain in her private part? Page 10 of 13 Answer: No. Question: Pain in her anus? Answer: No. Question: You did not ever heard her saying anything about this? Answer: No. Question: You did not ever heard

her say anything about this? Answer: No. Question: It was never reported to you before? Answer: No. Question: You never notice anything abnormal with the girl until that day? Answer: Yes until they talked about it. Question: You have said the girl is close to you? Answer: Yes. Question: All the time she was cheerful, a happy girl as usual? Answer: She was ok. Question: What do you mean by she was ok, she was not happy, she was not normal? Answer: As a child like a normal child. [29] At this juncture, given that inter alia, much emphasis has been put by learned defence counsel on the omissions of the witnesses to include in their statement to the police some crucial aspects of their oral evidence, as well as the contradictions in the witnesses' testimony, I find the case of Roy Bistoquet vs The Republic, SeA 3 of 2008, very Page 11 of 13 instructive on the weight which a court has to give to the evidence of a witness that is fraught with omissions and contradictions. I am instructed by the Bistoquet case, (supra) that in the first place, the omissions or contradictions have to be "material" such as when a witness in his or her oral evidence under oath in court gives evidence of certain facts which he or she failed to state in his statement to the police. [30] In Bistoquet (supra) the court had this to say; "As to whether a contradiction or an omission is material or not as to affect the outcome of a case, is dependent on the importance of the fact, the state of mind of the declarant at the time of making the statement, the time the statement was made, the explanation offered by the declarant in court for the contradiction or omission, the possibility that the contradiction or omission could be attributed to the officer recording the statement, whether the evidence in regard to the same fact is available from other sources and the strength of the other available evidence against the accused". [31] I have examined the omissions and contradictions in the light of the above considerations. I am unable to disregard the omissions and contradictions as not being "material". In Bistoquet, (supra) the court after reaching the same conclusion as I do in the instant case, had this to say; "We are unable to state, in this case, that the case carries a high degree of probability against the Appellant as defined by Lord Denning in Miller vs Minister 0.[Pensions [1947J 2 ALLER of the judgment. The evidence is not that strong against the Appellant as to leave only a remote possibility in his favour. In fact, the degree of probability is infavour of the Appellant ". [32] It came out, under cross examination, for example, that in her statement to the police, PWI had not mentioned that the accused had inserted his penis into her anus. In my considered opinion, this is a material omission. The social worker, Ms Angelic Azemia, made a material omission by not including in her statement to the police, that the alleged victim was reluctant to open her legs when she was being examined by the doctor, and that she asked her whether the doctor was to do like m did to her. Page 12 of 13 [33] In my considered opinion, there were also some material contradictions. The alleged victim, PW1, for example, testified that did insert his penis inside his anus. Yet, the evidence Dr Brioche, PW4, shows, that he found no signs of trauma either in or around the aIIeged victim's vagina or around her anus. This, is my considered opinion, is a material contradiction. [34] I have carefully scrutinised the evidence of all the prosecution witnesses who deponed at the trial of the accused, particularly, the evidence of the alleged victim, PWl, and did observe her demeanour as she testified under oath against the accused. Tn doing so, I have been of no illusion, that the

offence of which the accused stands trial is very serious, more so, given that the victim of the alleged offence was a child below the age of 15 years old when the offence was allegedly committed against her, and the fact that if convicted, the accused is likely to face a long term prison sentence.

[35] - ~Having given due consideration to the evidence of the alleged victim, PWl, I am unease .about her version of events in the light of the prosecution's overall evidence, given that she lacked consistency and coherent that makes her evidence not worthy of belief in the absence of corroboration evidence. I am equally concerned about her omissions and contradictions, and the omissions and contradictions of other prosecution witnesses, notably, the fact that she, and others, omitted to include certain key aspects of their oral testimony in the statement they gave the police. [36] As a general observation and comment, I am somewhat perplexed by the fact, that it transpired in evidence, that it was who apparently raised the alarm. According to 's testimony, she was the one who told the mother of the alleged victim, T of the aIIeged incident. Yet, she, who apparently has been present in court following the events as unfolded, was not called by the prosecution as a witness to testify in this case. [37] In the final analysis, therefore, in consideration of the totality of the evidence adduced before this court by the prosecution in this case, I find, that the prosecution has not presented sufficient evidence of a prima facie case against the accused to prove the essential elements of the offence of sexual assault of which the accused is being tried. I also find, Page 13 of 13 that the evidence of the prosecution has been so discredited, and is so manifestly unreliable that no reasonable tribunal would safely convict. [38] In the circumstances, I have to agree with learned defence counsel, that the evidence laid before this court by the prosecution taken at its highest, cannot lead to a properly directed jury to convict the accused in his case. I therefore uphold the submission of no case to answer, and accordingly, I acquit the accused, A L of two counts of Sexual Assault contrary to Section 130(1) as read with Section 130 (2) (d) and Section 130 (3) (b) of the Penal Code punishable under Section 130 (1) of the Penal Code. Signed, dated and delivered at He du Port 15th July 2024.

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