# National Supreme Court

# Circuit of Red Sea and Kasala States

# Port-Sudan

**Before:**

**H.E./ Abdulraouf Hassab Allah ……. President.**

**H.E./ Ibrahim Mohammed Almaki…. Member**

**H.E./ Ibrahim Mohammed Hamdan…Member**

**Trial of: Nasrelddin Mohammed Al-Sheikh**

**. /214/2014**

**Judgment**

This is an appeal for cassation submitted by Attorney/Maaz Hassen Bakheet on behalf of the convict in trial no GH A/75/2014 on13/8/2014, where he was convicted under Article (45) of the Juvenile Code and was sentenced under Article (86) to 5 years in prison and a fine of 500 pounds, and in case of failure to pay, he serves 2 months in prison to be spent consecutively, and which was upheld by the ruling in appeal ASG/183/2014 on 28/8/2014, altering the imprisonment term to be 3 years as of 2/1/2014, with the fine upheld along with the other orders.

The appeal is summed up in the following points;

Firstly;

The conviction was based on the testimony by the prosecutor's third witness, that had no ground according to the rules of proof, as regards the assessment and significance of the evidence. It was doubted because the facts ascertained by the investigator were that the room where the witness alleged, he had seen the accused and the victim in was too dark to allow seeing what was inside, despite his attempt to justify that by saying there were some holes in the wall through which he could see what was going on inside. The records and the evidence refuted the existence of such holes, causing the witness's testimony to be rejected, and interpreting the doubt in favor of the plaintiff.

Secondly;

The rejection of the evidence given by this only and direct witness leaves no ground to support the statement by the victim, as the other evidence is that of the medical report, prosecution document no (1), which is also rejected as it contradicts the (statements by the victim herself) who stated that the accused ejaculated between her thighs and not inside her vagina, and it is known that that is far from the vagina, making it illogical that the sperm could reach her vagina, which is only possible through intercourse which the victim denied had happened, raising doubt about her allegations.

Thirdly;

The mere presence of the plaintiff's sperm in his pants – prosecution evidence no. (3) – should be interpreted as a normal thing and not a proof that an act of sex had happened against the victim, and reviewing the evidence and the testimony by the defense witness affirming that he brought the accused from Sawakin and was with him all along, so, perhaps the accused had had a wet dream, bearing on mind that the prosecution's evidence no (3) – the accused clothes – were taken from him on the next day after the incident for running the texts, and so, this evidence too, is shrouded in doubt, and negates the hypothesis of his having sex with the victim. And, prosecution's document (2) negates the presence of sperm in the accused's penis when examined.

Fourthly;

The fact that the accused was with the victim in a room at sunset does not constitute an evidence of sexual harassment or abuse on the victim, as harassment is a physical act that requires not only the presence of the accused with the victim in a room but proving that a movement or an attempt or touching or signaling to arouse sexual desire.

Fifthly;

Facts and evidence indicate that the victim had been stalked by others before entering the house, a matter that raises the assumption that the sexual assault might have been committed by those individuals, in which case, doubt should be interpreted in favor of the accused as the basic assumption is innocence.

In my opinion, the conviction is right under Article (45) paragraph © of the Juvenile Code for the following reasons;

Firstly;

Undoubtedly, Attorney Maaz Hassen has exerted considerable effort and comprehensively analyzed the evidence and the facts to cast doubt over the evidence and to justify the interpretation of doubt in favor of the accused. However, we disagree with him, and rather, agree with both Criminal Court and the Court of Appeal

Secondly;

In the beginning, we have to specify the meaning of the phrases (sexual harassment and sexual act) for, the legislator, although did not define either of the two phrases above, still, the legislative objective of these two phrases can easily be inferred from the articles of the Criminal Code of 1991, and from sharia jurisprudence, or from the jurisprudence at large, hence, these phrases signify the following;

(1) From a sheer legal view;
Notably, the Criminal Code of 1991 has introduced these phrases in Article (151) criminal, the same as in the Juvenile Code of 2010, that the crime of obscenity means every act committed by an assailant and infringing propriety of another person, or to have an act of sex that is short of adultery or sodomy, and this is a general meaning to what an assailant does and that is against propriety, or constitutes a kind of sexual act.

(2) Also, inferring from other legal stipulations, we find that the crime of obscenity) is mentioned by the legislator in a different sense in Article (156) of the Criminal Code of 1991 and bears the same (intent of obscenity and sexual harassment) as it reads;
(He who ever seduces a person or takes him/her or helps in taking him/her or leading him or hiring him to commit the crime of adultery, sodomy, obscene acts of impropriety or that breach public morals (etc.).) And, the context shows that the mere act of seduction or helping, are contained in the definition of (Sexual harassment and act) against another even if the assailant does not directly or physically perform an act of sex. And here I recall proceedings of a case that I deliberated in the 70s, where the decision by the court of appeal was (flirting or sweet words even by winking or whistling that indicate harassment, or showing of sexual organs, in whichever manner, are considered as sexual harassment and a conduct of sex that contradicts public order and morals.
Hence; all these acts are not far from being sexual harassment and sexual behavior.

(3) In reference to Article (3) interpretation, of the Criminal Code of 1991, the crime (be it sexual harassment or behavior) cannot be justifiable by the consent of the victim or if it happens against the consent of the victim, defined by the legislator as (unjustifiable) if it was given by;

(4) a/ someone under coercion or by mistakenly understanding the facts, if the assailant was aware that a victim's consent was a result of his coercion.
b/ If the consent was given by someone who is underage, or by someone who is not aware of the gravity of what he consented to, either due to mental or psychological instability.
4- As for the definition of the word (intent) in the Criminal Code, it means;
(that an assailant causes or leaves a result intentionally using the means that leads to that result, or he knows when he uses this means that it will cause such an effect or has a clue that such means will leave the effect he intended.)

Notably, the legislator generalized the word (means) in the definition so as to include all means; physical or moral, and to affirm that legislative intent by generalizing the word (means) he defined the word(result) that ensues as; ( a likely to occur result of such means or that the means used will definitely lead to the occurrence of this result.)

Hence, the phrase (harassment or behavior) includes in a general sense;

a/ every behavior, physical or moral act by the assailant against the victim to cause the result he intended, and which constitutes a crime.

b/ an act of coercion or moral terrorizing or threatening to cause someone to accept an act or refrain from doing it.

c/ an act or seductive behavior and assisting to achieve the result or effect.

d/ absence of consent is a proof of the incorrectness of the act or behavior because it contradicts public order and morals.

Conclusively, there is nothing to support the statement that the phrase (sexual harassment or sexual behavior) means (only) behavior or physical act and not the moral one, even if not coupled with a physical act.

b) Secondly;

The view of Islamic sharia and sharia jurisprudence;

1/ The Islamic sharia prohibits that a man and a woman stay alone together, and the fundamental rule is (if a man and a woman with no sharia bond between them, gather alone, will have the Satan as their third companion.)

2) The Islamic jurisprudence differentiates between the legitimate solitude of spouses being together, whilst prohibiting the impermissible solitude of non-married couples, according to the hadith.

3/ Allah prohibited adultery and whichever that might be close to it; be it an act or words, as the Quran;

(And do not approach unlawful sexual intercourse. Indeed, it is ever an immorality and is evil as a way.) [ surah17 – Al-Isara, chapter 15]

4/ the Sharia'a prohibited solitude of those engaged to marry as it could not be guaranteed that an unlawful act that is prohibited by Allah and His messenger might take place, until they are lawfully married;

And considering the mentioned above, and back to the case, I see the following;

1/ the accused did not deny entering the room where the victim was, but he alleged that he had seen something happening to the victim, and that some other person was there in the room and that that person was the one who closed the door behind him, denying that he had done anything the victim alleged.

2/ The witness (Mihraj Bai) affirms in the records, page 23, that he had seen the accused enter the name where the incident took place, with a flashlight in his hand, and that he saw the victim coming from the nearby shop, and then he saw the accused hold the victim by the hand and drag her into the house ( the house was fenced with worn out sacks.) and that he saw the accused take the victim into the room, so he called the victim's mother and informed her.

In my opinion, this evidence as stated by the witness when interrogated, page 27, affirms that the accused dragged the victim into the house from the street. And, from the statements by the accused, I find nothing to justify dismissing the statements of this witness, as the accused did not allege any animosity between the witness and himself that could lead him to falsely accuse him.

3/ the medical report, prosecution evidence no (1), where the test was made on the night of the incident, that there was sperm inside the vagina. And it is known that an ejaculation outside the vagina could occur even without entering the penis into the vagina, and that does not negate the fact of a sexual act (the victim affirmed that in the records on page 13).

In the investigator's journal, a sample was taken from the accused under pants where the criminal lab proved there was sperm in there. And although the accused alleged that he had had a wet dream, still, the

facts and evidence refute that allegation as the sample was taken on the same night the incident happened.

To sum it up, the decision by the Criminal Court was in conformity with all the evidence presented and accordance with discretion and sound weighing and the law. Hence, the law to be applied is that of the Juvenile Code of 2010 which explicitly stipulates that its articles supersedes all other laws. And it defines an underage child and an adult as;

(he who has not reached 18 years of age.)

And that (an adult is he who has reached 18 years of age.)

Despite the difference of opinions in the circles of the Supreme Court, where some opinions see that the Criminal Code of 1991 is the one to be applied, still, we disagree as according to the interpretation of laws and general stipulations of 1974 that considers the Special law an exception from the general Criminal Code of 1991, and the Juvenile Code is the law for children victims or assailants, as stipulated in Articles (3 – 4) paragraphs of interpreting general laws (6) and (3).

- The rules of the special law prevail as it is an exception of the general law.
- A later law ruling prevails over the previous law.
  In addition to the explicit stipulation of Article (3) of the Juvenile Code 2010, the rulings of this law shall prevail over all other laws in favor of a child.
  The facts in the proceedings proved that the child did not reach 18 years of age as she was born 2003 according to her birth certificate (prosecution document no 4)
  Thus, the Court of Appeal was right in upholding the conviction under Article (45) paragraph © punishably under Article (86) paragraph (J). Apparently, the Court of Appeal lowered the prison sentence to 3 years, and we won't interfere in that. However, we see that the Criminal Court did not apply the item of determining the (collecting) of the fine that must be followed as in Article )198), Criminal Procedures which stipulates that;
  (if a sentence of fine is delivered the court that issued the ruling shall determine the means of collecting, and to order, in case of failure to pay, collecting the fine through one of the following methods;
  A – b – c – d.
  This stipulation is worded as an obligatory and not merely a permissible item, as the phrase (the court shall) signifies that the court (shall order) being a compulsory rule. And, the alternative prison sentence shall not begin unless;
  (if collecting the fine proves unattainable via the methods mentioned above then it is for the court to order an alternative prison sentence)
  Hence, we see that the decision of fine is to be amended so the fine is collected by the Criminal Court according to Article (198) procedures, and that the alternate prison sentence does not prevail or be executed unless it proves not possible to collect the fine according to Article (198) Criminal Procedures 1991. All in all, I extend my appreciation to judge/Yahya Ahmed for his good reasoning of his decision.
  And, in light of the above, we see;

Firstly; Upholding the conviction under Article (45) paragraph (C) of the Juvenile Code 2010, and we also uphold the imprisonment sentence according to the ruling by the Court of Appeal.
Secondly;
We alter the decision regarding the prison sentence, as an alternative to paying the fine, as follows;
The fine is 500 pounds to be collected in accordance to Article (198) Criminal Procedures 1991, (according to our directives above) and that the 2-month alternative punishment shall not be executed unless it proves impossible to collect it, according to paragraph (4) of Article (198) Criminal Procedures 1991.

Abdul Raouf Hassab Allah Malassi
Supreme Court Justice
31/3/2015

Second opinion;
I agree
Mohammed Abubaker Mahmoud
Supreme Court Justice
14/4/2015

Third opinion;
I agree
Ibrahim Mohammed Almaki
Supreme Court Justice
16/4/2015

**Final Judgment**

Order:
1/ We uphold the conviction under Article (45) paragraph (C) of the Juvenile Code, and we uphold the punishment as altered by the Court of Appeal.
2/ We alter the ruling of the fine as follows;
The fine is 500 pounds to be collected according to Article (198) Criminal Procedures 1991, (in accordance with the directives above) and that the alternative imprisonment shall not be executed as determined by the court (two months) unless it is proved unattainable, according to paragraph (4) in Article (198) Criminal Procedures 1991.

Abdulrawouf Hasaballah Mallassi
Supreme Court Justice
Head of Circuit
16/4/2015