REPUBLIC OF SENEGAL

DAKAR COURT OF APPEAL

CORRECTIONAL CHAMBER

Judgment No…

Parties present

Public Prosecutor, Solicitor General and …… on behalf (counsel)

Versus
(counsel…, counsel…)

Present

….: President
….: Judges
….: Registrar

Between:
The Public Prosecutor and Madam…born 03.03. 1962 in Dakar of late… and … housewife, domiciled in Ndoyene Deny Youssou, Tel:....on behalf of;
Respondent, absent at the hearing and assisted by …., counsel;

ON THE ONE HAND

AND
Cheikh…. born on 25.7. 1953 in Zinguinchor, son of… and of…, domiciled at Parcelles Assainies, Unité 14 (SAP);
Appellant, appearing at the hearing, assisted by … and …., counsels;
Accused of rape of a minor with less than 13 years and pedophilia;

ON THE OTHER HAND

The Special high court of Dakar, deliberating on the said matter, made the following decision on 19.03. 2019:
"Deliberating publicly and in the presence of parties in correctional matters and at first instance;
Declares the accused guilty of the facts with which he is charged;
Sentences him to ten (10) years of imprisonment;
Declares admissible the civil action by … on behalf of…;
Grants nominal franc to the claimant for civil damages;
Orders the accused to pay the costs;
Sets enforcement by committal to maximum";

The accused and the public prosecutor appealed the above mentioned decision on basis of the court registrar's acts of 22 and 26. 03, 2019;
Following the appeals and the written submissions of the public prosecutor at this court, the accused and claimants

for civil damages were summoned to appear before this court at a public hearing of 20.8.2019 to adjudicate the matter;

Upon that summon, the case was put on the cause list for the above mentioned date of hearing but was adjourned on 10.03.2020 for pleading;

Mr…., was the judge rapporteur;

The public prosecutor made his submissions;

The case was adjourned for deliberation and for the decision to be made at the hearing of 05.05.2021;

After its deliberations, the court made the decision in following terms:

THE COURT

Considering the decision of the Special high court of Dakar made on 19.03.2019;

Considering the appeals made by the accused and the public prosecutor on basis of the Registrar's act of 22 and 26.03. 2019;

After considering the report of the Judge Rapporteur;

Considering submissions of the General Solicitor;

Considering the elements of the case file;

After deliberation in accordance with the law;

Considering that by statements received at the registry and dated 22 and 26. 03. 2019, … and… on behalf of their client… on the one hand and the public prosecutor on the other hand made respectively the main appeal and the incidental appeal of the judgment No 0992/2019 delivered on 19.03.2019 by the Special high court of Dakar in the matters of suspect caught red-handed and with following decision:

"*Deliberating publicly and in the presence of parties in correctional matters and at first instance;*

Declares the accused guilty of the facts with which he is charged;

Sentences him to ten (10) years of imprisonment;

Declares admissible the civil action by … on behalf of…;

Grants nominal franc to the claimant of civil damages;

Orders the accused to pay the costs;

Sets enforcement by committal to maximum";

On procedure

Considering that the appeals were made in accordance with the law and that they should be declared admissible;

Considering that all parties have appeared and that it is appropriate to adjudicate the matter;

On merits

Facts and procedure

Considering that it appears from the procedural records that on 05.03.2019 … the Diamniadio police was seized by madam… with complaint against …. and… on allegations of rape and pedophilia on her daughter being 11 years old;

That the police went to the place where the offences had allegedly been committed and arrested … while … escaped when he saw the police coming;

Considering that in the interrogation statement, the complainant stated that her daughter was recurrently scratching her belly due to pains she had, which pushed her to take the minor to the clinic where a doctor confirmed she had been abused sexually and which she charges to the accused;

That the victim… confirmed the accusations by her guardian stating that… raped her on the balcony of their house, … in the garden;

That, while…. was interrogated, he denied the facts, stating he never had sexual intercourses with the girl…; that, to him, this story was cooked up by the complainant, even though he acknowledged the good relations that exist between their two families; that he was diabetic, which even led him to break up with his young wife after four months of marriage in 2015 because he could not satisfy her sexually; that when presented to the public prosecutor, he was charged with rape of a minor of thirteen years and pedophilia, then brought before the court for suspects caught red-handed, which confirmed these charges, through the contested decision;

On the appeal

Considering that appearing before the court on 24 December 2019, the accused maintained his statements made at the hearing of the first instance, denying all the facts; adding that madam... , the custodian of the girl, had proposed to him to negotiate with the family, which he refused;

That he added that even though he got married in 2015, it was a year earlier that he felt he could no longer have

sexual relations because of diabetes;

Considering that .... reiterating what she said at the first hearing, stated that after every lunch she used to go to the balcony, and it was there that the accused found her, took off her trousers and panties, before lying on top of her and penetrating her;

That during the sexual relations, she felt pain and bled; that the accused then threatened her with death if she ever denounced him; that it was in these circumstances that he raped her several times at the balcony;

Considering that madam… confirmed previous statements adding that the gynecologist confirmed old sexual penetration since the facts happened for duration of one year;

Considering that in light of these contradicting statements the court ordered urological expertise to determine whether the accused could have sexual intercourse, if not since when he couldn't have sexual relations; that the urological service of the Aristide DANTEC Hospital submitted the report on 03.03. 2020;

Considering that the debates were then reopened on 10 March 2020;

Considering that, when reheard, the accused referred to his preliminary statements, while specifying that, he was communicated his diabetes medical file with all the related analysis papers;

Considering that the claimant for civil damages did not appear at the hearing;

Considering that the solicitor general pointed out that even if the report does not provide the court with official information, its content supports the position of the accused on his impotency;

That in the face of diverging statements of parties, he asked the court to override the contested judgment and acquit the accused;

Considering the pleadings of ….and …, counsels of the accused pointing out that the expert did not clearly allude to the questions of the court while it was evident that the accused was suffering from diabetes and had visual problems;

That in addition the claimant for civil damages, after dithering in his statements chose not to appear at the hearing;

That according to them, the girl started to complain of pain in the belly before the doctor discovered the absence of

the hymen, adding that the claimant for civil damages had also accused another person who escaped;

That they concluded that there was a problem of liability and consequently pleaded for annulment of the judgment and the acquittal of the accused, due to the benefit of the doubt;

Consequently

Considering that within the meaning of article 320 of the Penal Code, rape is understood as "any act of sexual penetration, of any nature whatsoever, committed on another person by violence, coercion, threat or surprise";

That article 320 bis of the same Code punishes as pedophilia, "any act, touching, caressing, (...) for sexual purposes on a child less than sixteen years of age of either sex";

Considering that the materiality of the sexual penetration, as well as of the pedophilia, exercised on ... is sufficiently established both by the analysis report of February 27, 2019, and by the medical certificate established on March 5, 2019, which concluded, after medial check of the patient, to a not recent defloration;

Considering that at all stages of the proceedings, including the appeal, the accused has consistently denied all the facts;

That in the same vein, to check his statements, the court proceeded to ordering medical expertise to confirm the accuracy of the statement that since 2014, he cannot have sexual relations due to diabetes;

That the report of Prof… head of the urology-andrology service of CHU Le DANTEC concluded as follows:

“Diabetes can be complicated by erectile dysfunction especially if it has been going on for a long time and is poorly treated.

Mr ... did not present to us the document stating that he had diabetes in 2014.

Mr ... does not present the clinical examination of lesions that could suggest erectile dysfunction. Any erectile dysfunction whatever the cause observed to date does not in any way indicate erectile dysfunction in 2014”;

Considering that such a report in no way informs the court about the existence at the time of the facts of the erectile dysfunction alleged by the accused, or at least about the date of the erectile dysfunction mentioned by the expert ;

Considering that, beyond these uncertainties and the persistent discrepancy in the parties' statements, it is important to note that the incriminated facts were initially attributed both to the accused and to the person named ... who became untraceable after he escaped, as confirmed by his own wife ... who was heard during investigation;

That it should be recalled that in this matter, criminal responsibility must be individual and cannot be hypothetical;

Considering that thus, in view of the objective elements mentioned above, it must be retained that the responsibility of the accused for the facts is hardly established beyond doubt;

That it is therefore appropriate to overturn entirely the contested judgment and consequently to declare the accused acquitted;

FOR THESE REASONS

Ruling publicly in presence of parties in correctional matters and at appellate instance;

On procedure

Declares the appeal admissible;

On merits

Overturns the contested judgment entirely;
Deliberating afresh: Declares the accused acquitted;
Orders the costs to be borne by the Treasury;

Thus done, tried and pronounced by Dakar Court of Appeal on the above day, month and year.

And have signed the President and Registrar./-