

SUPREME COURT OF SEYCHELLES

Redacted
[2025]
CO 58/2022

In the matter between:

THE REPUBLIC
(Represented by Mrs. Luthina Monthy)

Prosecution

versus

MC
(represented by Mr. Kalyan Karunakaran)

Neutral Citation: *Republic v/s MC* (CO58/2022) 05th August 2025

Before: Adeline J

Summary: Accused prosecuted for sexual assault under Section 130 (1) read Section 130 (2) d – complainant/alleged victim of the assault below 15 years – The Act constituting the sexual assault not consented to – Section 130 (3) (b) – Accused also prosecuted for distribution of prohibited visual recording – Section 157 D of the Penal Code.

Heard: 9th September 2024, 26th September 2024 and 16th December 2024

Delivered: 05th August 2025

FINAL ORDER

The accused, MC, is found guilty of one count of sexual assault contrary to Section 130 (1) of the Penal Code read with Section 130 (2) (d) of the Penal Code, and is accordingly convicted.

The accused, MC, is also found guilty of one count of distribution of a prohibited visual recording of another person having reason to believe it to be a prohibited visual recording, without the other person's consent, and is accordingly convicted.

JUDGMENT

Adeline J

FACTUAL AND PROCEDURAL BACKGROUND

- [1] The accused, MC, in the matter pertaining to CB88/08/17, Anse Etoile, was charged before this court with the following offences, as per the statement and Particulars of the offences featured in the charge sheet dated 22nd February 2023, notably;

Count 1

“Sexual Assault contrary to Section 130(1) of the Penal Code read with Section 130(2) (d) of the said Act and punishable thereunder”

The Particulars of the offence pertaining to Count 1 read;

“MC of [REDACTED] within the month of May 2017 sexually assaulted one 13 year old girl, namely, TS, by penetration of the body orifice, namely the vagina, of the said TS with his penis for a sexual purpose.

Count 2

Distribution of a prohibited visual recording without the other person's consent contrary to Section 157 D of the Penal Code

The Particulars of the offence read;

MC of [REDACTED] on a date unknown to the Republic distributed a prohibited visual recording and having reason to believe it to be a prohibited visual recording of TS aged 13 years old without the consent of the said TS.

- [2] On the 3rd of August 2023, the accused, MC, pleaded not guilty to both charges, (Count 1 and Count 2).
- [3] At trial, the Prosecution called 5 witnesses to testify against the accused. The evidence of those witnesses are outlined hereunder.

THE EVIDENCE LED AT TRIAL

- [4] The first prosecution witness called was Dr. Setarah, Brioché (“Dr Brioché”) (PW1) who gave expert evidence. In his evidence, Dr Brioché told the court, that on the 19th August 2017, in the child abuse clinic at the Seychelles hospital, he examined a 13 year old female child by the name of TS, and that thereafter he wrote a medical report which he tendered in evidence as exhibit P1.
- [5] Going through the report, Dr. Brioché points to the fact, that upon examination of the 13 year old on an allegation of sexual abuse, he found that the external genital of the girl, (the virtual complainant/alleged victim) appeared normal, and the hymen not intact. Dr Brioché explained, that although this is the common indication that a woman has had sexual intercourse, that may not be the only reason. In his opinion, other reasons include, certain sports activities such as gymnastic and horse back riding. It has to be acknowledged, that in her evidence, the complainant/alleged victim, TS, conceded of having had a history of sexual intercourse using protection. Dr Brioché also stated, that the complainant/alleged victim told him that she has had protective sexual intercourse.
- [6] The second prosecution witness called was the complainant/alleged victim, TS, (PW2). TS is a 20 year old who lives at [REDACTED], Mahe. In her testimony, TS stated, that she was a 13 year old who was in S2 when a girl at school she was very close with spoke to her of MC (the accused). She then searched for MC on Facebook, and thereafter sent him a friend request which he accepted. TS testified, that they then started texting each other and talking to each other.
- [7] TS testified, that on the same night that they started texting each other, MC, the accused, asked her to send him a selfie of her as he would like to see how she looks like in reality. After 2 -3 weeks that they have been texting each other and have had different conversations between them, they become more intimate, and MC asked her to send him

nude pictures for him to see her naked. TS testified, that she did send MC nude pictures of her although she was scared, and that she did so after MC had sent her pictures of him. TS explained that MC told her to send him one picture of her wearing a panty and one of her naked.

- [8] It was the testimony of TS, that one day, on her way to school, she and MC was having a telephone conversation about a plan to meet each other in the night of that day. As she was still discussing the plan with MC, upon reaching the school gate, the Head Teacher confiscated her phone. TS told the court, that she had to borrow a friend's phone to phone MC to inform him that she would not be able to meet him as planned. TS stated, that MC was angry and got mad with her, telling her that she was not supposed to go to school. As per TS's testimony, MC told her, in a vulgar way, that she was good for nothing.
- [9] TS told the court, that after 3 weeks later, she received her phone back. She phoned MC on his phone number which she said she still remembers as 2813028. As per TS' testimony, again MC got mad with her and told her that she is a coward. TS testified, that after receiving her phone back, they started texting each other again. One day MC called her and told her to abscond from home. Something which TS told the court she was hesitated and scared to do, and that she told MC that she was not comfortable to do something like that. MC again asked her why was she being coward, and why was she acting as a mummy's girl? According to TS' testimony, it was "*like peer pressure*" because MC was telling her that there are other girls of her age who like doing those kind of things.
- [10] TS testified, that after feeling under continued pressure from MC, one night she agreed to meet up with MC who came to pick her up in a Sirion car. She could not remember the car registration number. TS stated, that, that night she left the house through the living room door which she said is an emergency exit door which when one opens it doesn't make sound or noise. It was the testimony of TS that she got out of the house and got into the car with MC who was in the driver's seat. TS stated, that she sat in the rear passenger seat on the right hand side. As MC drove the car away, TS asked him where were they going. MC told her that they were going to Perseverance.
- [11] TS also testified, that when they reached Perseverance at a place where there was a lot of casuarina trees, MC stopped the car, switched off the engine and then left the driver's seat

and came to sit close to her in the rear passenger seat. TS stated, that they talked for some time. Thereafter, MC told her to remove her T-shirt and her bra which she said she did. It was the testimony of TS, that then MC asked her to remove her skirt and her panty which she said she did. TS stated, that thereafter, MC started to kiss her, and after a while, he inserted his finger into her private part.

[12] It was the testimony of TS, that thereafter, MC took a condom, placed on his penis then moved his body to the top of her body and inserted his penis inside her vagina. TS testified, that after ejaculating into the condom, MC moved out of the top of her body, removed the condom from his penis, and threw it away. TS stated, that she then put her clothes back on her body as did MC too, and then MC drove her back home. It was the testimony of TS, that after MC had dropped her home, she went to the toilet to pee and realised, that there was blood in her pants and that her vagina had a burning sensation. According to TS' testimony, she washed her panty and wore another one with a panty liner inside.

[13] It was also the testimony of TS, that she has had sexual intercourse with MC three times, and that on each occasion, MC picked her up from home, drove to Perseverance where he fingered her, and thereafter placed a condom on his penis and then inserted his penis inside her vagina. TS stated, that after the sexual intercourse encounters, she and MC kept texting each other and talking to each other until she learned that MC was having contact with a girl named R [REDACTED], a girl whom she learned that MC was with before they started meeting each other. TS testified, that when she learned that, she refused MC's requests for her to meet him again.

[14] TS testified, that it was in the August school holidays that she went to [REDACTED] and stayed at his uncle's place. When she was there on [REDACTED] she decided to send a message to R [REDACTED] C [REDACTED] to find out whether she and MC were together. When asked by R [REDACTED] why she wanted to know that, TS told her that MC was texting her wanting to meet up with her. As per TS' testimony, R [REDACTED] told her to go and meet MC and thereafter, she will "pop up", confront him and shame him. TS stated, that she told R [REDACTED] she would not be able to do that.

[15] It was the testimony of TS, that thereafter, MC phoned her and swore at her. After sometime, MC called her again, and according to her testimony she did not answer his

phone calls. TS testified, that she remembers that after refusing to answer MC's phone calls for some time, she received a text message from MC which read "*la ou bred*" (which in my English interpretation was a threat). TS testified, that sometime later, a friend of hers by the name of D [REDACTED], sent her pictures of her which was being circulated on social media.

- [16] TS testified, that she phoned MC and asked him why did he do that. According to TS' testimony, at first, MC did not answer as he hanged up the phone. It was TS' testimony, that she then phoned her mum to tell her what she said she did wrong. That is, that she had shared her nude pictures with someone known as MC. TS gave her mum MC's phone number. TS stated, that because of that incident, she cried and felt depress to the extent that she wanted to kill herself. TS also stated, that after that incident, she did receive a phone call from MC who asked her why did she had to tell her mum about him having put her nude pictures on social media given that he did it for 5 minutes only and then deleted them. As per TS' testimony, this was the last time he heard from MC.
- [17] Other salient aspects of TS' testimony, was that she told the court, that at that time she was having sexual intercourse with MC, she was only 13 years old and MC was 19 years old, and that when she told MC that she was only 13 years old, his answer was "*it's ok*". TS stated, that she cannot remember all the exact dates she had sexual intercourse with MC, except on the 18th June because on that day it was MC's birthday. TS also stated, that she could not remember the year when she had sexual intercourse with MC.
- [18] Examined over the content of the extraction report, exhibit P3, extracted from her phone Samsung Galaxy J1 Mini 2016, TS told the court, that the content of the report are the same as those she had on her phone which she sent to MC and which MC sent her. She identified the photos as her photos, particularly, the photo of her in her panty, and photos 2 and 3 as MC in his boxer. TS also identified photos 4 and 5. In photo 5, MC is seen with an erected penis which TS confirmed was amongst the photos MC sent to her. TS identified other photos including one where MC is seen standing on the bed holding his private part.
- [19] The second witness for the prosecution called was one W [REDACTED] (PW3). Her testimony was that during the school holidays, which she stated was either in August 2016 or 2017, she sent her daughter, TS, to her brother's place on [REDACTED]. As per her testimony,

one day, at around 7 pm, she received a phone call from TS whom she said was at the time crying, feeling fearful and panicking. PW3 testified, that she asked her daughter, TS, what was wrong and why was she crying? TS answer was that she has done something wrong and that thing she did wrong was that she has taken nude pictures of herself including her naked and sent them to MC who is going to post them on Facebook. At that point, PW3 asked TS to give her MC's phone number, and as per PW3's testimony, TS gave her phone number 2813028.

[20] It was the testimony of PW3, that she phoned MC and told him what her daughter, TS, has told her. PW3 testified, that she implored MC to change his mind and, not to carry out his threat to post her daughter's, TS, nude pictures on Facebook as this will destroy her future and their entire family. PW3 stated, that she begged MC not to do it. She explained, that for some time, whilst on the phone, MC stayed silence and then told her that he would call her on the coming Sunday which he did not. PW3 testified, that the following day, she did call MC who did not answer his phone calls. Pw3 also testified, that whilst at work the following day, she received a phone call from a working colleague by the name of Beryl Pillay, who informed her that there are naked pictures of her daughter, TS, on Facebook. Pw3 stated, that on the same day, he contacted MC by phone to confront him. As per Pw3's testimony, MC's response was that he posted the photos on facebook for only 5 minutes. PW3 stated, that her colleague, B [REDACTED] was present during the conversation between her and MC, and that she could hear their conversation as the phone was on loud speakers.

[21] PW3 testified, that this incident brought shame to her family and affected her as well as her daughter most, because she, TS, was depressed and had behavioural change that she even did not want to go back to school. Pw3 also testified, that she also learnt from TS, that MC has been putting pressure on her to abscond from home during the night, and that has she left home in the night 3 times and went out with MC and had sex when she was only 13 years old.

[22] The fourth prosecution witness called was Ms. B [REDACTED] PW4. PW4 testified, that in the month of August 2017, during lunch time, she was informed by a working colleague that there were photographs of the youngest daughter of another working colleague, Ms. E [REDACTED] PW3, being circulated on Facebook. As per her testimony, given that she

knows the girl, TS, she went on facebook and showed PW3 the photos. PW4 testified, that sometimes during the day, after working hours, in her presence, Ms E [REDACTED] PW3, phoned the accused and asked him why did he post photos of her daughter on facebook in spite of having begged and implored him not to do it. It was the testimony of PW4, that she was there present when Ms. E [REDACTED] Pw3, told the accused that she will proceed with a police case because of what he has done. PW4 was shown page 8 and 9 of the Examination Report, exhibit P4. She confirmed, that the photos in the report are the same which she saw on facebook.

[23] The fifth prosecution witness called was Police Officer, ASP Ivan Esparon, PW5, an expert witness attached to the Digital Forensic Unit of the Seychelles Police Force for the past 7 years. PW5's testimony, was that on the 29th August 2017, he received a request from Inspector Agnes Fanchette to extract data, text messages and images from a mobile phone make Samsung Galaxy J1 Mini 2016, following which he produced a Report, exhibit P3, which was made part of the evidence against the accused. PW5 confirmed, that the report pertains to case number FSL 519 – 17, CB number 88 – 8 – 17, and that the mobile phone Samsung GSM Galaxy J1 belongs to TS, the virtual complainant/alleged victim in this case. Referring to the Report, exhibit P4, PW5 told the court, that three images were created on the phone on the 12 July 2017. The Report also shows other images and text messages recovered from phone number 2813082 which as per PW5's testimony, labelled in the contact as MC and those images were on the 8th July 2017, 16th February 2017, and that the last message on the last page of the report is also related to number 2813028 in the contact labelled as MC.

[24] PW5 testified, that on the 6th September 2017, he received a request from Police Officer ASP Justin Dogley to extract information from a pendrive which contained images of some screen shot which PW5 said he did. As per his testimony, he then prepared a Report which Report was exhibited as P4. It was the testimony of PW5, that the images were copied on the pendrive on the 22nd August 2017 and that from the time the images were placed on the pendrive and the time he concluded his examination, there was no "*interferences*" by any means. Under cross examination, PW5 told the court, that he has no information of where the images originate, but said, that he knows that these images had been transferred from

an application known as WhatsApp because of the abbreviation WAO. PW5 also stated, that the images could have been a transfer of a screen shot or photo of a screen shot.

- [25] Giving evidence in his defence, the accused, MC, DW1, testified, that he got to know TS, (PW2) on Facebook under the name of Tracey Francesca. DW1 testified, that in the first conversation that he and TS had, TS (whom he then knew as [REDACTED]) told him that she got to know of him through a friend by the name of AS [REDACTED], and that one day she saw him talking to A [REDACTED] at the new playground. It was the testimony of DW1, that he did not physically met TS, PW2, but they chatted on messenger, and after they exchanged their phone number between them, they chatted on WhatsApp. DW1 confirmed, that his phone number at that time was 2 [REDACTED]
- [26] DW1, who at the beginning of his testimony stated that he never met TS physically, then went on as to say that it was after he accidentally, out of anger, circulated a picture on his Facebook page that he met her in town a few times. DW1 described his relationship with TS as "*friend with benefits*" and as per his testimony, this was because they exchanged pictures. He also stated, that, based on the information on Facebook, he thought that TS was of his age and perhaps older, and that it was after the incident, that he saw her in school uniform. DW1 testified, that the incident was the fact that when he was talking to TS as a friend, he had a relationship with one R [REDACTED] and that at one point, TS was interfering with his relationship. According to DW1, once they were in an argument and TS told him to "*do what you want*", and that was when, out of anger, he shared the photos on his Facebook page for under 5 minutes and removed it.
- [27] DW1 testified, that he was contacted by PW2's older sister who had seen the pictures on WhatsApp shared by M [REDACTED]. He explained, that M [REDACTED] photography is a WhatsApp group called "Breaking news" and that is how she got to have the pictures in her phone. DW1 also testified, that later on that day, TS' mother contacted him.
- [28] In DW1's testimony seeking to elaborate on what the interfering with his relationship meant, DW1 stated, that TS wanted him to end his relationship with R [REDACTED] and to be with him, and when he did not want to do that TS threatened to inform R [REDACTED] about the "*friend with benefit*" thing they had. It was the testimony of DW1, that he only found out that TS

was younger than him, and that his real name was TS, a few days after the photo incident on Facebook, after talking to A [REDACTED] DW1 testified, that once he got to know of that he cut off contact with TS. DW1 denied ever having had a sexual relationship with TS, PW2.

[29] Examined on the 1st picture extracted, DW1 stated, that this was a message he sent to TS (PW2) to inform her that he has already removed the post on Facebook, and that if she does it again, (ie if she inform R [REDACTED] of their friend with benefits thing) he will post it again. DW1 proceeded to explain another message, reads as “R [REDACTED] sorry si monn hurt u”, and R [REDACTED] reply, “I okay u, ki MC in vin dir u”, and then, “mersi pu sa ki un fer apre u mum in call MC”. DW1 added, that these messages were after things between PW2 and R [REDACTED] had escalated and he had to tell R [REDACTED] about everything including the conversation he had with PW2’s mother.

[30] In examination in chief, the accused, DW1, was asked to explain text messages between him and TS, PW2. He stated, that he cannot remember the dates when those text messages were sent to him, but said, that it was before the whole incident (ie before TS informed R [REDACTED] of their relationship. The text messages read;

“ki pu al fer laba? Parey nou abitye, ule reponn mon wi ubyn non ? Si u pa le koz ek mon, dir ”

“Mon pa le akz un rod mn zs pou kaple. Uk kot u fanm ki ou pa anv i de koste, ki li i parey disab ek delo” Response from DW1, the accused ; “ Ok mersi, and then an emoji and then “apre text mn dir mn u mank mn, ou anv i fer piti ek mn”,

TS, PW1, replied;

“en fiy parey mn, fr piti ek u fatal uh”.

[31] As regards to the testimony of TS, PW2, the accused, DW1 stated, that they did make plans to meet up, but he cancelled them few times due to work on the island.

[32] Asked to explained the allegation made by TS, PW2, that one day he told her that she was not supposed to go to school and that she is a “donner grenn”, DW1 explained, that on

that particular day, he was on Mahe and they had made plan to meet each other but then TS, DW2, told him that he was going to school.

- [33] In examination in chief, the Accused, DW1, was examined on the allegations made by TS, PW2, that he, DW1, pressured her to meet with him and to send him pictures of herself. DW1's response was, "*the pictures yes because it was the "friend with benefit" between me and her because that's when I shared the picture first and that was between me and her to do the whole picture thing*".
- [34] DW1's answer to questions about him having had a sexual relationship with TS, PW2, was "*not to my knowledge*". He denied, that on the day of his birthday on the 18th June he had sex with TS, DW1.

CLOSING ARGUMENTS OF THE PARTIES BY WAY OF WRITTEN SUBMISSIONS

The Prosecution's Submission

- [35] In its closing submissions, learned counsel for the prosecution, *inter alia*, revisits the salient aspects of the evidence of the 5 individual witnesses who testified for the prosecution against the accused as well as the documentary evidence tendered as exhibits. It is submitted by learned counsel, that the evidence taken as a whole shows, that the prosecution has discharged its burden of proof in respect of both charges against the accused, in that, it has proved the elements of the two different charges against the accused beyond reasonable doubt. As regards to the offence of sexual assault, learned counsel submits, that both the mens rea and the actus reus for the offence of sexual assault have been established as well as the absence of consent, given that the alleged victim was below the age of 15 years when she and MC had sexual intercourse.
- [36] As regard to the actus reus required for proof of the offence of sexual assault, learned counsel submits, that the evidence of the prosecution tendered by TS, PW2, shows, that she and the accused had sexual intercourse on three different occasions and that her evidence was credible. Learned counsel also submits, that under cross examination, MC maintained, that she was truthful when she testified that MC had sexual intercourse with her, and added, that on each occasion, MC inserted his penis inside her vagina. Learned

counsel submits, that this amounted to penetration. Learned counsel also submits, that the fact that the medical report reveals that TS' hymen was not intact when she was medically examined following the incident, shows, that she has had sexual intercourse. In fact, by TS' own admission, the evidence also shows, that TS had sexual intercourse previously.

- [37] Learned counsel refers the Court to the messages exchanged between TS, PW2 and the accused, DW1, in a report tendered as exhibit P3. DW1 (MC) confirmed that these were messages he sent and received on his phone. Learned counsel refers the Court to page 5 of the report, exhibit P3, the exchange of messages having been the following;

PW2 (TS) : *"Ki pou al fer laba"?*

DW1 (MC): *"Parey nu abitye"*

It is the submission of the learned counsel, that this exchange of messages between PW2 and DW1 suggests, that they were in a *"habit of doing something somewhere"*. Learned counsel also refers the court to another exchange of messages between PW2 and DW1, that read as follows;

PW2 (TS) : *"Mon pale akòz ou rod m'n zis pu kaple u, al kot ou fanm, and what not"*

DW1 (MC) : *'Okay, mersi'*

It is the submission of learned counsel, that these exchanges of messages show, that they used to go somewhere and to have sex.

- [38] Learned counsel further refers the court to page number 11 of the report containing another exchange messages between PW2 and DW1, that reads as follows;

DW1 (MC) : *"Wanna meet"?*

PW2 (TS) *Why?*

DW1 (MC) *"Samedi soir"*

It is the submission of learned counsel, that when PW2 (TS) asked DW1 (MC), to go where? He replied, *"Perseverance parey labitid, u pu le u"?* When PW2 (TS) asked DW1 (MC) *'ki pu al fr laba?*, his reply was, *"Parey nu abitye"*.

- [39] In seeking to bring clarity over these messages, exchanged between PW2 (TS) and DW1 (MC), learned counsel submits, that the two used to meet at Perseverance for the purpose of having sexual intercourse. It is the submission of learned counsel, that there is no issue as to the identity of the offender, given that PW2 (TS) identified the accused, DW1, by name. The accused, DW1, (MC) is someone well known to PW2. It is submitted by learned counsel, that DW1 has not denied knowing PW2 (TS).
- [40] In her submissions, learned counsel also addressed the issue of consent. She submits, that PW2 (TS) was 13 years old then, exhibit P2, and that she had no capacity to consent to the sexual intercourse by virtue of Section 130 (3) (b) of the Penal Code that reads as follows;
- “A person does not consent to an act which if done without consent constitutes an assault under this Section if;*
- (b) the person is below the age of fifteen years.*
- [41] It is submitted by learned counsel, that although the evidence about the sexual intercourse is not corroborated by other evidence, there is no requirement for corroboration for a finding of guilt. Learned counsel cited few case law authorities to support her proposition, notably, the case of EC v R SCSC 788 [2016] and R v Lucas [2010] SCSC. In respect of the latter case, learned counsel refers to page 8, in which case, Gaswaga J had stated the following;
- “there is no rule preventing a court from entering a conviction based on evidence of a single witness as long as he is entirely reliable, trustworthy and credible”.*
- [42] Learned counsel quoted the following extract from the case of Raymond Lucas v The Republic SCA, No 17/09 putting more emphasis on the law as it presently stands, notably;
- “we therefore hold that it is not obligatory on the court to give a corroboration warning in cases involving sexual offences, and we leave it at the discretion of judges to look for corroboration when there is an evidential basis for it as stated earlier”.*
- [43] It is also the submission of learned counsel, that the evidence adduced by the prosecution proves the accused’s (DW1) guilt for the offence of distributing a prohibiting visual recording without the other person’s consent. Learned counsel refers the court to the

evidence of PW2 (TS), stating, that based on her evidence, she was coerced by the accused, DW1, to send him pictures of her which he then posted on his facebook page without PW2's consent.

[44] Learned counsel further submits, that the evidence of PW3 corroborates that fact, she having said in evidence, that her daughter, PW2, called her and told her that the accused, DW1, had threatened to distribute her nude photos, and after receiving his phone number from her she phoned the accused and begged him not to do it, but still went along and did it. It is submitted by learned counsel, that the evidence of PW4 confirms, that the nude photos of PW2 (TS) were on facebook, she having personally seen the photos.

[45] Learned counsel alerts the court to the fact that in evidence, the accused, DW1, had stated, that he posted the photos on his facebook page out of anger because PW2, TS, had interfered with his relationship with his girlfriend, and that these evidence taken into consideration prove the offence of distributing a prohibited visual recording without the other person's consent. Commenting on the evidence of the prosecution's witnesses, it is submitted by learned counsel, that their evidence was cogent, consistent, the charges against the accused has been proved beyond reasonable doubt.

Defence Submissions

[46] In its submissions for the accused in defence of the charges against him, learned counsel strenuously argues that to convict the accused on the evidence adduced before this court by the prosecution, which evidence he says is weak, replete with profound inconsistencies, lack of credible corroboration and leaves a surplus of critical questions unanswered, would fall short of the standard of proof required of the prosecution which is *beyond reasonable doubt*.

[47] It is submitted by learned counsel, that given that the legal burden of proof is on the prosecution, a conviction should only follow when the evidence adduced against the accused is sufficiently compelling and devoid of contradictions as to leave no other logical explanation in the minds of the court that the accused committed the alleged offences of which it is charged. Learned counsel submits, that the defence posits that such explanations

given by the accused, not only exist, but are, in fact, more credible and consistent with the totality of the evidence than the narrative advanced by the prosecution.

- [48] In learned counsel's view, the case for the defence is that, while there was an inappropriate and regrettable online relationship between the accused and the complainant/alleged victim, such relationship did not escalate to physical contact. Learned counsel added, that while it is admitted that the distribution of the images was a poor judgment by the accused, the same was a momentary and isolated lapse precipitated by direct provocation, rather than a calculated act of malicious intent.
- [49] Scrutinising the prosecution evidence to prove the alleged sexual assault offence against the accused, from its perspective, learned counsel for the accused submits, that the case against the accused hinges almost exclusively on the evidence of the complainant/alleged victim, TS, which evidence, in learned counsel's view, is unreliable, self-serving, lacks precision and clarity, and not sufficiently supported by physical and digital evidence. Learned counsel states, as an example, the complainant/alleged victim having been unable to recall the year when the alleged sexual assault incident took place as a fundamental failure to establish a coherent timeline.
- [50] It is the submission of learned counsel that, in its defence, the accused gave a clear and consistent account of his whereabouts on the date of the alleged incident, which was, that he was attending a public parade before visiting his girlfriend, R [REDACTED]. In learned counsel's submission, that was an alibi that the prosecution neither challenged nor disproved.
- [51] Learned counsel takes issue with the medical report, exhibit P1, which states, that the complainant/alleged victim's hymen was not intact, referring the court to Dr. Brioché's testimony that the non-intact hymen could have been the result of several causes. Learned counsel refers the court to the testimony of the complainant/alleged victim, she having said, that she has been engaged in sexual activities with other partners. Learned counsel submits, that the medical report only proves that the complainant/alleged victim's hymen was not intact, thus she was not a virgin, not that the accused has sexually assaulted her.

- [52] As regards to the expert evidence of ASP Evans Esparon, it is the submission of learned counsel, that his evidence was more compelling for the defence than the prosecution, given that in his testimony, ASP Esparon indicated, that the original full size images had been deliberately deleted, as were the messages between the accused and the complainant/alleged victim. It is the submission of learned counsel, that in this regard, the accused's inability to recall the specific context of these isolated deleted fragments for several years prior is understandable and ought not to be construed to his detriment.
- [53] In summarizing its submissions for the accused as regards to the charge of sexual assault, it is learned counsel's submission, that the accused has been unwavering in his denial of having had any physical sexual relationship with the complainant/alleged victim, even though he admitted the online relationship and exchange of photographs, and that such admission lends credibility to the totality of his testimony.
- [54] As regards to count 2, the offence of Distribution of a Prohibited Visual Recording without the other Person's Consent, it is submitted by learned counsel, that the accused does admit that he posted one photograph on his private Facebook page, and that his explanation has been that he acted in anger and frustration because the complainant/alleged victim had threatened to destroy his existing relationship with R [REDACTED] and by the complainant/alleged victim telling the accused to "*do what you want*" was a provocation that led the accused to do that, and that the posting lasted only for five minutes. In learned counsel's view, that was simply a momentary, regrettable lapse in judgment for which the accused has demonstrated remorse.
- [55] It is also submitted by learned counsel, that from his perspective, the evidence of the complainant's mother, (PW3) and the accused, indicates, that wider circulation of the image was conducted by a third party, and that in this regard, the accused cannot be held criminally liable for actions of others. It is further submitted by learned counsel, that no evidence was tendered by the prosecution to show that the accused possessed actual knowledge that the complainant/alleged victim was 13 years old at that time of their online interaction.

- [56] Learned counsel cites the case of R V ML & Ors CR 63/19 [2019] SCSC, in which case, as per counsel's submissions, the court, "*recognised that where a minor actively misleads an accused person as to their age, such an act fundamentally alters the assessment of the accused culpability and moral blame worthiness*". It is the submission of learned counsel, that in the instant case, the evidence shows, that the complainant/alleged victim initiated contact on Facebook and used the false name of Tracey Francesca, and cultivated an online persona that gave the accused no objective reason to suspect her minority.

THE COURT'S REASONING AND ANALYSIS OF THE FACT AND THE LAW

- [57] The accused in this case is charged under Section 130 (1) read with 130(2) (d) of the Penal Code. Section 130 of the Penal Code reads, in extensu, as follows;

"(1) a person who sexually assaults another person is guilty of an offence and liable to imprisonment for 20 years;

(i) provided that where the victim of such assault is under the age of 15 years and the accused is of or above the age of 18 years and such assault falls under subsection 2 (c) or (d), the person shall be liable to imprisonment for a term not less than 14 years and not more than 20 years.

(3) Provided also that if the person is convicted of a similar offence within a period of 10 years from the date of the first conviction the person shall be liable to imprisonment for a period not less than 28 years.

(4) Provided further that where it is the second or a subsequent conviction of the person for an assault referred to in subsection 2(d) on a victim under 15 years within a period of ten years from the date of the conviction, the person shall be liable to imprisonment for life.

(2) for the purpose of this Section "sexual Assault" includes

(a) an indecent assault,

(b) the non-accidental touching of another with one's sexual organ, or

(c) the non-accidental touching of another with one's sexual organ, or

(d) the penetration of a body orifice of another for a sexual purpose

(3) a person does not consent to an act which is done without consent constitutes an assault under this Section if;

(a) the person's consent was obtained by misrepresentation as to the character of the act or the identity of the person doing the act.

(b) the person is below the age of fifteen years, or

(c) the person's understanding and knowledge are such that the person was incapable of giving consent.

(4) In determining the sentence of a person convicted of an offence under this section the court shall take into account, amongst other things,

(a) whether the person used or threatened to use violence in the course of or for the purpose of committing the offence, (b) whether there has been any penetration in terms of subsection (2) (d), or (c) any other aggravating circumstances”

[58] In reference by the Attorney General under Section 342 A of the Criminal Procedure Code (18 of 2021 [2022] SCCA 40 (19 August 2022), at paragraph 21, Fernando PCA, had this to say;

“the general rule in criminal cases, as stated earlier, is that the legal burden of proving any fact essential to the prosecution's case rests upon the prosecution and remains with the prosecution throughout the trial.”

[59] The general rule as articulated by the PCA in Reference by Attorney General (supra), has its origin in the English Landmark House of Lords case, *Woolmington v DPP* [1935] AC, in which case the presumption of innocence was re consolidated for application across the commonwealth. In a unanimous judgment, Lord Viscount Kailash had this to say;

“Throughout the Web of the English Criminal Law one golden thread is always to be seen that it is the duty of the prosecution to prove the person's guilty subject tothe defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the

prosecution or the prisoner, ... the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England, and no attempt to whittle it down can be entertained’.

- [60] In Reference by the Attorney General (supra) the Court of appeal stated, that “*generally a sexual offence is made punishable only where both mens rea and actus rea is established by the prosecution*”. In making this statement, the court relied on *Harding v Price* [1948] 1 K B 695, quoting Goddard CJ, having stated that *actus non facit reum nisi mens sit rea* which means, that act is not punishable without a mental element, or an act does not make a person guilty unless there is a guilty mind.
- [61] In essence, therefore, to prove the accused’s guilt for the offences of which it has been charged, the prosecution had to prove the *actus reus* and the *mens rea* of the offence of sexual assault. Given that the offence which the accused is alleged to have committed is sexual assault contrary to Section 130 (1), and that the act constituting the sexual assault is in contravention to Section 130 (2) (d), that is, reus the *actus* which the prosecution had to prove is that there was a penetration of a body orifice of another person for sexual purpose. In other words, it was incumbent on the prosecution to prove that the accused had sexual intercourse with the complainant/alleged victim, TS.
- [62] As regards to the *mens rea* for the offence of sexual assault under Section 130 (2), the Prosecution had first to prove, that the accused had the intention to commit the act of penetrating the body orifice of the complainant/alleged victim. That is to say, that the accused had the intention to have sexual intercourse with the complainant/alleged victim, TS. The prosecution had then to prove, that the accused had knowledge that the complainant/alleged victim could not have consented to the physical act of sexual intercourse because it had no capacity to consent legally given that she was under 15 years old at the time of the sexual intercourse.
- [63] The fact that the complainant/alleged victim had no capacity to consent to the sexual intercourse, bears relevance to Section 130 (3) (b) of the Penal Code quoted at paragraph [42] above. Thus, under Section 130 (3) (b) of the Penal Code, were the complainant/alleged victim of the sexual assault is a person below the age of fifteen years,

the law imposes a strict liability on the accused. Therefore, in the instant case, all that the prosecution had to prove in terms of *mens rea*, is that the complainant/alleged victim, TS, was under fifteen years old when the accused had sexual intercourse with her.

[64] Having scrutinized the evidence led by the prosecution in respect of count 1, the question that now falls to be determined, is whether, on account of the evidence led before this court by the prosecution, the prosecution has proved the accused's guilt for the offence of sexual assault contrary to Section 130 (1) of the Penal Code read with Section 130 (2) (d) of the Penal Code beyond reasonable doubt? As was said in Woolmington (Supra), "*proof beyond reasonable doubt generally means that, the court must subject the entire evidence to such scrutiny as to be satisfied, beyond reasonable doubt, that all the important elements placed on the prosecution by the substantive laws are proved. If not satisfied, the accused must be acquitted*". In other words, should the court find, on account of the evidence on the whole of the case that there is a reasonable doubt, the accused in this case must be acquitted.

[65] In the English case of Miller v Minister of Pension [1947] 2 ALLER 372, 373, Lord Denning had the following to say about the notion of proof beyond reasonable doubt;

"Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with a sentence of course it is possible but not in the least probable, then the case is proved beyond reasonable doubt but nothing short of that will suffice"

[66] Therefore, on account of the evidence led before this court by the Prosecution to prove the *actus reus* of the offence, it is the finding of this court, that the evidence of TS, the complainant/alleged victim, against the accused was compelling, coherent and consistent and that she was a credible witness worthy of belief of her account that in the month of May 2017, the accused had sexual intercourse with her. Her evidence, together with the evidence extracted from mobile phone Samsung GSM, Galaxy G1 belonging to her, and the messages in relation to phone number 2813028, labelled in the content as MC tendered by Police Officer Asp Evans Esparon, PW5, proves, that the accused, MC, within the

month of May 2017, sexually assaulted TS, (PW2) who was only 13 years old then, (as per her birth certificate tendered as exhibit) by having had sexual intercourse with her.

- [67] Such a finding, is within the background of the fact, that I carefully observed TS when she gave her evidence in court. The fact that I found her to be compelling, coherent and consistent, there was no necessity for a corroboration warning because in my considered opinion, there was no evidential basis for it. I adopted that approach based on the guidelines given in *Raymond Lucas vs The Republic SCA 17/2009*.

HOLDINGS AND IMPLICATIONS

- [68] Therefore, on account of a holistic examination of the totality of the evidence adduced before this court, by the prosecution, I hold the view, that the prosecution has discharged its burden of proof with regard to all the elements or ingredients of the offence of sexual assault with which the accused has been charged, and has done so at the standard required in criminal cases, which is, beyond reasonable doubt. I therefore find the accused, MC, guilty of one count of sexual assault contrary to Section 130 (1) of the Penal Code read with Section 130 (2) (d) of the Penal Code. Accordingly, I convict him for one count of sexual assault.

- [69] The accused, MC, is also charged with one count of distribution of a prohibited visual recording without the other person's consent. The charge against the accused is brought under Section 157 D of the Penal Code (Act 7 of 2012) that reads as follows;

"157 D Distribution of prohibited visual recording

"A person who distributes a prohibited visual recording of another person having reason to believe it to be a prohibited visual recording, without the other person's consent, commits an offence and is liable on conviction to imprisonment for a term of 20 years.

- [70] The evidence of TS, (PW2), the evidence of Wilna Emmanuelle, (PW3), the evidence of Beryl Pillay, (PW4) and the evidence of Police Officer ASP Evans Esparon (PW5) corroborate the fact, that the accused, MC did publish on his Facebook page *nude* pictures of TS, (PW1), although TS and her mum (PW3), implored him not to do it. In fact, in

evidence, the accused himself did not deny doing that. His explanation was that he did it because TS (PW2) was interfering with his relationship with R [REDACTED] because TS (PW2) wanted him to be with her, and because he did not want that, and TS wanted to inform R [REDACTED] of their "*friend with benefit*" relationship. In his evidence, the accused (DW1) also said, that he put the pictures on his Facebook page for 5 minutes only.

[71] Therefore, on account of the evidence adduced by the prosecution, I am equally satisfied, that the prosecution has discharged its burden of proof to prove the charge of distribution of a prohibited visual recording without the other person's consent against the accused beyond reasonable doubt. For this reason, therefore, I also find the accused, MC, guilty of one count of distribution of a prohibited visual recording without the other person's consent, and accordingly, I convict him for the offence.

Signed, dated and delivered at Ile du Port 05th August 2025.

