

**POLICE v BHEEKY MOONESH KUMAR**

**2006 INT 234**

**Cause No.6/01**

**IN THE INTERMEDIATE COURT OF MAURITIUS**

**In the matter of:**

**Police**

**v**

**Moonesh Kumar Bheeky**

**JUDGMENT**

Accused is charged with having on or about 9<sup>th</sup> October 1998 raped one Soonita Hoomale in breach of Section 249(1) of the Criminal Code. Accused who was represented by Counsel has pleaded not guilty to the charge.

The prosecution produced:

- i) act of birth of accused (Document A);
- ii) act of birth of complainant (Document B);
- iii) 2 medico-legal reports, re: examination of complainant and accused (Documents C and D);
- iv) three FSL reports, re: examination of swabs taken from complainant, examination of locus and examination of exhibits (Documents D1 to D3);
- v) 2 photographs (Documents F1 and F2) and a plan of the alleged spot of the incident (Document E);
- vi) a statement taken from the accused (Document G1); and
- vii) a statement explaining the photographs and the plan (Document H).

The prosecution called complainant Soonita Hoomale, a 24 year old deaf and dumb woman. The prosecution enlisted the help of Mr J. Mareacheallee, a specially qualified teacher and Head of the Beau Bassin institution for the deaf, to interpret questions put to Miss Hoomale by state counsel and counsel for the accused, as well as her answers to those questions.

What can be gathered from the examination-in-chief of Soonita is the following. She lives with her mother. Latter goes to work in the morning and comes back home in the afternoon. On 9<sup>th</sup> October 1998, she was alone at home busy washing the dishes in the kitchen. Accused, who is related to her, called at her place. Accused closed the door, dragged her into another room and pushed her on the floor. He then climbed on her, fondled her breasts, lifted her skirt, removed her panties and after having opened his flies and pulled down his trousers, inserted his "thing" into her private part and had sexual intercourse with her by force; he then ran away. Each time she was questioned, Soonita referred to a "thing" with which accused had allegedly penetrated her private part. It is was only after she had been shown the drawing of a male body (Document K refers) that she pointed out the penis as being the "thing" referred by her to explain how accused had penetrated her. She added that she struggled and cried as she was hurt when accused held her by her hair. After accused had left, she went to the toilet and thereafter continued with her household chores until her mother came back home and she related the incident to her. Miss Hoomale added that when accused ran away, two persons ran after him.

The prosecution also called Mrs Parmawtee Hoomale, the mother of Miss Soonita Hoomale. She testified that Soonita who is the eldest of her four children, is deaf and

dumb and communicates by signs. Soonita usually stays alone at home when she goes to work. On 9<sup>th</sup> October 1998, she left home at 5.45 and came back earlier than usual to find Soonita crying in the kitchen. On questioning her, she learnt that "Kamlesh" (latter being the accused) had during her absence called at her place and had struggled with Soonita who was in the kitchen doing the dishes; in the process he caught hold of her breasts. At Soonita's request, she took her to the place of Kamlesh. On seeing the latter, Soonita pointed at him and said that he had struggled with her and "*fine trappe so l'estomac.*" Having spoken to Kamlesh's mother, she went back home and waited for her brother. At about 7 or 7.30 pm, Mrs. Hoomale went back to the place of Kamlesh accompanied by her brother. Whilst latter was speaking to Kamlesh's father, latter tried to assault him. Later at about 21.30, she called at the police station and reported the matter.

In cross-examination, she agreed having whilst deposing in chief, stated that when she came back from work, Soonita told her that Kamlesh had "*trappe so l'estomac.*" She agreed that she did not mention that Soonita told her that Kamlesh had raped her. In reply to a question put to her, she stated that Soonita being deaf and dumb, she communicates by signs and from same made by Soonita, i.e, that accused had thrown her to the ground, struggled with her and climbed on her, she understood her to mean that she had been raped by accused. In reply to another question put to her, Mrs Hoomale said that she complained of same to her brother when latter came home in the evening. She denied having misunderstood the signs of Soonita. She explained that although both herself and Soonita have never attended any specialised school for the deaf and dumb, yet the two of them understand each other very well. She was furthermore not aware whether Soonita had had any sexual intercourse with other men

but added that Soonita had told the doctor who had examined her that she had had sexual intercourse with accused on several occasions.

In re-examination she maintained that Soonita told her that she had been raped by accused.

Inspector Thug confirmed that on 9<sup>th</sup> October 1998 at about 21.30 at Phoenix Police Station, Mrs Hoomale gave a declaration on behalf of her daughter, Miss Soonita Hoomale.

Witness Enrico Mercure, called by the prosecution, confirmed that in the morning of 9<sup>th</sup> October 1998 he and witness Arnaud Jonathan Mascareigne were working at the place of Miss Hoomale. Latter's mother who is a labourer was at work. He saw accused calling at the place of Miss Hoomale. He saw accused calling at the place of Miss Hoomale on three occasions. On the third one, he saw Miss Hoomale opening the door brusquely and coming out of the house. He also confirmed the presence of the grandfather of Miss Hoomale on the site of work. Still according to the witness, he did not see or hear anything unusual except for the noise of chairs being moved around and the shouts of Miss Hoomale – which shouts he heard approximately before noon. He was unable to describe the nature of those shouts. According to him, they were not shouts of help; they were not continuous ones but at an interval of one or two seconds between each shout. He ended up by saying that they were the usual shouts of Miss Hoomale which he had heard before. He also added that when the mother of Miss Hoomale came back in the afternoon, he was still working and saw the two of them going towards accused's shop. According to the witness, the kitchen of Miss Hoomale is about 6 feet from where he was working.

Witness Mascareigne, also called by the prosecution, was not of much help. He could only confirm that on 9<sup>th</sup> October 1998, he saw accused calling at the place of Miss Soonita Hoomale on three occasions. Twice his statement given on 20<sup>th</sup> April 2000 had to be put to him. Even after having admitted part of the contents of that statement which was put to him, the witness denied having given that statement to the police on 20. 04. 2000. He maintained having given only one statement - that of 10<sup>th</sup> October 1998. However PS Thummiah, who was called by the prosecution, confirmed having in presence of PC Issur recorded a statement from the witness on 20. 04. 2000.

Accused was called to give evidence. He solemnly affirmed to the correctness of his written statement given to the police on 11.10.98, in presence of his father and legal representative (Document G1 refers). The version of accused as per his written statement to the police is the following. At about 8.45 in the morning of 9<sup>th</sup> October 1998 after having helped his uncle with some work in the yard, he was on his way home. He was passing in front of the house of Soonita, his cousin sister who is deaf and dumb, when he heard noises emanating from the kitchen. He rushed inside and saw Soonita holding a box of matches. A pressure cooker was lying on the floor. Soonita looked confused. He snatched the matches from her hands and pushed her away. At the same moment came a next door neighbour, one Sevamee who sent him away on an errand. He denied having raped Soonita. He added that there were several persons working not far away from the house of Soonita. Latter is a nervous person and becomes hysterical at the mere touch of a person. Had he touched Soonita on that day, latter would have shouted.

In court, he explained that his house is about 10 metres away from that of Soonita and that latter is difficult to handle when she is hysterical. He reiterated his version given in his statement that at about 8.30, he was passing by her kitchen when he heard a noise. Fearing for the safety of Soonita, he went in the kitchen and saw matches in her hands; she was trying to light a stove. Knowing that Soonita had on previous occasions sustained burns, and having also heard that she had tried to set fire to herself, he snatched the matchbox from her hands and shoved her away. At the same moment walked in one Mrs Nalama Chinien, also known as Mami Sevamee a next door neighbour. Mrs Sevamee asked him to go to the shop which he did, whilst leaving Soonita in the care of Mrs Sevamee. Later he came back and after having handed over the goods to Mrs Sevamee, he went back home. Accused maintained that he went to the place of Soonita twice only - the first time when he heard the noise, and the second one to hand over Mrs Sevamee's shopping to her. He added that he was 16 years old at the time of the alleged offence; at the time he was deponing in court he was 22 years old and was in gainful employment. He denied having on 9<sup>th</sup> October 1998 had sexual intercourse by force with Soonita. He also denied having had sexual intercourse with Soonita on previous occasions.

I have duly considered the whole evidence on record and the submissions of both Learned Counsel. The case for the prosecution rests essentially on the evidence of complainant who is deaf and dumb. The present case being of a sexual nature, I am aware of the danger of acting upon the uncorroborated testimony of complainant. Dr Boolell who had examined the latter on 10<sup>th</sup> October 1998 at 11.00 has described her as suffering from a slight mental impairment, i.e., lacking a few areas of concentration and having intermittent confusion as to orientation. She also suffers from epilepsy for which she was following treatment at the Brown Sequard Hospital. She understands sign

language and with the help of Mr Mareacheallee, Dr Boolell had no difficulty in understanding her.

In reply to a question put to him, Dr Boolell explained that it was possible for the complainant to suffer from delusion.

It would be recalled that Miss Hoomale was a difficult witness. It was with great difficulty that she answered questions put to her. At times she would even refuse to answer questions put to her. Her testimony, far from being consistent and straightforward, was indeed fraught with material contradictions, some of which I shall highlight.

- 1) Whereas in examination-in-chief, she said that she was in the kitchen washing the dishes when accused called at her place, in cross-examination, she said that she was in the bedroom making the bed. Again, having in examination-in-chief said that accused dragged her to another room where he threw her down on the floor and sexually abused her, in cross-examination, she said that accused came in, closed the door, put her on the bed and after having removed her knickers, fondled her breast and had sexual intercourse with her. When confronted with her statement that she had given to the police, she said that she was in the kitchen preparing food. However, when she was again questioned about the exact spot where sexual intercourse allegedly took place, at first she did not come up with any answer but mimicked acts of removing pants and sleeping, and then only said that it was on the floor. To the question whether she was on the material day preparing food in the kitchen, she replied in the affirmative but remained silent when questioned as to whether whilst she was handling matches, accused came in and removed them from her hands for her own safety.

When asked what she did after the alleged sexual act, she would not reply, but instead related the whole sexual incident.

- 2) When she was questioned about the number of times she had had sexual intercourse prior to the alleged incident, Miss Hoomale stated that it was the first time. When confronted with her statement, she agreed having said to the police that prior to the alleged incident she had had sexual intercourse with the accused on three occasions. However, she remained silent when questioned about the dates of her previous sexual encounters with accused and of her feelings. In answer to another question put to her, she stated that her mother was aware of her past sexual relationships with accused and that she had reported the matter to the police. But she remained silent when she was confronted with her statement to the police wherein she had said that she had never made any mention of her past sexual experiences with accused to her mother.
  
- 3) In reply to a question put to her, Miss Hoomale said that she did not bleed when accused had sexual intercourse with her. However, she admitted having in her statement that she had given to the police said therein that after the accused had sexual intercourse with her, she bled and that blood even dripped on the floor. To another question put to her, she said that accused had ejaculated and sperm had dribbled on the floor as well as on her dress which she was still wearing during the sexual acts. Now according to the medico-legal report (Document C) of Dr Boolell, latter did not find any fresh injuries around Miss Hoomale's genitalia which would be suggestive of forceful penetration. Further, the Scientific Officer who examined the locus did not find any evidence of forensic value, nor did his examination of the exhibits brought to him by the police on 10<sup>th</sup> October 1998.

- 4) Further, there is no evidence on record in support of the allegations of Miss Hoomale that after she had sexually been abused by the accused, latter was chased by two men.
  
- 5) According to Miss Hoomale, a stone mason witnessed accused fondling her breasts. At the request of counsel for the defence, witnesses Enrico Mercure and Arnaud Jonathan Mascareigne who were on the list of witnesses for the prosecution were called on the floor of the court for the purpose of complainant identifying the stonemason but according to the complainant that person was not in court. No evidence was adduced by the prosecution to substantiate those allegations of Miss Hoomale.
  
- 6) Miss Hoomale identified Sevamee Chingen, witness for the defence, whom she alleged having witnessed accused having sexual intercourse with her in the kitchen. That witness, who would have been a material witness for the prosecution was not called by the prosecution, in support of the above allegations.
  
- 7) It is the contention of Miss Hoomale that soon after the incident, she complained of her misfortune to Goorucheran Chunnoo. Although according to the evidence adduced on record, G. Chunnoo is the grandfather of Miss Hoomale, yet latter referred to him as being her uncle. According to this witness, on 9<sup>th</sup> October 1998 at about **9.00** am he was near the house of his daughter when he heard Soonita shouting. He then saw accused rushing out of the house of Soonita. Using sign language, he queried Soonita who told him that accused had held her hands. Soonita also told him that she had pain in her back. He then went away.

He added that he could not quite understand Soonita's signs. Strangely enough this witness was not called by the prosecution to give evidence, but was merely tendered for cross-examination at the request of learned counsel for the defence. The prosecution did not think it fit to elicit evidence from this witness as to the physical appearance of Soonita when it is alleged that he had seen Soonita immediately after the incident.

- 8) As for the evidence of the mother of Soonita, it is rather odd that her evidence in examination-in-chief only amounted to saying that Soonita had told her that accused had struggled with her and "*trappe so l'estomac.*" It was only after her statement that she had given to the police on 10<sup>th</sup> October 1998 was put to her by learned counsel for the prosecution that she agreed having said therein that:

*"Mo fine prend mo ti fille mo fine alle acote Kamlesh so la caze. le temps fine arrive la bas, nous fine rentrer dans so la caze Kamlesh tipe dibouter dans so la cuisine. Mo ti fille fine montrer moi Kamlesh et d'apres li c'est Kamlesh meme ki fine viole li."*

It was only then that she added that Soonita had also told her that Kamlesh had raped her. Her explanation, in cross-examination, for having failed to mention that Soonita had also told her that accused had allegedly raped her was simply that she had forgotten to do so although she agreed that rape is a more serious matter than "*trappe l'estomac.*" According to her, Soonita has never told her about her past sexual activities with accused, nor has she ever spoken about any other past sexual experiences to her, thus giving the lie to Soonita who said that her mother was aware that she had had sexual

intercourse with the accused in the past and that she had even reported the matter to the police.

In the light of the above, I find that it would be most unsafe to rely on the sole uncorroborated evidence of the complainant to find the charge against the accused proved beyond reasonable doubt. The information against the accused is accordingly dismissed.

**N. Devat**

**President Intermediate Court (Civil Division)**

**10 May 2006**