

**Nourrice v Republic
(2007) SLR 19**

Somasundaram RAJASUNDARAM for the appellant
Joel CAMILLE for the respondent

Judgment delivered on 1 February 2007 by:

RENAUD J: The appellant was convicted and sentenced by the Senior Magistrate on 10 December, 2003 for the offence of assaulting a child contrary to section 70(1)(a) and punishable under section 70(b) of the Children Act. The Appellant entered her appeal after 8 months and 23 days and she sought the indulgence of this Court to condone the delay. After due consideration this Court in its ruling dated 31 January 2005 condoned the delay, granted leave and allowed the appellant to proceed with her appeal.

Section 70(1) states that -

Without prejudice to sections 162 (Desertion of Children) or 163 (Neglecting to provide food etc for children) of the Penal Code, a person who has the custody, charge or care of a child and who willfully

- (a) assaults or ill treats that child; or
- (b) neglects, abandons or exposes that child, in a manner likely to cause him unnecessary suffering, moral danger or injury to health (including injury to or loss of sight, hearing, limb or organ of the body and any mental derangement) is guilty of an offence.

The prosecution therefore has to prove the following elements of that offence:

- (1) That the accused had the custody, charge or care of the child, and
- (2) That the accused wilfully assaulted or mistreated that child.

If these two elements are not proved beyond reasonable doubt by the prosecution the charge against the accused is liable to be dismissed.

The appellant advanced the following grounds of appeal:

1. The Magistrate failed to observe the inconsistency of the statements of witness PW1, PW2 and PW3 as to the material issue of hitting with the stone.

2. The Magistrate erred in his findings that the accused hit PW1 while PW2 and PW3 testified that they did not see the accused hitting PW1 in that the Magistrate failed to observe the lack of corroboration.
3. The Magistrate has wrongly appreciated the child witness PW1 while the other two witnesses failed to corroborate as to the commission of the offence.
4. The Magistrate failed to appreciate the lack of independent witnesses to support the prosecution case whilst all the witnesses are from the same families and are related to each other.
5. The Magistrate erred in presuming that it could not be anybody other than the accused who committed the offence.
6. The fine imposed of R2,500 is manifestly high and excessive.

Inconsistencies in the witnesses' testimony may occur even if each witness may have observed the same transaction. This is a natural phenomenon. However, the trial court ought to assess the inconsistencies and establish whether it has any significant bearing on the material issues which may lead the court to entertain a reasonable doubt as to the proof of all the elements of the charge. Inconsistencies when viewed singly may be excusable and have no bearing on the material issue but when these are viewed globally it may be considered otherwise as having an effect on the finding of guilt of an accused.

The appellant argues that the inconsistencies in the statements of the prosecution witnesses as to the material issue of hitting with the stone amounted to a lack of corroboration. I have carefully perused the record of the proceedings and I have observed certain inconsistencies which I have considered in the light of the aforementioned observations.

The Senior Magistrate concluded that - "the fact remains that PW1 was assaulted by someone, who, as per the evidence adduced in Court, could not be anybody else than the Accused herself". The judgment however does not make the finding as to what constituted the assault on PW1. Was it the holding of the virtual complainant by his collar; was it the giving of 4 slaps on the back of PW1; was it the hitting with stone; or was it the holding by the accused of the hand of PW1; or, was it all the instances mentioned. It is my considered view that the trial court ought to have found what constituted the assault for which the accused was charged.

I find that none of the prosecution witnesses corroborated the evidence of the virtual complainant Kelly Simeon that the accused held him by his collar. Similarly, I find that there is no corroboration of the evidence of Kelly that the accused gave him 4 slaps on his back.

PW3 Brianson Pharabeau testified that he saw the accused hit Kelly on the head with a piece of brick whereas the virtual complainant said that the accused hit him with a stone.

The accused was not represented by counsel at the trial. The tenor of her cross-examination of PW3 Brianson Pharabeau was that that witness was not present at the scene of the incident and that he was relating to the court what others may have asked him to say.

I note that PW3 Brianson Pharabeau neither mentioned that he saw the accused holding PW1 Kelly by his collar nor that he saw the accused giving four slaps on the back of PW1. That witness testified that he saw the accused hitting PW1 Kelly with a piece of brick whereas Kelly said that the accused hit him with a stone. The mother of Kelly further stated that she sent Kelly and Michelle to the shop but did not mention PW3 Pharabeau. In the light of these inconsistencies, could it be said beyond reasonable doubt that PW3 Pharabeau was there? I believe that there is a reasonable doubt as to the presence of Pharabeau at the scene of the incident at the material time. The benefit of the doubt should be given to the accused.

The mother of Kelly stated that she picked up the stone/brick and took it to the Police Station. The stone/brick was not produced in court. She also testified that she took Kelly to the Police Station and Hospital. It is common practice in such cases for the Police to give the victim a Police Medical Report Book that is then completed by the examining doctor. There is no evidence of such being done, and if it was done, the Police Medical Certificate was not produced. Furthermore, the doctor who allegedly examined Kelly did not testify. The Prosecution produced a handwritten medical report which was admitted without objection. That medical report was signed by Dr Carlos and states as follows:

Beoliere Clinic, Mahe.

Patient: Kelly Gino Kneel SIMEON

DOB: 06.11.1991

Age: 10yrs

A male patient of 10 years old, past history good, arrived in Beoliere Clinic today, the mother referred child, pain in head, skull occipital, accompanied mild swelling in site, not presenting unconsciousness, not vomiting.

Child was in attendance, excluded this problem to carry treatment.

Dr Carlos

That medical report is dated 15 February 2002. I find that this medical report has no relevance to the incident that happened on 6 January 2002.

For the reasons stated above, I conclude that a fundamental element of the offence was

not proved by the prosecution in that there is no evidence that goes to prove that the accused had the custody, charge or care of the child in issue at the material time. Further, I find that there is a lack of corroboration as to the alleged assault, be that the holding by the accused of the virtual complainant by his collar, or the accused giving four slaps on the back of the virtual complainant. With regard to the accused allegedly hitting the virtual complainant with a stone/brick on his head, I find that the evidence adduced is not corroborated and is therefore inconclusive, hence, a reasonable doubt persists and the benefit of the doubt is in favour of the accused.

In the circumstances, I find that it is unsafe to uphold the conviction of the Accused. I accordingly dismiss the charge against the accused and set aside the sentence. I order that any fine that the accused had paid be refunded to her.

Record: Court of Appeal (Criminal No 14(c) of 2004)