

SUPREME COURT OF SEYCHELLES

Redacted
CR 81/2023

In the matter between:

THE REPUBLIC
(Represented by Mr Alvine Marie)

Prosecution

Versus

D Y C
(Represented by Mrs Aishah Molle)

Accused

Neutral Citation: *Rep vs DYC* (CO 81/2023) (24 April 2025)

Before: Adeline J

Summary: Prosecution for the offence of sexual assault – Section 130 (1) read with Section 130 (2) (d) and Section 130 (3) of the Penal Code

Heard: 23rd May 2024, 24th May 2024 and 26th June 2024

Delivered: 24th April 2025

FINAL ORDER

In the final analysis, therefore, on account of the totality of the evidence led before this court by the prosecution, I am satisfied, that the prosecution has proved, beyond reasonable doubt, that on the 24th the May 2023, DYC sexually assaulted, BAR, a 13 year old child at the time, by having penetrative sexual intercourse with her. I therefore find the accused, DYC, guilty of one count of sexual assault contrary to section 130 (1) read with section 130 (2) (d) of the penal code, and accordingly, I convict him for the offence.

JUDGMENT

Adeline, J

FACTUAL AND PROCEDURAL BACKGROUND

- [1] The accused, DYC, whose residential address is [REDACTED] Praslin is indicted before this court with a single count of a felony featuring in the indictment filed in court on the 2nd November 2023, the statement of which reads as follows;

Count 1

“Sexual Assault contrary to Section 130 (1) as read with Section 130 (2) (d) and Section 130 (3) (b) of the Penal Code Punishable under Section 130 (1) of the Penal Code”.

The Particulars of the offence in the indictment reads as follows;

“DYC, a 26 year old Fireman residing of [REDACTED] Praslin on the 24th May 2023, sexually assaulted another person, namely, BAR who was ages 13 years old at the time by penetration of a body orifice for sexual purpose namely, by inserting his penis in the vagina of the said BAR”.

- [2] On the 23rd January 2024, the accused, DYC, pleaded not guilty to the charge of sexual assault, and the case proceeded to trial.
- [3] At trial, the prosecution led the evidence of 6 prosecution witnesses to prove the charge against the accused. The evidence of those witnesses are outlined hereunder.

THE EVIDENCE LED AT TRIAL

- [4] The first witness called to testify at trial was prosecution witness BAR, (PW1), the complainant/alleged victim. In her evidence, BAR, PW1, told the court that she is a 14 year old girl who was born on the 27th October 2002. She lives at [REDACTED] Praslin with her mum, her step father and her brother.
- [5] Asked whether she has anything to tell the court about what she complained happened to her in the month of May 2023, PW1 stated, that on Sunday the 21st May 2023, at around 3

pm, she received a friend request on Facebook from DYC which request she said she accepted. She, PW1, and DYC then started to send each other text messages. After a while, they went off line after PW1 had given DYC her phone number. PW1 testified, that at around 4 pm later that day DYC called her. She remembers DYC's phone number then which she said was 2 [REDACTED] PW1 stated, that they spoke for a while, and that in their telephone conversation, amongst otherthings, they mentioned each other's age. PW1 told DYC that she was 13 years of age, and DYC told her that he was 26 years old. DYC also told PW1 that he knows her brother, one E [REDACTED] as well as her mum.

- [6] It was the testimony of PW1, that in the evening on that particular day, DYC called her again. The calls she received was from phone number 2 [REDACTED] Her phone number was 2 [REDACTED] They spoke again. PW1 testified, that on the 22nd May 2023, on his way home from school, she received another phone call from DYC who asked her why is that, that she did not come to his place. PW1 also testified, that on the 23rd May 2023, DYC again called her and they entered into a telephone conversation. PW1 further testified, that on the 24th May 2024, DYC again phoned her and they again talked to each other. She remembers DYC telling her that he was working and that he would be going for training thereafter.
- [7] PW1 stated, that after completing his training around 8 pm, DYC phone her and they had another telephone conversation. At one point in the conversation, they both told each other, that they were going to have a shower. Thereafter, DYC phoned PW1 and told her that he was on his way to [REDACTED] Praslin and asked her to come over to his place. PW1 testified, that DYC kept asking her to come to his place to a point that he also started to give her directions to walk towards him and to meet him. PW1 stated, that she followed instructions as to the direction to get to where DYC was on her phone as she walked towards where DYC was waiting for her. She walked until she got to where DYC was waiting for her and that was at the backside of a gym. There, PW1 met DYC in a car make [REDACTED]. In her testimony, PW1 told the court that the car ertiga had a fire brigade logo on it.
- [8] It was the testimony of PW1, that she got into the car and sat in the rear passenger seat following which DYC drove the car to Anse Possession. PW1 stated, that arriving at Anse Possession, DYC who was wearing his work uniform, stopped the car, left the driver's seat,

and came to sit close to her in the rear passenger seat. PW1 also stated, that while sitting close to her, DYC removed his clothes. He then removed PW1's short. PW1 testified, that thereafter, DYC moved his body on her body and then inserted his private part into her vagina and they had sex. PW1 also testified, that after sex, DYC dropped her at a beach at Cote D'or where she stayed for a while and later walked home.

- [9] It was the testimony of PW1, that when she arrived home, her mum questioned her about her whereabouts earlier. PW1 stated, that at the beginning, she did not reply nor say anything. PW1 told the court, that after a while, the police arrived home. The police too started to question her asking her where had she been. PW1 testified, that at the beginning she refused to answer police questions and to say anything until a lady police officer whom she said was a "tom boy", which to her meant a lesbian, started to ask her questions. PW1 stated, that although she was scared, it was at that point that she started to tell the lady police officer what has happened.
- [10] PW1 testified, that she was asked several questions like, where does she come from, where was she, who was the person she was with, and question about the vehicle. PW1 told the court, that she explained to the police officer everything in answer to questions she was asked. The police officer told PW1's mum to bring her to the police station in the morning at around 8 am the following day. PW1 testified, that the following day, her mum took her to the police station where she was asked more questions, and had a statement taken from her.
- [11] Under cross-examination, PW1 stated, that although she was only 13 years old then, she managed to open a Facebook account because she did not provide her correct date of birth to open the account, and that her correct date of birth is 27th October 2009. PW1 also stated, that at the time she opened her Facebook account, she was in a relationship with one S [REDACTED] A [REDACTED]. PW1 sought to bring more clarity over her testimony that on the day of the alleged incident, she went to her brother who was only about 5 minutes walking distance away from home to bring his phone. PW1 also stated, that she did not inform her brother or anybody else that she was going somewhere or that she was talking to someone, having not tell anybody that she was leaving home.

- [12] Under cross-examination, PW1 stated, that she was pressured by DYC to come to meet him at the gym because he was constantly on the phone asking her to come.
- [13] Under cross-examination, PW1 also said, that because she was in a relationship last year with someone named Ronan, she was being monitored by social services. She confirmed, that she was still in a relationship with Ronan on the day she met the accused, DYC, stated, that R [REDACTED] has his own court matter which he is dealing with, whereas, this current one involves DYC, although, social services were dealing with both cases. Under cross-examination, PW1 maintained, that on the 24th May 2023, she and DYC had sex in a car after DYC had removed her clothes, and that she has been truthful when she said that fact which is also borne out of the statement she gave the police.
- [14] The second prosecution witness called to testify at trial was one Mr Georges D'offay, PW2, the CEO of Cable & Wireless Seychelles, one of the telecommunication services providers. PW2 testified, that he was in court in answer to a witness summons after receipt of a warrant pertaining to two telephone numbers, number [REDACTED] 34 and [REDACTED] 54, by which warrant the police requested for some information connected with these two telephone numbers. PW2 confirmed, that on behalf of Cable & Wireless he wrote a letter dated 10th August 2023 to the commissioner of police, in which letter he provided the necessary information that were requested. The letter containing the signature of PW2 was exhibited as P1.
- [15] Referring to the letter, P1, PW2 sought to explain some of the terms used therein. He stated, that the word *MEI* used in the letter, refers to each particular phone because each individual phone has an *MEI*, and the purpose of such *MEI* is to recognise exactly to whom the phone belongs. PW2 proceeded, stating, that because Cable & Wireless has BTS all around Mahe, Praslin and La Digue, the exact locations from where the calls are made are known. Seeking to bring clarity over the content of exhibit P1, PW2 explained, that in respect of telephone number [REDACTED] 34, it is registered under the account name of M [REDACTED] B [REDACTED] bearer of NIN [REDACTED] which NIN was given to them by the customer on the day she visited their customer services centre to be registered and given an SIM card.

- [16] It was the testimony of PW2, that accompanied the letter written to the commissioner of police, P1, was a pendrive containing all the detailed information sought for, particularly, all incoming and outgoing calls taken from the database. Referring to another document admitted as exhibit P2, PW2 explained, that the document contains information pertaining to incoming and outgoing calls, the site location, the number from which the calls was made, the number in receipt of the calls, the calls duration, the calls date and time and so forth. As regards to phone number [REDACTED]64, PW2, going through its call log, stated, that on the 21st of May 2023, at 16:34:20 hrs, phone number [REDACTED]34 was in receipt of an incoming phone call from phone number 2627464. Other calls were made on the same day from that number [REDACTED]64 to [REDACTED]34, a total of four calls.
- [17] It was the testimony of PW2, that on the 22nd May 2023, a total of 9 calls were made from phone number [REDACTED]64 to [REDACTED]34 at different time interval. On the 23rd May 2023, 9 calls were made. On the day the alleged incident happened on the 24th May 2023, as per exhibit P2, at 21:25:15 hours, there was a last phone call made on phone number [REDACTED]64 to number [REDACTED]34. Earlier at 20:55 hours on the 24th May 2023, a 51 seconds phone call from number [REDACTED]64 to number [REDACTED]34 was made at Anse Golbert. PW2 explained, that the fact that incoming calls were recorded, means, that those calls were received because someone answered the calls. PW2 stated, that the last call made and received on the 24th May 2023, was at 23:49 hours.
- [18] The third prosecution witness called to testify against the accused was police officer, Sergeant (sgt) Sheila Arneply, PW3, who has been in the police force for 36 years and is currently based at La Digue Police Station in the CID Department. PW3 testified, that on the 24th May 2023, at around 10:22 hours, she received a telephone call from police officer Corporal (Cpl) Uranie who told her that one J [REDACTED] of [REDACTED] Cote D'or, Praslin has reported that his 13 year old sister by the name of BAR has gone missing from home.
- [19] Sgt Arneply testified, that upon receipt of such report, she instructed Cpl Uranie and others, to conduct a search for BAR. It was the testimony of Sgt Arneply, that around midnight on that particular day, she received a phone call from Cpl Uranie and others, that

BAR has returned home safe and sound, and Sgt Arnephy learnt from BAR's mother that BAR returned home at around close to midnight. Sergeant Arnephy testified, that she advised her colleagues police officers to go to BAR's home to see them all and to advise BAR's mother to report to the child Protection Services the following day.

- [20] It was the testimony of Sgt Arnephy, that the following day, the 25 May 2024, one Veronica Jeanne, a Social Worker, informed her that at around 9 am, BAR and her mother reported to Social Services. There, the consent of BAR's parent was sought for the procedures to follow, and she, PW3, recorded a statement given by BAR in the presence of the social worker, Ms Jeanne.
- [21] PW3 testified, that on the following day, the 26th May 2023, BAR was taken to the Baie Ste Anne, Praslin, hospital where he was examined by a gynaecologist in the presence of her mother and the social worker amid allegation that she had sexual intercourse in the evening the previous day when she went missing from home. Sgt Arnephy stated, that before 11:00 hours on that day, she received the report of the examination which showed that Bar has been sexually active.
- [22] It was the testimony of PW3, that she was on duty on the 8th June 2023, and that at around 07:32 hours, in the presence of constable Arabella Athanase she cautioned the accused, DYC, after BAR had told the police that he is the suspect, and told him his constitutional rights. Sgt Arnephy stated, that DYC remained silent. Sgt Arnephy added, that on the 2nd August 2023, she made a request to the Civil Status office on Praslin for a birth certificate of the complainant/alleged victim, BAR, by way of a letter dated 2nd August 2023 which letter was exhibited as P3.
- [23] It was the testimony of Sgt Arnephy, that following the request, she received from the Civil Status a birth certificate of BAR, the complainant/alleged victim, which indicates that she was born at [REDACTED] Praslin on the [REDACTED] 2009, and that she holds the National Identity Number of [REDACTED]. Her biological father is one B [REDACTED] R [REDACTED] her biological mother one M [REDACTED] J [REDACTED]. Sgt Anerphy testified, that based on the complainant/alleged victim's birth certificate, she was a 13 year old girl when the alleged incident of sexual assault happened. The birth certificate was exhibited as P4.

[24] Sgt Arnephy testified, that when she was on duty on the 18th August 2023, she made another request to the Civil Status office by letter dated 18th August 2023, exhibit P5, for a birth certificate of the accused, DYC, and thereafter, she did receive a birth certificate of the accused, DYC, which was exhibited as P6. Amongst the information featured in the birth certificate, is that the accused was born on the [REDACTED] 1996, and that his previous name was D [REDACTED] L [REDACTED]. His National Identity Number is [REDACTED]. Sgt Arnephy told the court, that at the time the accused allegedly committed the offence, his name was D [REDACTED] L [REDACTED].

[25] It was the testimony of Sgt Arnephy, that as part of her investigation of the alleged offence of sexual assault, that she took statement from other witnesses. Sgt Arnephy stated, that given that the complainant/victim, BAR, had said in her statement that it was D [REDACTED] L [REDACTED] from the fire brigade who came to pick her up, she went to the fire station, and upon examining the occurrence book (OB), she noticed that the accused's movements as were alleged by the complainant/victim, BAR, really happened. Sgt Arnephy stated, that she received the relevant extract from the occurrence book dated 24th May 2023 from the person in charge of the station which she placed in her case investigation file. The extract was exhibited as P7. Reading the relevant entries from the extract (exhibit P7) Sgt Arnephy had this to say;

"24th of May 20203 whereby D [REDACTED] C [REDACTED] resumed duty at 3:20 pm, and then at 6:05 there was a training that took place, and the training ended at 8:15 and at 20:51 D [REDACTED] C [REDACTED] left to go and collect a document from M [REDACTED] Estate. (Verbatim record of the proceeding of 23rd May 2024 Page 26)

[26] Sgt Arnephy added, that according to the record in the occurrence book, the accused left the fire station at 20:51 hours and returned back to the station at 22:28 hours in vehicle S36583.

[27] The 4th witness called by the Prosecution to give evidence against the accused, was one M [REDACTED] J [REDACTED] a carer who lives at [REDACTED] PW3. PW3 testified, that she is the mother of 5 children, 4 sons and a daughter, and that daughter is the complainant/alleged victim in this case, BAR. PW3's testimony, was that on the 24th May

2023, at around 7:45 pm, she received a phone call from her partner who asked her to bring food for him. Upon her arrival at her partner's place, she received a telephone call from her eldest son, J [REDACTED] J [REDACTED] who told her that someone has called him and informed him that his sister, BAR, has been seen getting into a car, and the car was a Kia having a picture of a fireman on it. PW4 stated, that she then phoned her daughter, BAR, but she could not get through to her because her phone was off line.

[28] It was the testimony of PW4, that she and her partner kept calling her daughter, BAR, and did so "nonstop several times" without success because her phone was off. PW4 stated, that they then called the police station. The police officer who was in receipt of the call asked her whether she has any idea where they could have gone. PW4's reply was no, and she was told to be on the lookout what time she comes back. PW4 stated, that she kept calling and after some time she went into the bedroom. She added, that whilst in the bedroom, she again phoned the police and she was told by the police the minute that BAR arrives home to inform them.

[29] It was the testimony of PW4, that when her daughter, BAR, arrived back home around 10:45 PM, she tried to talk to her but at the beginning, she, BAR refused to talk to her. Then they entered into a quarrel. PW4 stated, that she then phoned the police and told them that her daughter was back home. PW4 testified, that the police came and told her to bring BAR to see CID officers and Social Services Officer the following day. PW4 also testified, that she spoke to her daughter, BAR, the following day. BAR told her that the men she went out with is DYC who lives at Grand Anse, and is with a lady from Consolation. PW4 stated, That at that time she did not know who DYC was. She later got to know of him on a day when he was getting out of a bus from consolation after her daughter had shown her that this was D [REDACTED] C [REDACTED]

[30] Under cross examination, PW4 stated, that her daughter, BAR, used to tell her of her whereabouts whenever she had left the house, and that was the first time that she failed to tell her of her whereabouts, and had her phone switched off. PW4 stated, that this was the reason why she was worried. PW4 refuted the suggestion, that her daughter told her those things she told her because she felt threatened by her. She explained, that after her daughter

had told her everything that had happened, and after she had read her statement, she realised that the content of her statement was consistent to what she had told her verbally.

- [31] Under cross examination, PW4 confirmed, that her daughter, BAR, was taken to the hospital by social services to be examined by a gynaecologist, and that she was there to accompany her as she normally does when her daughter has to go to the hospital for appointments or whenever she needs medical attention.
- [32] Under cross examination, PW4, also stated, that her daughter, BAR, does not normally absent herself from home. She explained, that she is usually home by 4:30 pm, or before 7 pm on days when she had to attend training in respect of different school activities such as dancing football and judo. PW4 reiterated, that the information she received from her son was that her daughter, BAR, had got into a brown Kia, and the fact that she did not know the car or the person that was in the car, she had every reason to be worried.
- [33] The 5th witness called to testify for the prosecution against the accused, was one A [REDACTED] F [REDACTED] of a [REDACTED] Mahe, Seychelles, PW5. PW5 testified, that he is a firefighter holding the rank of Assistant Section leader who is based on Eve Island, Praslin. PW5 testified, that he was on night duty on the 24th May 2023, and had conducted a training from 6pm to 8pm. PW5 stated, that after the training, a work colleague by the name of D [REDACTED] C [REDACTED] asked him for permission for him to leave the place of work for him to go and collect money for his child, which permission he gave to D [REDACTED] C [REDACTED].
- [34] It was the testimony of PW5, that because there was a problem with their pick up they had rented a black Suzuki Ertiga S3 [REDACTED]. He stated, that he gave permission to DYC to use the black Suzuki Ertiga. DYC left the station around 8:51 p.m to collect money for his child because according to him, his child would be leaving tomorrow morning on the Cat Cocos ferry at 8 a.m. PW5 testified, that he remembers DYC telling him, that he was going to collect cash from his uncle at [REDACTED] PW5 stated, that around 10 pm the police turned up at the station and told him that they have received a complaint, that DYC is with an underaged little girl in a black vehicle.

- [35] PW5 testified, that he told the police that he doesn't know DL, but he knows DYC whom he has given permission to go and collect money for his child. He stated, that he immediately called DYC but he could not reach him. After some time, PW5 reached him and told him to immediately report to the station. PW5 also testified, that before leaving the station, the police told him to ask DYC to report to the police station at Baie Ste Anne. PW5 stated, that when DYC arrived at the station, he instructed his driver one A [REDACTED] J [REDACTED] to take him to the Baie Ste Anne police station.
- [36] PW5 testified, that from the police station, DYC came back to the station and told him that the police had made a mistake, and that it wasn't him they were looking for. It was the testimony of PW5, that at around 12:30 a.m., the police returned to the station and told him that the girl had told them that she was with DYC in a black car, and that the matter is now being handled by Sgt Arnephy of Child Protection. PW5 also testified, that he was told that more information can be obtained from Sgt Arnephy. PW5 further stated, that he conveyed all the information about the incident to the CFO (Chief Fire Officer). PW5 stated, that he spoke to Sgt Arnephy about the incident who spoke to him about wanting a statement from him and other information she needed including information from the station logbook logged in the log book by the watch room attendant. PW5 explained, that the information Sgt Arnephy needed included information such as, what time he gave permission to DYC to live the station, what time did the vehicle leave the station, and where did it go, what time it came back and so forth.
- [37] Under cross examination, PW5 reiterated, that before inspecting the parade at 4 p.m. on that particular day, DYC sought from him permission to leave the station, and reminded him of his request for permission to leave at the end of the training to go and collect money for his child. PW5 explained, that he did give DYC permission to leave and told him to inform the watchroom attendant for him to record in the station's log book. PW5 stated, under cross examination, that he cannot describe what DYC's attire was when he left the station because he did not see him leaving, but knows that he left the station in a black Suzuki Ertiga, a rented car because he gave him permission to use the car.

- [38] The sixth prosecution witness called to testify against the accused, was Dr Maxwell Fock Tave, PW6, a medical practitioner specialized in gyne obstetric who is based at the Seychelles hospital in the gyne obstetrical department. PW6 testified, that he was on duty at the Baie Ste Anne hospital, Praslin on the 26th May 2023 when upon receipt of a request from Sgt Arnephy, he examined a 13 year old patient by the name of BAR because of her history of sexual intercourse with another partner. PW6 testified, that following his examination of the child, he wrote a report dated 26th May 2023, which report was exhibited as P8.
- [39] Reading from his report, *inter alia*, PW6 stated, that he found the child he examined to be "in good general condition, good general nutritional state, was well developed for her secondary sexual characters. PW6 added, that there were no suspicious skin lesions, and the oral cavity was normal, clean abdomen was soft, no palpable abnormality. It was the testimony of PW6 that the external genital area was clean, no abnormal discharge and no lesion was seen. The hymen was ragged, not interact, and there was no lesion in the vagina. The inner area was also normal".
- [40] PW6 testified, that the fact that he found that BAR's hymen was not intact and that it was ragged, was an indication that there has been some sort of penetration in the past. Asked whether he could tell when the penetration actually happened, PW6 stated, that the area heals very quickly, in that to see a fresh lesion it has to be within 24 to 48 hours, and after that, one would only see scars, and as such, one would not be able to tell the difference between whether it happened in the last week, month or year. PW6 added, that in the instant case, it certainly cannot say when that actually happened. It was the testimony of PW6, that because BAR's hymen was broken and therefore it was not intact, it could have been that her vagina has been penetrated by a penis during sexual intercourse.
- [41] Under cross examination, PW6 stated, that he was told by the child he examined, BAR, that she has a history of different partners and that she has been engaged in sex with three different persons since November 2022.
- [42] At the close of the case for the prosecution, the accused who was explained of his constitutional right to defend the charge against him opted not to give evidence in his

defence in exercise of his right to remain silent, and not to call witnesses to give evidence in defence of the charge against him.

CLOSING ARGUMENTS OF THE PARTIES BY WAY OF SUBMISSIONS

Prosecution's Submission

[43] In its closing written submissions, learned counsel for the prosecution began by summarizing the salient aspects of the evidence of the six witnesses who testified for the prosecution, and then proceeds to analyse the evidence in the light of the applicable laws. It is the submission of learned counsel, that the burden to prove the accused guilt for the offence of sexual assault rests on the Republic, the prosecution, and that the standard required is beyond reasonable doubt. Learned counsel cites the English case of *Miller vs Minister of Pension* [1947] 2 ALLER 372, 373 quoting an extract therein by Lord Denning. In learned counsel's submissions, the elements of the offence of sexual assault which the prosecution had to prove beyond reasonable doubt are the following;

1. That the accused sexually assault it's victim, BAR, PW1, by penetration of her body orifices, namely her vagina
2. The accused intentionally committed the assault, and
3. The victim did not consent.

[44] Addressing the issue of consent, learned counsel submits, that the complainant/alleged victim, PW1, who was born on the 27th October 2009, was only 13 years old when the accused, DW1, committed the offence of sexual assault against her. Learned counsel refers to the birth certificate of the complainant/alleged victim in evidence as exhibit P4. He submits, that by virtue of section 130 (3) (b) of the penal code, the complainant/alleged victim, PW1, could not have consented to the sexual act given that by law she is incapable of giving consent.

[45] Addressing the issue of penetration, learned counsel refers the court to the evidence of PW1, the complainant/alleged victim, particularly, her evidence that the accused took her to an unspecified area in a vehicle and had sex with her in the back seat of the vehicle when

he inserted his penis inside her vagina. Learned counsel also refers the court to exhibit P8,, the medical certificate which shows, that the complainant/alleged victim's hymen was ragged and not intact when she was examined on the 26th May 2023 as evidence that there has been penetration of the vagina. It is the submission of counsel, that the evidence of the complainant/alleged victim, PW1, that the accused penetrated her vagina with his penis, was coherent, clear, reliable and truthful that it must be believed.

- [46] Learned counsel also addressed the issue of corroboration referring to the relevant aspects of PW1's testimony. Of particular significance, learned counsel refers the court to the testimony of PW1, the complainant/alleged victim, she having said, that on the 21st May 2024, she gave the accused her telephone number [REDACTED] 64 and the accused gave her his telephone number [REDACTED] 64 and that on the 21st, 22nd, 23rd and 24th of May 2024, throughout the day the accused phoned her and they talked, and that in the evening of the 24th May 2023, the accused phoned her and asked her to come and meet her behind the gym at [REDACTED] [REDACTED] which she did and from there she got into a vehicle she called ertiga, and taken to a place where they later had sex.
- [47] It is the submission of Learned counsel, that this aspect of the complainant /alleged victim's evidence is corroborated by the evidence of PW2, who stated, amongst other things, that on the 24th May 2024, at around 2000 hours, she received a phone call from her son, one J [REDACTED] J [REDACTED] who told her that PW1 had been seen getting into a car behind the gym at [REDACTED]. It is also the submission of learned counsel, that in his evidence, Mr A [REDACTED] F [REDACTED] PW3, stated, that on the 24th of May 2024, he gave the accused permission to take a black vehicle, a Suzuki Ertiga to go and collect a personal document at [REDACTED] at around 2051 hours and that the accused left the base at Eve island in the said vehicle. In learned counsel's view, this corroborates the evidence of the complainant/alleged victim, PW1, that at around 2000 hours on the 24th May 2024 she got into a car made Ertiga driven by the accused behind the gym at [REDACTED].
- [48] It is submitted by learned counsel, that the complainant/alleged victim's testimony is further corroborated by the evidence of PW4, Mr D'offay, who stated in evidence, that as per the call logs, exhibit P2, from the 21st May 2024 up to the 24th May 2024, mobile

phone number [REDACTED] 34 received incoming calls from mobile phone number [REDACTED] 64 which was being used by the accused. Learned counsel also refers the court to exhibit P2, the call logs, showing that on the 24th May 2023, at 20:55 hours there was an incoming call to the number [REDACTED] 34 from phone number [REDACTED] 64 that lasted for 51 seconds. In learned counsel's view, this corroborates the evidence of PW1, the complainant/alleged victim, that on the 24th May 2024, at around 2000 hours she received a phone call from the accused who told her to come and meet him behind the gym at [REDACTED]

[49] As regards to the act of sexual assault itself, it is submitted by learned counsel, that corroboration is not required given that the court can still convict the accused on account of uncorroborative evidence if the court finds the evidence of PW1, the complainant/alleged victim, to have been reliable, credible and truthful. Learned counsel cites the case of R v Lucas Criminal Side No 03 of 2006, and R vs Labaleine 1985 SLR 43, to support this proposition.

[50] As regards to intention, learned counsel submits, that the intention of the accused is proved by the mere fact that the accused had sexual intercourse with the complainant/victim, PW1, after he phoned her and told her to come and meet him behind the gym at [REDACTED] and when she went there, she was taken in a black Ertiga driven by the accused and went to a secluded area where they had sex.

Defence submissions

[51] In its written submissions of behalf of the accused in defence of the charge of sexual assault against him, learned counsel submits, that the evidence tendered before this court by the prosecution, particularly by the virtual complainant/alleged victim herself, Sgt Sheila Arnephy and others raises serious doubts as to whether the alleged act of sexual assault did actually take place. It is the contention of learned counsel, that the truthfulness of the complainant/alleged victim's version of the events of the 24th May 2023 should be put into question given that in cross examination, she stated, that at the time of the alleged incident she was in a relationship with someone by the name of Ronan.

[52] It is also the submission of learned counsel, that the fact that the virtual complainant/alleged victim was not truthful as to her whereabouts when asked by her brother, this casts doubts as to whether she was truthful in her account of the events of 24th May 2023. In learned counsel's view, the fact that as a 13 year old girl she did not inform her family where she was going, shows, that "she has a propensity of not being truthful", thus this taken together, raises serious doubt as to the credibility of her testimony.

[53] It is submitted by the learned counsel, that the testimony of the virtual complainant/alleged victim's mother, Ms M [REDACTED] J [REDACTED] to the effect that she tried to call the virtual complainant/alleged victim to find out her whereabouts but could not reach her because her phone was switched off, and that when she returned home at around 10:45 pm she sought to find out from her where she had been, telling her that if she doesn't say where she was she would call the police, shows, that her mother, M [REDACTED] exerted pressure on the complainant/alleged victim for her to say that she had been with a man called DYC. It is also submitted by learned counsel, that the fact that M [REDACTED] J [REDACTED] had stated in cross examination that it was unusual for the complainant/alleged victim to go places without informing her prior, and that she could not reach her because her phone was switched off, contradicts the testimony of Mr. Doffay who had stated, that if a person's phone had been turned off then the calls made to the number would not be registered on the call log.

[54] Learned counsel addresses the element of penetration referring to the evidence of Dr. Maxwell Fock-Tave, the gynaecologist who examined the virtual complainant/alleged victim, focussing on his testimony, that he was told that the virtual complainant/alleged victim had a history of having engaged in sexual intercourse with 3 different persons and the fact that he also stated, that there were no fresh scars on the vagina.

[55] On the law, learned counsel addresses the issue of corroboration. Learned Counsel has this to say;

In the case of Raymond Mellie V R (SCA N01 of 2025) the court of Appeal stated, inter alia, corroboration is always required in sexual offences. However, in addition to that, corroboration, which is an independent testimony of some material fact tending to implicate the accused with the crime, will be required only if the witness herself is credible.

If the contrary is the case and if there is no other cogent evidence, then the accused should be acquitted even if corroborative evidence is capable of being found”.

THE COURT'S REASONING AND ANALYSIS

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

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

Provided that 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.

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 20 years.

Provided further that where it is a 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 10 years from the date of the conviction, the person shall be liable to imprisonment for life.

(2) For the purposes of this section "sexual assault" includes -

(a) An indecent assault;

(b) The non-accidental touching of the sexual organ of another.

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

(d) The penetration of a body orifice of another for sexual purposes.

(3) A person does not consent to an act which if 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 15 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 offense 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 offense;

(b) Whether there has been any penetration in terms of subsection (2) (d) ;

(c) Any other aggravating circumstances.

[57] The analysis of the facts led in evidence as regards to the law to be applied is made from the premise, that by virtue of article 19 (2) of the constitution, the accused is innocent until proven guilty. The question that therefore needs to be determined, is, whose task is it to prove the accused's guilt for the offense of which the accused has been charged? In reference by the attorney general on the 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 rest upon the prosecution and remains with the prosecution throughout the trial".

[58] The general rule as articulated by the PCA in reference by the 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 reconsolidated for application across the commonwealth. In a unanimous judgement, lord Viscount Kankey had this to say;

"Throughout the web of English criminal law, one golden thread is always to be seen that it is the duty of the prosecution to prove the person's guilt subject to the defence of insanity and subject also to any statutory exception. If, at the end 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".

- [59] The prosecution having the burden of proving the accused's guilty, the question that therefore follows, is what were the prosecution required to prove? In reference by the attorney general (Supra) the court of appeal stated the following;

"Generally a sexual offence is made punishable only where both mens rea and actus reus is established by the prosecution".

By making this statement, the court relied on the case of *Harding v Price* [1948] 1 KB 695, quoting Goddard CJ, having stated, that *actus non facit reum nisi, mens sit rea* which means, that an act is not punishable without a mental element, or an act does not make a person guilty unless there is a guilty mind.

- [60] In essence, therefore, to prove the accused's guilt for the offense of sexual assault as charged, the prosecution had to prove that the accused committed the actus reus of the offence and had the mens rea in committing the offence. Since the offence which the accused is alleged to have committed is sexual assault contrary to section 130 (2) (d) of the Penal Code, the actus reus, which the prosecution had to prove is that there was penetration of the body orifice of the complainant/alleged victim for sexual purposes. In other words, it was incumbent on the prosecution to prove that the accused had sexual intercourse with the complainant/alleged victim, BAR as the charge alleged.
- [61] As regards to the mens rea for the offence of sexual assault under Section 130 (2), the prosecution had 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, the accused had the

intention to have sexual intercourse with the complainant/alleged victim, BAR. The prosecution had to then 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 legally consent given that she was under 15 years old at the time of the sexual intercourse.

[62] The fact that the complainant/alleged victim had no capacity to consent to sexual intercourse in law, bears relevance to section 130 (3) (b) of the penal code quoted above. Hence, under Section 130 (3) (b) of the Penal Code, where the complainant/alleged victim of the sexual assault is a person below the age of 15 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 for the offence was that the complainant/alleged victim, BAR, was under the age of 15 years old when the accused had sexual intercourse with her. In evidence, the complainant/alleged victim truthfully testified, that she was only 13 years old when they had sexual intercourse. Her testimony was corroborated by the evidence of her mum, as well as her birth certificate tendered as documentary evidence as exhibit.

[63] Having scrutinised the prosecution's evidence as regard to the offence of sexual assault, the question that falls to be determined, is whether, on account of the evidence led before this court by the prosecution, the prosecution has proved the accused guilty for the offence of sexual assault contrary to section 130 (1) of the Penal Code reads with Section 130 (2) (d) of the penal code beyond reasonable doubt? In Woolmington (supra) the court had this to say;

"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 other 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 finds 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.

- [64] 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 cause of justice. If the evidence is so strong against the man as to leave only a remote possibility in his favor 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.

- [65] In the instant case, on account of the evidence laid before this court by the prosecution to prove the actus reus of the offence of sexual assault, it is the finding of this court, that the evidence of the complainant/alleged victim, PW1, was compelling, coherent and consistent, and that she was a credible witness when she stated, that on the 24th May 2023, following a telephone call she received from the accused, she left the family home and walked to behind the gym at Cote D'or, Praslin where she was picked up in a car Ertiga, driven by the accused and headed to an unspecified area on Praslin where they had sexual intercourse. For this particular reason, I find no good reason for a corroboration warning because there is no evidential need for it. I rely on the guidance of the court of appeal in *R v Lucas*, criminal side No 03 of 2006 for having adopted that position.

- [66] Based on the complainant/alleged victim's evidence, clearly, the elements of the offense as charged have been proved, in that, 1. She had experienced penetrative sexual intercourse, 2. The accused participated in the sexual intercourse in that he was the perpetrator or culprit as he was the one who inserted his penis inside the complainant/victim's vagina and 3. That the complainant/victim had no legal capacity to give her consent to such sexual intercourse because she was only 13 years old when the alleged sexual intercourse took place.

- [67] Looking at the evidence as a whole, it is also clear, that to a material extent, the evidence of the prosecution witnesses corroborated each other. For example, in evidence, the complainant/alleged victim, BAR, stated, that on the 24th May 2023, the accused DYC, called her at around 8:00 p.m at night, and told her to come and meet with him behind the gym at the Cote D'or which she did. When she was there, she was picked up by DYC who

was wearing his work uniform and driving a motor vehicle she remembers was an Ertiga, and he drove the car towards Anse Possession where they had sex.

[68] The mother of the complainant/alleged victim, M [REDACTED] J [REDACTED] PW2, stated, that on the 24th May 2023, around 8 p.m, she received a phone call from her son one Jude Joubert, who informed her, that BAR has been seen behind the gym at Cote D'or getting into a car and when she phoned her, her phone was turned off and she could not reach her. She also stated, that BAR returned home at around 10:45 p.m.

[69] Mr A [REDACTED] F [REDACTED] PW5, an Assistant Section Leader, and a Fire fighter based at Eve Island, Praslin stated, that on the 24th May 2023, at around 8pm following a request from DYC, he gave him permission to leave the station to go and collect money for his child from his uncle whom he was told lives at [REDACTED]. PW5 confirmed, that he also gave permission to DYC to make use of a black Suzuki Ertiga registration number [REDACTED]. DYC left the station at around 8:51 p.m., and returned to the station at around 10:30 p.m.

[70] PW5's, evidence was consistent with what were recorded in the log book kept at the station, which entries were consistent to his oral testimony as testified by the investigating officer Sgt Arnephy who tendered in evidence the relevant extract of the logbook as exhibit P7.

[71] In the final analysis, therefore, on account of the totality of the evidence led before this court by the prosecution, I am satisfied, that the prosecution has proved, beyond reasonable doubt, that on the 24th the May 2023, DYC sexually assaulted, BAR, a 13 year old child at the time, by having penetrative sexual intercourse with her. I therefore find the accused, DYC, guilty of one count of sexual assault contrary to section 130 (1) read with section 130 (2) (d) of the penal code, and accordingly, I convict him for the offence.

Signed, dated and delivered at Ile du Port 25th April 2025.



