

IN THE COURT OF APPEAL OF SEYCHELLES

Reportable

[2022] SCCA 19 (29 April 2022)
SCA CR 23/2020
(Appeal from CR 24/2020)

In the matter between

D L

(rep. by Ms Kelly Louise)

Appellant

and

The Republic

(rep. by Ms. Corrine Rose)

Respondent

Neutral Citation: *DL v R* (SCA CR 23/2020) [2022] SCCA 19 (Arising in CR 24/2020)
(29 April 2022)

Before: Fernando President, Robinson JA, Tibatemwa-Ekirikubinza JA

Summary: Appeal against conviction for sexual assault and the sentence imposed.

Heard: 11 April 2022

Delivered: 29 April 2022

ORDER

Appeal allowed.

JUDGMENT

FERNANDO, PRESIDENT

1. The Appellant has appealed against his conviction for sexual assault contrary to section 130(1) read with section 130(2) of the Penal Code and the sentence of 20 years imposed on him.
2. The Appellant has filed the following grounds of appeal:
 - i. The Learned Chief Justice erred in finding that on the evidence before her it was established beyond a reasonable doubt that the Appellant was guilty of having sexually assaulted the Virtual Complainant.
 - ii. The Learned Chief Justice – in the instance that conviction is upheld – erred in convicting the Appellant to 28 years’ imprisonment, the sentence being manifestly harsh in the circumstance.
3. The only two persons who could testify to the alleged incident are the prosecutrix ML and the Appellant. Marvelle K. Louise (hereinafter referred to as ML) is 29 years old and lives with her partner and has two children. She works as a chambermaid at Hilltop Hotel. Daniel Lespoire is the name of the accused Appellant. She had said that the alleged incident happened on the 25th of March 2020. According to her evidence she had been on the bus stop at Bel Air Road waiting to go and pick up her daughter who during the day is taken care of by her sister at her house in Sans Soucis. It is while she was at the bus stop that the Appellant had arrived in a small car and asked her if she wanted a ride and she had said yes. The Appellant is alleged to have told her that he will bring her to Sans Soucis. According to ML at one point whilst on the road the Appellant had made a U turn after receiving a call which the Appellant had told her was from his wife. He is then alleged to have told her that he will first go to check on a block of land that he and his wife had bought at Perseverance to build some apartments and thereafter go and drop her soon. Thereafter they had gone to Perseverance. At Perseverance the Appellant had driven towards an alley where there were a lot of casuarina trees and stopped. The Appellant had told her that he had stopped there to talk to ML. He had told her that he likes her and loves her and that he had been looking at her for some time. He had then removed his pants. ML had then gone on to state: “He

continued to talk and told me that I have nothing to be afraid of and he also put on his durex. I was scared. I wanted to get out of the vehicle but the car was locked and I told him to stop. He continued. He pushed my seat at the back and put it in a sleeping position. He started to remove my clothes and did it with force, even if I was trying to stop him. He had grabbed on to my hand and pressed against it. I was trying to hit him on his chest for him to stop. He was trying to penetrate my body with his penis while I was trying to stop him. He managed to put his penis in my private part but not much. When I told him I was going to call the police he told me to stop and relax, not to get angry, not to phone the police and that he can give me money.” ML then claims that she had opened the door and got outside the car. It is to be noted that prior to that ML had said that she could not get out of the vehicle as the car was locked. The Appellant had thereafter asked her to put on her clothes, that she can go and that he would give her money. When questioned by the learned Prosecutor as to why she got into the car again, ML had said that she was not sure where to go and that she was afraid that he would kill her. According to ML the place where the incident had taken place is about 100 meters from the main road, but one cannot see the place from the main road. ML had said there were no houses near that place. Thereafter the Appellant with ML had gone in the direction of North East Point. The Appellant had then stopped at an ATM and asked ML to retrieve some money and give it to him. ML had then said she does not have any money nor does she have an ATM card. This was after the Appellant had told ML that he will give her money. Thereafter the Appellant had brought ML to town and stopped at Orion Mall and told her that his wife is in the shop and that he will get the money for her and asked her not to go to the police station. ML at this stage had got off the car, looked at the license number plate of the car and left. She had then gone to her cousin who works at Orion Mall and borrowed her phone to call her friend Anifa Jeannevole, as her phone had discharged since she left work that day. ML had told Anifa, what had happened to her and Anifa had advised her to go to the police station. ML had then gone to the police station and made a statement as to the incident. The police had taken her to the hospital where she had been examined by a doctor. Subsequently ML had identified the Appellant at an identification parade. According to

ML she had never seen the Appellant before. ML had said that her telephone number is 274477 and that the Appellant had never called her on this telephone.

4. Under cross examination ML had said that the panty that she was wearing at the time of the incident got torn when the Appellant pulled it down and when she tried to pull it up. ML had insisted that at the time the doctor examined her panty was torn, but also said that she thinks that the doctor had seen the panty. ML had also stated that she had removed the panty in the presence of the doctor on the instructions of the doctor. ML had put it back on her “the same way” she removed it.
5. The defence position in this case had been one of consent. This is reflected in the following question and answer:

“Q. I further put it to you that because he did not give you any money, that is why you went to the police.

A. No. I had told him that I do not want his money.”

ML had admitted that she had not complained to the doctor about the pain in her wrist.

6. I note the following in analysing the evidence of ML. It is unfortunate that ML had not been questioned as to the time of the incident, by the Prosecutor or Defence Counsel. This may have been helpful in tracking the calls both ML and the Appellant had spoken of. Neither the Prosecutor nor Defence Counsel have questioned ML about the time the bus normally arrives or the regularity of bus services on the Belair-Sansouci route and there is no other evidence in this regard. This may have been useful in determining the necessity for ML to take a lift with the Appellant, especially taking into consideration that Perseverance is on the opposite side of Sans Souci and quite a distance from the Belair Road. It is strange that ML could not decipher, if her version is to be believed, what she was heading for when the Appellant, a total stranger; after stopping his car at Perseverance in a lonely place amidst casuarina trees, hidden from the main road and

away from any houses; started to become intimate with her by telling her that he likes her and loves her and that he had been looking at her for some time. It is difficult to accept without a reasonable doubt that ML did not consent to the sexual act, taking into consideration her description of the incident from the time the Appellant stopped his car near the casuarina trees and up to the time the act of sexual intercourse took place. ML having said earlier that she could not get out of the car as it was locked had contradicted herself by saying that she did get out of the car after the alleged act. ML had not spoken of any threats extended to her by the Appellant. The question arises if she was afraid that he would kill her, why did she continue to go along with the Appellant after the incident up to town, without getting off when the Appellant stopped at an ATM at North East Point. Also, ML had not clarified what made her think that the Appellant would kill her, when all that the Appellant had said up to that time was that he liked her, that he loved her and that he will give her money. There is a contradiction between the evidence of ML and Police Officer Sultane Amice and that of Dr. T. Velasquez as could be seen in the paragraphs below in regard to the condition of the panty. ML and Police Officer Sultane Amice had said it was torn but Dr. T. Velasquez that it was not. The clothing that ML had been wearing at the time of the incident was examined by all three Justices and Counsel on both sides at the hearing of this appeal. The panty, undoubtedly was torn at the hem on both sides and had a big hole in front and any person even having a cursory glance at it could not have missed it. Thus there is a doubt as to how the doctor could have missed seeing it. The pair of knee length tight Denims and blouse which had very thin straps was intact and had no tears whatsoever. The zip and the button at the waist of the shorts also remained intact. The condition of the denims and blouse does not indicate that there had been a struggle between ML and the Appellant and that the denims were removed with force as stated by ML. According to the Appellant, as could be seen later, it was ML who removed her trouser and panty and wore the clothes back after having sex.

7. Anifa Jean-Baptiste had corroborated the version of ML about receiving a call from ML on the 25th of March 2020. It appears she is the Anifa

Jeannevole referred to in the evidence of ML. According to her it was “a while before 04.00 pm” and she had advised ML to go to the police station. ML is alleged to have told her what had happened.

8. Sub-Inspector Timothy Hoareau had arrested the Appellant on the 25th of March 2020 at 05.35 pm, about 2 1/2 hours after the alleged incident.
9. Dr. T. Velasquez had examined ML at the Victoria hospital at 7.25 pm on the 25th of March 2020 and that after ML had narrated to her what had happened to her. The examination had been about 4 hours after the incident. Her examination had revealed there were no marks on the body or skin indicative that she had fought with a man. The swab taken was negative and this because ML had told her that the Appellant had used a condom. Dr. T. Velasquez under cross-examination had answered in the affirmative the question put to her, namely “Did you have a good look at the panties that you removed?”. When asked “What condition was the panty?” her answer had been “It was normal.” In re-examination when asked whether she had mentioned anything in her report about the condition of the panties her answer had been she had not mentioned anything as there was nothing to mention in that regard. The doctor’s evidence shows the panty ML was wearing was normal and there was nothing wrong with it, which indicates that it was not torn as stated by ML.
10. Police Officer Sultane Amice had said that she took over the panty ML had been wearing at the house of ML after she had gone to the hospital and had been examined by the doctor. The panty according to her was torn.
11. The Appellant’s first statement made at 06.02 pm about 3 hours after the alleged incident and about 30 minutes after his arrest, that had been led by the prosecution as part of its case, without any objection from the defence, is as follows: “I knew a lady for about approximately one month. During that month that we knew each other we talked to each other over the phone. At times she calls me and at times I call her. When I do not have work to do I made illegal Taxi trip but not every time. At times I made trips for that lady which I knew her for one month. While we were

communicating that lady told me that her name is Kathrina but I do not know her surname. We both agreed for us to have a side relationship with each other. Kathrina told me that she has her boyfriend and she knew that I have my wife. Each time when I made trips for her I brought her at Mont Buxton. I would like to state that when I am not working Kathrina and I used to go for a ride, during that time we kissed each other and she always accepted for me to kiss her, I never forced her. Today Wednesday 25th March 2020 Kathrina call me to come to pick her up in town and that was around 1430hrs. I picked her up at Barrel Discotheque. When she embarked in the car, she sits on the back seat behind the front passenger seat. She told me to go at Perseverance. Kathrina told me that she will sit on the back seat thus to prevent her boyfriend from seeing her. We went at Perseverance leading to Anse Etoile and there we sat and talk and even kissed each other. At that time, she was sitting on the front passenger seat next to me. Whilst we were talking, she asked me to give her some money, she asked me to give her Rs1500 (fifteen hundred rupees), I told her that I do not have the money and that I will give it to her lately. I asked her for us to have sex, she agreed to do so. Kathrina was wearing a trouser but I do not recall the colour. She started to touch me and she lower the back part of the seat where she was sitting, then she removed her trouser and her panty which I do not recall the colour. I moved from the driver's seat and I came in front of her. I took a durex that I brought with me and placed it on my penis. That durex Kathrina told me to bring along when she called me earlier. She opened her legs herself and I inserted my penis in her vagina. I would like to state that I did not force or pressed her while we were having sex. While I was inserting my penis in her vagina Kathrina enjoyed because I heard her moaning in a manner that I was satisfying her. It was not for long because I ejaculate quickly. When I finished ejaculating, I woke up on her and removed that durex containing of sperm inside and throw it outside the car. Kathrina used her panty to clean her with and then she wore her clothes back. After we both ready to leave Kathrina went back on the back seat where she was sitting. I would like to state that before we had sex, I moved my grey short as well as my blue boxer, I kept my T-Shirt on and thus was a grey T-Shirt with a small pocket on the left upper side. I would also like to state that Kathrina didn't ask me to stop or to fight with

me when we were having sex. After that I brought Kathrina at the Bus Terminal in town, we went through the same road we took when we were coming. When we leave we were talking to each other. Before she disembarked from the car, I told Kathrina that when I get my money I will contact her, she told me that it is okay. She even told me that she gives me thirty (30) minutes for me to give her the money or else we will not see each other again. I was in a grey hired car make Picanto. I rented that car with a lady who I do not know her name. I would like to tell the police that if I gave Kathrina the money she wouldn't report to the police."

12. The Appellant's second statement, which had also been led by the prosecution as part of its case, without any objection from the defence is as follows: "Today the 3rd April 2020 at Anse Aux Pins Police Station the lady pointed on me in the line as she knows me and we had a relation with each other before. I state that the lady who has pointed on me, her name is Christine but I don't know her signature."

13. From the telephone records produced by Cable & Wireless (Seychelles) Ltd and Airtel there is no record of any calls from the Appellant's phone numbered 2543364 to 274477, the phone claimed to be used by ML during the period 23rd March to 25th of March 2020. However from the telephone records produced by Cable & Wireless (Seychelles) Ltd on Appellant's phone numbered 2543364, the Appellant had received a call from 2567509 at 02.39 pm from Saint Louis which is in the area of Barrel Discotheque, the place where according to the Appellant he had picked up ML on the 25th of March. It is to be noted that Hilltop Hotel where ML works as a chamber maid is at Saint Louise and a short distance from Barrel Discotheque. Thereafter he had received about 6 calls on his phone (at 02.54, 03.13, 03.41, 03.51, 03.59 and 04.00 pm) up to the time Anifa Jean-Baptiste received a call from ML around 04.00 pm giving rise to a doubt whether the Appellant could have been involved in committing the offence of rape during the said period and at the same time picking up calls. The last incoming call recorded on ML's phone 274477 on 25th March had been at 01.32 pm, which appears to coincide with ML's evidence that phone 274477 had got discharged since she left work that day. The telephone

records produced in this case does not necessarily contradict the Appellant's statement that during the month of March he and ML spoke to each other over the phone as the Appellant had not specified when they spoke to each other over the phone during the month of March 2020 or for that matter whether he spoke during the period 23rd to 25th until he received a call from ML around 02.30pm on the 25th of March to pick her up in town.

14. As stated earlier the Appellant's statement had been led by the Prosecution as part of its case. Undoubtedly, this was a mixed statement, containing both inculpatory and exculpatory parts, namely where the Appellant admits to sexual intercourse with ML, but states that it was with her consent. In such a situation the Appellant's version of the incident, in regard to its material particulars should have been put to ML in her examination-in-chief, by the Prosecutor since it contradicts the prosecution version, namely the evidence of ML and therefore her response to it should have been sought. In its absence the prosecution itself has presented two divergent versions from which no reasonable court could have come to a determination. This is more so because one of the essential elements of the offence, namely non-consensual intercourse had to be proved beyond a reasonable doubt. The position would have been different if the Appellant's version of the incident wholly corroborated the evidence of ML. The learned Trial Judge should, in my view, in the circumstances of this case, not only have pronounced that she "found the complainant in this case very credible in the evidence she gave" as she did, but should have necessarily pronounced why she disbelieved the Appellant's version.

15. **Lord Lane CJ in R V Duncan (1981) 73 Cr App Rep 359** in a dictum which has been subsequently applied by the Court of Appeal in **R V Hamand (1985) 82 Cr App Rep 65** and unanimously endorsed by the House of Lords in **R V Sharp (1988) 1 All ER 65 (HL)**, said: "*Where a 'mixed' statement is under consideration by the jury in a case where the defendant has not given evidence, it seems to us that the simplest, and, therefore, the method most likely to produce a just result, is for the jury to be told that the whole statement, both incriminating parts and the excuses or explanations, must*

be considered by them in deciding where the truth lies. It is, to say the least, not helpful to try to explain to the jury that the exculpatory parts of the statement are something less than evidence of the facts they state. Equally where appropriate, as it usually will be, the judge may, and should point out that the incriminatory parts are likely to be true (otherwise why say them?) whereas the excuses do not have the same weight..." (emphasis by me)

16. In the Scottish case of **James McGirr V Her Majesty's Advocate (2007) HCJAC7** the accused in his statements to the police had admitted the killing but said it was under provocation. The sole issue before the Court was whether the appellant should be convicted of murder or of culpable homicide on the basis of provocation. The appellant, like in this case, did not give evidence but relied on the statements to the police. This being clearly a mixed statement the Appeal Court of Scotland held: "*Where the Crown leads evidence of a mixed statement, the trial judge must direct the jury that its contents are available as evidence for or against the accused, whether or not the accused gives evidence (Jones V HM Adv, 2003 SCCR 94), and that they must determine whether the whole or any part of the statement is to be accepted by them as the truth. He should also specifically direct them that if they believe the exculpatory part or parts of the statement, or if the statement creates in their minds a reasonable doubt as to the guilt of the accused, they must acquit. (cf Scaife V HM Adv, 1992 SCCR 845, at p 848)"* (emphasis by me).

17. As stated earlier this is a case where the prosecution itself has presented two divergent versions, which has led to a situation where each of the versions does not make a consistent story and both versions could not possibly have been true or correct, namely whether it was non-consensual or consensual sexual intercourse. The resulting doubt ought to have been resolved in favour of the appellant. This case can be compared to a case where one witness called by the prosecution contradicts another prosecution witness on material points and it becomes necessary for the prosecution to discredit and reject the evidence of one witness by treating him as hostile before asking court to accept the evidence of the other

witness and convict the accused. The Supreme Court of Nigeria in the case of **Christopher Onubogu & Anor v. The State (1974) LPELR-SC.180/1974** said:

*“Where one witness called by the prosecution in a criminal case contradicts another prosecution witness on a material point, the prosecution ought to lay some foundation such as showing that the witness is hostile, before they can ask the court to reject the testimony of one witness and accept that of another witness in preference for the evidence of the discredited witness. It is not competent for the prosecution which called them to pick and choose between them. They cannot, without showing clearly that one is a hostile witness, discredit one and accredit the other. (See *Summer and Leivesley v. Brown & Co. (1909) 25 T.L.R. 745*). We also think that, even if the inconsistency in the testimony of the two witnesses can be explained, it is not the function of the trial judge, as was the case here, to provide the explanation. One of the witnesses should furnish the explanation and thus give the defence the opportunity of testing, by cross-examination, the validity of the proffered explanation.”* See also **Nwabueze v. State (1988) 4 NWLR (Pt. 86) 16; Boy Muka v. The State (1976) 9 – 10 SC 305 and Dogo v. State (2001) 3 NWLR (Pt 699) 192.** (emphasis by me)

18. In the South African case of **Nelson S. Nzimande and The State AR 21/2017 (29 August 2017)** the High Court of South Africa Kwazulu-Natal Division stated: *“In the present matter I consider that the evidence of the complainant and her brother was adduced in a most haphazard and unsatisfactory manner, the witnesses not only contradicted themselves but also each other and no effort whatsoever was made to clarify the issues as they arose. The contradictions were material and affected the overall credibility of the witnesses. The learned magistrate’s finding that the evidence was clear and satisfactory in all material respects was arrived at without conducting a careful assessment of all the evidence before her. In this regard I consider that she misdirected herself. In my view, the learned magistrate ought to have entertained serious doubts about the guilt of the*

appellant having regard to the material contradictions which arose in the evidence before her. It follows, in my view, that the conviction cannot stand and must be set aside.” (emphasis by me)

19. The learned Trial Judge having correctly stated that that the evidence of ML, namely the prosecutrix, requires no corroboration, identifies “three independent strands of evidence adduced by the prosecution to bolster her narrative of events.”, namely:

- i. The torn panty bolsters the version of ML
- ii. That the Appellant who in his statement had claimed that he had a relationship with ML, the prosecutrix for a month before the incident, had not been able to state the correct name of the prosecutrix and had called her Kathrina in the first statement and Christine in the second statement, thus putting his version of the incident in doubt.
- iii. The phone calls the Appellant had claimed to have had with ML to show their relationship never happened.

20. As regards the torn panty there is a contradiction between the evidence of Dr. T. Velasquez who examined ML after the incident in the clothing she was wearing at the time of the incident and ML and Police Officer Sultane Amice. As stated, earlier Dr. T. Velasquez under cross-examination had answered in the affirmative the question put to her, namely “Did you have a good look at the panties that you removed?”. When asked “What condition was the panty?” her answer had been “It was normal.” In re-examination when asked whether she had mentioned anything in her report about the condition of the panties her answer had been she had not mentioned anything as there was nothing to mention in that regard. ML had also said that she thinks that the doctor saw the panty. It is the duty of any doctor examining a rape victim to look for any injuries in the body, the pubic area and examine the pubic hair and clothing that the victim was wearing at the time of the sexual assault. There had been no suggestion by the Prosecution that the doctor had failed in her duty in this regard. The

learned Trial Judge in her judgment regarding the discrepancy pertaining to the panty in the evidence of ML and the Doctor had stated it “must be due to the fact that the doctor did not pay particular attention to them.” This is merely an assumption and contrary to the evidence of Dr. T. Velasquez. I am of the view that the learned Trial Judge had erred in this regard as the doctor had specifically stated that she had a good look at the panties that she removed and it was normal. I also take note of ML’s evidence that she had removed the panty in the presence of the doctor and put it back on her “the same way” she removed it, and this the ‘torn panty’. The panty that was produced in Court at the trial, that was examined by all three Justices and Counsel on both sides, as stated earlier undoubtedly was torn at the hem on both sides and had a big hole in front and any person even having a cursory glance at it could not have missed it. Thus, there is a doubt as to how the doctor could have missed seeing it. In view of the material contradiction in the evidence of the doctor and ML and Police Officer Sultane Amice, it was unsafe for the learned Trial Judge to have placed reliance on that evidence to convict the Appellant.

21. As regards the failure of the Appellant to state the name of the Appellant correctly in the two statements he made to the police, it is to be noted that according to the Formal Charge and the Criminal Complaint filed in Court the name of the prosecutrix is stated as Ms. Marvelle ‘Kerone’ Louise. In my view the name Kerone; could easily can get mixed up with Kathrina and Christine as they are similar sounding words. There is also the possibility, that ML had not given her correct name to the Appellant as she according to the Appellant’s statement had wanted to hide her relationship with the Appellant from her partner.
22. The telephone records produced by Cable & Wireless (Seychelles) Ltd and Airtel in relation to phone calls referred to in the Appellant’s statement do not prove anything as stated at paragraph 13 above. In fact, the records somewhat corroborate the Appellant’s version as stated at paragraph 13 above.

23. The learned Trial Judge had thus erred, in identifying the three independent strands of evidence adduced by the prosecution as bolstering the narrative of events of ML, as stated in her judgment. The outcome of the case may have been different had she not erred in this regard. The learned Trial Judge had not considered the whole statement of the Appellant, especially the exculpatory parts in deciding where the truth lies. The learned Trial Judge had not considered those parts of the Appellant's statement, suggestive that the act of sexual intercourse had been with the consent of ML. No effort had been made to clarify the differences and the probabilities of the two versions save for the three independent strands of evidence which according to the Trial Judge bolsters the narrative of events by ML, referred to at paragraph 19 above.

24. The only issue to be determined in this appeal is the issue of consent. The learned Trial Judge had correctly stated in her judgment: "It is common ground that vaginal intercourse took place between the accused and the complainant. The complainant's evidence is that the intercourse was without her consent whilst the accused's narrative in his statement is that the intercourse was consensual."

25. Section 130(3) makes reference to when a person does not consent to an act of sexual assault as follows:

"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 fifteen years; or

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

The corollary of this could be said to be, where the person is above the age of fifteen years, and the person's understanding and knowledge are such that the person is capable of giving consent and there has been no

misrepresentation as to the character of the act or the identity of the person doing the act, a person consents. To be 'capable of giving consent' means having both the mental and physical ability to freely and voluntarily agree to engage in sexual intercourse. There is no evidence in this case of any mental or physical disability on the part of ML. It is the capacity to understand what is happening and making an informed decision and a choice one makes without any form of unlawful pressure or manipulation. Absence of consent being an element of the actus reus of the offence, has to be proved by the prosecution. The mens rea of rape is satisfied where the accused intentionally penetrates the vagina, knowing and having reason to believe, that the prosecutrix is not consenting.

26. The learned Trial Judge in her judgment had correctly set out the law in seeking to define consent and had stated that it "should be one that includes a communicative or affirmative consent standard. Such a standard would require that those engaging in sex demonstrate their consent to another...through actions or words". She had gone on to say that consent is not proved by the absence of a woman screaming, resisting or fighting off her attacker. Quoting R V Malone (1998) Cr. L. R. 834, the learned Trial Judge had said that there was no requirement that absence of consent be demonstrated or communicated.

27. The learned Trial Judge had also stated "That it is time to look beyond the traditional male perspective as the prism through which sexual offences must necessarily be viewed." and quoted R V Olugboja (1982) QB 320 where Dunn LJ said that "*There is a difference between consent and submission: every consent involves a submission, but it by no means follows that a mere submission involves consent.*" I do agree with the pronouncement made by Dunn LJ in R V Olugboja, but to distinguish between submission and consent is difficult and would depend on the circumstances of each case. I wish to add that to accept that all women will simply submit in the face of a sexual assault without trying to escape or putting up any form of resistance will be an insult to the character, personality and dignity of women and certainly militate against the modern

female perspective through which sexual offences are viewed. It should be noted that this was a case where the complainant did not testify there was violence or even a threat of violence from the Appellant.

28. In order to determine whether ML demonstrated her consent to the Appellant through her actions or words, I am compelled to look at the Appellant's statement, which had been led as part of the prosecution case, which has not been specifically disbelieved by the learned Trial Judge. According to the Appellant's statement it was ML who had called him on the 25th of March 2020 to come and pick her up in town and had asked him to bring a durex along with him. ML on embarking in the car had sat on the back seat behind the front passenger seat so that her boyfriend will not see her. Arriving at Perseverance ML had moved to the front passenger seat next to the Appellant and both of them had talked and kissed each other. ML had asked the Appellant to give her Rs 1500. ML had agreed to have sex with the Appellant. ML had caressed the Appellant and lowered the back part of the seat. She had removed her trouser and her panty. The Appellant had then moved from the driver's seat and had come in front of ML. The Appellant had then put on the durex and inserted his penis into ML's vagina, when she on her own opened her legs. The Appellant had stated ML enjoyed having sex with him as he heard her moaning in a manner that he was satisfying her.

29. I have noted my comments at paragraph 6 above in relation to ML's evidence. It is to be noted that Dr. T. Velasquez who had examined ML about 4 hours after the incident had not seen any marks on the body or skin of ML, despite ML's evidence that her clothes were removed by force and that the Appellant had grabbed her hand and pressed against it. The Appellant's statement that arriving at Perseverance he and ML started talking to each other is corroborated by ML.

30. I am of the view that the prosecution has failed to prove absence of consent, beyond a reasonable doubt. In view of the circumstances outlined before, it cannot be said that the Appellant had reason to believe that ML was not consenting, in fact it is the exact opposite.

31. It is not that I totally disbelieve the victim's version or believe the version of the Appellant, as found on the recorded proceedings, but I find that both parties are hiding something and not coming out with the whole truth. This is one of those cases that there certainly are doubts in the prosecution case, that have been highlighted above, which both the learned Prosecutor and the learned Trial Judge have failed to deal with. The Prosecution has not offered any evidence to dispel these doubts nor has the learned Trial Judge dealt with these doubts.
32. I am reluctant to disturb the findings of a Trial Judge on facts and credibility, but when there has been no evaluation or critical analysis of the evidence by the learned Trial Judge but a mere reliance on the evidence and that only of the prosecutrix, I am compelled to intervene. The learned Trial Judge had failed to consider the version of the prosecutrix as regards the alleged incident of rape as described by her, as probable and can be relied upon without a reasonable doubt, vis-a vis the version of the Appellant as being reasonably possible. The reasons set out in the judgment by the learned Trial Judge as referred to at paragraph 19 above, for convicting the Appellant are insufficient and unsatisfactory as she had overlooked and erred in relation to certain facts and failed to consider certain improbabilities.
33. Factual errors may be errors where the reasons which the trial judge provides are unsatisfactory or where he overlooks facts or improbabilities. When evaluating or assessing evidence, it is imperative to evaluate all the evidence and not be selective in determining what evidence to consider. In the **South African case of S V Van der Meyden 1999 (1) SACR 447 (W) 450** it had been stated: *"What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false, some of it might be found to be unreliable, and some of it might be found to be only possibly false and unreliable, but none of it may simply be ignored"*.

34. I cannot close my mind to the well-known principle that the benefit of any doubt has to go in favour of the accused, especially when the overall picture arising from those doubts creates a reasonable doubt as to the guilt of an accused person. This Court had held in **Raymond Lucas VS The Republic SCA 17/09 [2011] SCCA 38 (02 September 2011)** that it was not obligatory on the Court to give a corroboration warning in cases involving sexual offences before convicting an accused person, but when as in this case there are doubts in regard to the evidence of the prosecutrix and the case in its entirety; and which cannot be resolved and which leads up to a reasonable doubt I have no option but to give the benefit of that reasonable doubt to the Appellant.
35. It was held in the South African case of in **S V Van der Meyden 1999 (1) SACR 447 (W)** that: *“The onus of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent. These are not separate and independent tests, but the expression of the same test when viewed from opposite perspectives. In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same time no reasonable possibility that innocent explanation which has been put forward might be true. The two are inseparable, each being the logical corollary of the other.”*
36. In the Canadian case of **R VS Lifchus [1997] 3 SCR 320** it was held: *“Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilt of the accused beyond a reasonable doubt...”*
37. In the United States Supreme Court decision in **Re Winship [1970] 397 US 358**, the court held that the reasonable doubt rule has constitutional force under the due process provisions of the United States Constitution. The same could be said in regard to **article 19(1) of our Constitution** which states that *“every person charged with an offence has the right to a fair*

hearing” and under **article 19(2) (a)** “is innocent until the person is proved or has pleaded guilty”. **Brennan J said in Re Winship**: “Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.”

38. The Supreme Court of India said in **B. N. Mutto & Another v. Dr. T.K. Nandi [1979] 1 SCC 361**: “It stems out of the fundamental principle of our criminal jurisprudence that the accused is entitled to the benefit of any reasonable doubt. If two reasonably probable and evenly balanced views of the evidence are possible, one must necessarily concede the existence of a reasonable doubt. But fanciful and remote possibilities must be left out of account. To entitle an accused person to the benefit of a doubt arising from the possibility of a duality of views, the possible view in favour of the accused must be as nearly reasonably probable as that against him.”

39. The Supreme Court of India said in the case of **State of Punjab v. Jagir Singh [1974] 3 SCC 277**: “A criminal trial is not like a fairy tale wherein one is free to give flight to one’s imagination and fantasy. It concerns itself with the question as to whether the accused arraigned at the trial is guilty of the crime with which he is charged..... In arriving at the conclusion about the guilt of the accused charged with the commission of a crime, the court has to judge the evidence by the yardstick of probabilities, its intrinsic worth and the animus of witnesses. Every case in the final analysis would have to depend upon its own facts.....”

40. In the South African case of **S v T 2005 (2) SACR 318 (E)**: “The State is required, when it tries a person for allegedly committing an offence, to prove the guilt of the accused beyond a reasonable doubt. This high standard of proof – universally required in civilized systems of criminal justice – is a core component of the fundamental right that every person enjoys under the Constitution and under the common law prior to 1994, to a fair trial. It is not part of a charter for criminals and neither is it a mere technicality. When a court finds that the guilt of an accused has not been

proved beyond reasonable doubt, that accused is entitled to an acquittal, even if there may be suspicions that he or she was, indeed, the perpetrator of the crime in question. That is an inevitable consequence of living in a society in which the freedom and the dignity of the individual are properly protected and are respected. The inverse – convictions based on suspicion or speculation – is the hallmark of tyrannical systems of law....”

41. In the South African case of **Ricky Ganda vs The State [2012] ZAFSHC 59**, it was held: *“..... The proper approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and having done so, to decide whether the balance weigh so heavily in favour of the state as to exclude any reasonable doubt about the accused’s guilt.”*
42. Also, in the South African case of **Zulman JA in S v V2000 (1) SACR453 (SCA)**: *“It is trite that there is no obligation upon an accused person, where the State bears the onus, “to convince the court”. If his version is reasonably possibly true, he is entitled to his acquittal even though his explanation is improbable. A court is not entitled to convict unless it is satisfied not only that the explanation is improbable but that beyond any reasonable doubt it is false....”*
43. In the Zimbabwe case of **S V Makanyanga 1996 (2) ZLR 231** the court observed: *“A conviction cannot possibly be sustained unless the judicial officer entertains a belief in the truth of the criminal complainant, but the fact that such credence is given to the testimony does not mean that conviction must necessarily ensue. Similarly, the mere failure of the accused to win the faith of the bench does not disqualify him from an acquittal. Proof beyond reasonable doubt demands more than that the complainant be believed. It demands that a defence succeeds wherever it appears reasonably possible that it might be true.”*
44. In **R V Cooper [1969] 1 All ER 32 at 34** it was said an appeal court: *“must in the end ask itself a subjective question, whether we are content to let the*

matter stand as it is, or whether there is not some lurking doubt in our minds which makes us wonder whether an injustice has been done. This is a reaction which may not be based strictly on the evidence as such; it is a reaction which can be produced by the general feel of the case as the court experiences it..."

45. In this case there is a lurking doubt in my mind as to whether the conviction should stand based on an analysis of the evidence of both the prosecutrix and the Appellant, and the general feel of the case.

46. For the reasons enumerated above I have decided to allow the appeal, quash the conviction and acquit the Appellant forthwith.

Fernando President

I concur:

Robinson JA

I concur:

Tibatemwa-Ekirikubinza JA

Signed, dated and delivered at Ile du Port on 29 April 2022.