LANEMUA -v- REGINAM

High Court of Solomon Islands
(Palmer J.)
Criminal Case No. 27 of 1992
Hearing: 26 October 1992 at Auki
Judgment: 4 December 1992 (Honiara)

J. Remobatu for Appellant
R. B. Talasasa for the Respondent

PALMER J: The Appellant, **Paul Lanemua** was convicted in the Auki Magistrate's Court on a charge of **Criminal Trespass** and **Indecent Assault**. He pleaded not guilty to both charges but was convicted. He was fined $30.00 and $120.00 respectively. He was also found to be in breach of a bond to keep the peace and so forfeited the $50.00.

The fines were made payable in 14 days in default 2 months imprisonment to be served by father.

He now appeals against the convictions on the following grounds:

(i) **The Court failed adequately to address itself inrelation to Count 1, the question of ownership and possession of the dwelling house in order to determine whether an offence had been made out.**

(ii) **Having warned itself of the dangers of convicting on the uncorroborated evidence of the complainant, the court nevertheless convicted your petitioner on the uncorroborated evidence of the complainant which is in itself unconvincing in relation to Count 2.**

There were two other grounds but these were dropped before the appeal was heard.

The first ground addresses the question of ownership and possession of the house. Mr Remobatu seeks to argue that unless the question of ownership and possession is clearly established, no conviction could justifiably be made, as a crucial element of the offence of trespass is the violation of someone's right to property, and in this particular case the question of ownership of the dwelling house is not clear.

Subsection 182 (2) of the Penal Code reads:

"Any person who enters by night any dwelling house, or any verandah or passage attached thereto, ... without lawful excuse, is guilty of a misdemeanour, and shall be liable to imprisonment for one year."

A key question that arises from this appeal point is, whether the offence of criminal trespass can be committed in the absence of the owner of the said dwelling house.

Let us assume that the owner happened to be out that particular night when the offender or the stranger enters the dwelling house. Can he be charged with the Offence of criminal trespass?

Subsection (2) does not say that the dwelling house must be occupied by the owner at the time of commission of the offence.

An owner may be on leave, and so leave his house vacant or he may have his relations or friends occupying the house and looking after it whilst he is away. The fact that a stranger or a person comes into the dwelling house in such circumstances can amount to an offence if the element of '**lawful excuse**' is lacking.

It is not a necessary requirement of the subsection that it must be established that the woman and the 2 children were the owners of the house. Rather, the question that needs to be asked is, were they lawfully there? If yes, then anyone else who enters that house without lawful excuse is a trespasser. It is not necessary to establish that the occupants were owners. What the defence has picked on is the statement of the complainant under cross examination where she stated that: "***the house was not my house. It was our first day we live in that house.***"

For the purposes of section 182(2) and applying the particular facts of this case it is sufficient if it is found that the complainant was lawfully in the dwelling house. A person who intrudes at night whilst she is there without lawful excuse is a trespasser.

Did the Court address the issue of ownership and possession? If one looks at the written judgment of the lower court, it could be said that the court did not address this issue.

However, one must be careful in coming to that conclusion, because it is very possible that the learned magistrate considered that question, made up his mind about it and wrote the judgment.

In his judgment, the learned magistrate wrote:

"From the evidence, I now satisfied that Paul Lanemua went into the house in which Rose Maegosia and her children were sleeping on the 25th December 1991. Paul admitted that himself."

The question that can be asked is; was it necessary, as an ingredient of the offence, that the question of ownership and possession must be established.

For the purposes of criminal trespass, it is important that there is evidence which identifies either who the owner is or who was in lawful possession of the house. The relationship of the complainant to the house as owner or occupier is therefore important.

The evidence before the lower court is quite clear. It shows that the complainant was in occupation of the said dwelling house at that time.

There is however no evidence to suggest that she was not a lawful occupier or that she had no lawful possession of the dwelling house. So even if the court was to consider the question of ownership or possession of the dwelling house, it would not have been able to make any conclusive findings as to adverse possession or illegal possession of the said dwelling house.

There is no hint or suggestion in the evidence of the Defendant that the complainant had no lawful right to occupy or live in the said dwelling house.

The evidence before the lower court shows to the contrary a strong presumption that she was a lawful occupant of the said premises with her two children. If this is disputed then the Defendant must prove on the balance of probabilities that she herself had no right to be residing in the said dwelling house. This has not been done by the Defendant.

I am satisfied there was sufficient evidence for the learned Magistrate to conclude that the complainant was lawfully in the house and that although the record of the judgment did not show that he did or did not apply his mind to the question of ownership or possession it would not have made any difference as there is no evidence to show otherwise.

The fact that the complainant was sleeping in that house with doors locked with her two children raises a presumption in her favour that she was residing lawfully in that dwelling house. If the Defendant wishes to challenge that presumption then he must produce evidence to rebut it on the balance of probabilities. He has not done that. Accordingly there is no evidence or little evidence for the court to consider otherwise that the complainant did not have lawful possession. The learned magistrate was

entitled to conclude that the elements of criminal trespass had been fulfilled. There is clear evidence too that the Defendant did not have lawful excuse to enter that building.

The first ground therefore must fail.

I turn to the second ground.

The danger of convicting on uncorroborated evidence in sexual offences cannot be minimised.

In *R. -v- Henry and Manning (1969) 53 Cr. App. R. 150,* per Lord Justice Salmon at page 153 he said:

> *"What the judge has to do is to use clear and simple language that will without any doubt convey to the jury that in cases of alleged sexual offences it is really dangerous to convict on the evidence of the woman or girl alone. This is dangerous because human experience has shown that in these courts girls and women do sometimes tell an entirely false story which is very easy to fabricate, but extremely difficult to refute. Such stories are fabricated for all sorts of reasons, which I need not now enumerate, and sometimes for no reason at all. The judge should then go on to tell the jury that, bearing that warning well in mind, they have to look at the particular facts of the particular case and if, having given full weight to the warning, they come to the conclusion that in the particular case the woman or girl without any real doubt is speaking the truth, then the fact there is no corroboration matters not at all; they are entitled to convict."*

The above comments are applicable to this case although they were directions to a jury. The direction or warning that a magistrate who is judge of fact and law should consider is not minimised. It is the same.

In *R -v- Gammon (1959) 43 Cr. App. R. 155 at page 160*, the same caution is brought out.

> *"It is always the duty of the tribunal in offences of this nature to invite the jury to look for corroboration and to warn them that they should be careful not to convict in the absence of corroboration unless the evidence completely satisfies them of the guilt of accused."*

In the present case the magistrate warned himself as follows:

> *"As a matter of practice, I remind myself of the danger of convicting in offences of sexual nature without corroborative evidence."*

He then assessed the evidence and found that there was an entry into the house by the Defendant and a physical handling of the victim's vagina by him, as well as climbing on top of her.

At the second to the last paragraph of his judgment, the learned magistrate stated:

"From the evidence, I am satisfied that Paul did hold Rose's vagina that morning without her consent."

The learned magistrate had the opportunity of seeing the victim and the Defendant giving evidence. He had the opportunity of observing their mannerism; how they gave the evidence. He is my opinion in a far better position to assess the weight to be attached to the evidence of the parties.

I am satisfied the learned magistrate warned himself sufficiently of the dangers of convicting on the evidence of the victim alone.

I am satisfied that in his consideration of the particular facts of this case, he was completely satisfied of the guilt of the accused. The evidence in the record of proceedings clearly bears this out. This court will not lightly overturn an assessment of a presiding magistrate as to what weight to attach to evidence unless it can be shown clearly that there was no justifiable grounds for attaching such weight.

Learned counsel also raised a submission as to Prosecution's refusal to call a second witness without any explanation.

The starting point must be to recognise that Prosecution has the discretion whether to call its witnesses or not.

The learned author in **Archbold Criminal Pleading Evidence & Practice, 43rd Edition at page 418,** however pointed out that,

"Where *the witness' evidence is capable of belief it is the duty of the prosecution to call him, even though the evidence that he is going to give is inconsistent with the case sought to be proved."*

He continues:

"The discretion of the prosecution must be exercised in a manner calculated to further the interests of justice and at the same time be fair to the defence. If the prosecution appear to be exercising their discretion improperly it is open to the judge to interfere and in his discretion to invite the prosecution to call the witness."

In ***Adel Muhammed el Dabbah -v- Attorney General for Palestine*** *[1944] A.C. 156* per Lord Thankerton at page 168, he says:

"the court will not interfere with the exercise of the (prosecution's) discretion, unless, perhaps, it can be shown that the prosecutor has been influenced by some oblique motive." ***(This case is referred to in Archbolds (Ibid) page 418).***

The submission of learned counsel for the appellant is that no reason appears in the court record as to why the second witness of prosecution was not called.

He argued that the absence of a reason should alert the court further when warning itself against the dangers of convicting on uncorroborated evidence, and had the court applied its mind to this factor, it is possible that less reliance would have been placed on the uncorroborated evidence of the only prosecution witness called, the victim.

I accept that there is a no record of the reason if any as to why prosecution did not call the second witness. It would be mere speculation to try and find a reason.

What is however of importance here is whether there is any evidence of impropriety, or divergence on the part of prosecution that should warrant this court's intervention in the judgment of the lower court?

What was wrong or unjust about the exclusion of the second prosecution witness's evidence by prosecution? Did the defence wish to call that witness?
In the case of Horace Henry Bryant -v- Reginam [1946] 31 Cr App.R146, it recognises that prosecution has a duty to make a person who can give material evidence available to defence to call as a witness if they decide not to call him. But that is as far as that duty goes. They are not under a duty to supply a copy of that witnesses statement. Defence can ascertain from that witness his/her evidence themselves. Prosecution is not under a duty to give a reason as to why they have decided not to call their witness. There is a duty however, to make that witness available to the defence.

I am aware that the defendant was not represented in the trial at the lower court. But there has been no indication whatsoever that he wished to call that witness or that other witness had not been made available to him, or that there had been impropriety involved.

Accordingly, the omission by prosecution to give a reason for not callin its second witness is in my humble opinion immaterial.

Nothing has been shown to satisfy me that the learned magistrate did not warn himself adequately of the dangers of convicting on uncorroborated evidence and that he did not weigh the evidence before him fairly before entering a conviction.

Accordingly the second ground must also fail.

Appeal dismissed.

(A.R. Palmer)
JUDGE