IN THE SUPREME COURT OF SEYCHELLES

THE REPUBLIC

VERSUS

ROMEL ALBERT **ACCUSED**

Criminal Side No 4 of 2006

Mr. Esparon for the Republic

Mr. B. Hoareau for the Accused

JUDGMENT

Perera ACJ

The Accused stands charged with the offence of sexual interference with a child, contrary to Section 135(1) of the Penal Code. That Section provides that –

> "135(1) A person who commits an act of indecency towards another person who is under the age of fifteen years is guilty of an offence and liable to imprisonment for 20 years."

According to the particulars of offence, the accused, allegedly had sexual intercourse with one VM, a girl of 12 years of age, at Anse Royale on 28th January 2005.

After the Complainant had given evidence, the Prosecution added a second charge under Count 2, based on Section 135(1) but the particulars of the offence were *"Romel Albert on 28th January 2005, at Anse Royale, Mahe, committed an act of indecency towards another person, namely VM, a girl of 12 years of age, by touching the breast and the vagina of the said VM".* Learned Counsel for the

Accused had no objections to that addition, and consequent to that count being put to the Accused, he pleaded not guilty. The trial proceeded on the basis of two counts thereafter.

In his closing submissions, however, Learned Counsel for the Accused contended as a matter of law that the charge under Count 1 was a nullity on the ground that there was no offence known to law as "*sexual interference".* He submitted that the offence specified in Section 135(1) was "*an Act of indecency towards another person*" and not "*sexual interference"* as stated in Count 1. He therefore submitted that that charge was a nullity, and that for the same reason, Count 2 was also a nullity.

The reference to "*sexual interference"* in the marginal note to Section 135(1), should, pursuant to Section 7 of the interpretation and General Provisions Act (Cap 103), be treated as having being inserted or convenience or reference only, and not as part of the act.

The essence of that section is the *act of indecency*. The House of lords, in the case of ***R v. Court (1988) 2. A.E.R. 221*** affirmed that a sexual motive could not of itself render an assault indecent. It was held that indecency must be manifested in conduct, at least to the extent that "*right minded persons*" would consider, without reference to any uncommunicated motive of the defendant, that the conduct in question might involve indecency. If it does, the uncommunicated motive of the defendant can be referred to in order to characterize the conduct as indecent or decent according to the presence of sexual motivation. "*Whether particular conduct can be a candidate for sexual characterization is a matter for the Judge".* In that respect, Prof Glanville Williams defined the word "*indecent"* as "*overtly sexual".* So also ***Lord Lane CJ in Faulknor v. Talbot (1981) 3. AER 468 at 471*** defined *"sexual*

assault" to include "*any intentional touching of another person without the consent of that person and without lawful excuse. It need not necessarily be hostile, rude or aggressive as some of the cases seem to indicate".* Section 135(1), deals with offenders who sexually interfere with children under the age of 15 years, by committing acts of indecency in the sense discussed above.

In the present case, Count 1 which particularizes the offence as sexual intercourse, could well have been based on Section 130(2) (d). In the case of ***Hibonne v. R (1976) S.L.R. 47,*** it was contended in Appeal that the charge was defective in that in the statement of offence Section 291 should have read Section 292, and that in the particulars of the offence mention should have been made of all the elements of the felony of breaking into a building with the intent to steal. ***Sauzier J*** following the case of ***R v. Mcvitie (1960) 2. A.E.R 498*** held that those defects did not make the charge bad in law, but only made it defective. He applied Section 331 (a) of the Criminal Procedure Code, and held that no failure of justice had been occasioned and that the Accused had not been prejudiced. In the present case as well, although the statement of offence in Count 1 is defective as to form, yet it could not be stated that the Accused was prejudiced in his defence, as the offence was clearly particularized. For similar reasons, Count 2 is also not bad in law.

The Complainant, who was 12 years old at the time of the alleged incident *(born on 2nd August 1992),* and 14 years old at the time of testifying in Court on oath, was reluctant to answer questions put to her in examination in chief. However, making allowance for her tender age and the exposure to Court proceedings, evidence was recorded with much delay due to her remaining silent when being questioned on material particulars. She however stated that she came to the house of one Bertha Renaud on her way home from school. Later she told her that she was going to her own home with another girl called Sheryl, a friend, to change her clothes. Sheryl

drank some water and left. She saw the Accused outside, so she ran inside her house and closed the door, but did not lock it. There was no one else at home at that time. The Accused pushed the door, and came in. She was hiding in her room, when the Accused came there and grabbed her. She asked him to release her, but he pressed her to the bed. The Complainant stated that she could not remember what happened thereafter. At that stage the Prosecution, with Counsel for the Accused not objecting gave the statement to the Complainant to refresh her memory. Thereafter she stated that the Accused touched her breasts, and her vagina. She also stated "*and then he had sex with me".* However, despite persistent questioning by Counsel for the Prosecution, the Complainant did not explain what she meant by "*sex".* Counsel for the defence objected to further evidence on that matter and submitted that in the statement to the Police, the Complainant had only stated "*he pulled me and he did a lot of bad things with me, and I stopped him."*

The Complainant further testified that in April 2005, that is about four months after the Alleged incident, her mother accused her of visiting one Channel Alcindor at his house. She denied going there.

In the examination, in chief, she stated that she made a second statement to the Police on 20th April 2007 stating that she did not want to proceed with the case, but now she wanted to proceed as her mother wanted it.

Questioned by Court once again as to what she meant by stating that the Accused had "*sex*" with her, she continued to be silent, as she did when questioned by Counsel for the Prosecution on that matter. It was thereafter that the Prosecution added the Count 2.

Sheila Gomme (Pw2) the mother of the Complainant testified that one Bertha

Renaud asked her whether the Complainant was sent for an errand at Channel Alcindor's house, and she said no. She was also told that the Complainant had got a letter, but when she asked her for it, she refused to give it. Thereafter she took her to the hospital for a medical examination where Dr. Michel confirmed that she was sexually active. The report dated 26th April 2005 (P1) issued by Dr. Michel, the gynecologist reads thus-

Re VM – 12 years

Patient VM aged 12 years has been brought by mother for examination.
Apparently she has been coming out from the house of a young men (sic).

On Examination

- no bruises

vulva – slight whitish discharge
hymen not intact – old laceration marks
Diagnosis – sexually active

Sg

d. Dr. Michel

GYNAECOLOGIST"

The doctor was not called to testify regarding this report.

Sheila Gomme further testified that although others told her that the Complainant was speaking to Channel Alcindor, she herself had not seen that.

Corp. Agnes Julius (Pw3) produced a statement under caution made by the accused on 4th August 2005. According to the personal details thereon, the accused was a Prisons Officer at the Long Island Prison. That statement was admitted in evidence without objections from the defence. (P3). In that statement, the accused had stated –

"I am staying at Anse Royale with my mother Jeanne Pothin, VM it could be five years since I knew her. From where she lives is not too far from my place. I know her mother very well and I used to talk with them before. VM used to come to my place and sometimes my concubine made her go to the shop for her. Sometimes my concubine is there when she comes to my place and sometimes I am alone. She came to my place only when I called for her or my concubine called her. When VM came to my place she helps me by holding woods for me or if am cleaning the water tank I gave her the pail to hold. Any help I need she gave me. I don't gave VM any money but when its school term I gave her some school items. Her mother knew that she came to my place to help me. I have never taken VM in my bedroom to do sexual intercourse. I have *learnt that VM had done sexual intercourse with a namely Channel Alcindor who actually came to a neighbour's place namely Bertha Renaud. Me I have never done sexual intercourse with VM. I don't know why VM is saying those lies against me because I have never had any problems with her and with her mother. I think VM is 13 years old. Now VM and her mother had stopped talking to me regarding this problem.*

SGN: ***R ALBERT***"

Bertha Renaud (PW4) testified that the Complainant came to her house whenever her mother Sheila Gomme was not at home. On the material day, the Complainant came from school, and left to change her clothes. Apart from that she did not know what happened. When the Complainant returned, she was normal, and did not make any complaint to her. The witness further stated that the Complainant and the accused were *"like two friends, are like my children and while VM is at my place, Romel could sometimes take her to his place, but only when his wife is around*". Later she added that the Complainant was taken even when the accused's wife was not at home. However one day, she saw the accused exposing himself to the

Complainant outside her house, when she was doing her school homework inside the house. The accused, who was wearing a pair of shorts, had lowered it exposing his "*private part".* She told the mother of the Complainant about that incident, but she did not take any notice.

At the end of the case for the Prosecution and upon being called to present the defence, the accused elected to make a statement from the dock and to call one witness. He stated –

> "I am Romel Albert, I live at Anse Royale, with my wife Jeanne Pothin. I have known V for about 5 years. She will come to my place sometimes when my wife is there, and sometimes, if ever I am alone, I need a little help, I ask her, and she comes. Her Mum was aware that she used to come, whenever I need her, or, when my wife ever needs some help, maybe to go to the shop to buy a few stuff, she will call her and she will send her to the shop. Whenever she comes to do a few chores, maybe help me doing a few stuffs in the house, I never gave her money, but when, in the beginning of the term, after Vacation, I helped her with the stationeries, bags, a few stuffs like this. So, I heard from the green pipes that she was having an affair with somebody named Channel Alcindor.
>
> *O.K, that is when her Mum decided to take her to have an examination, and was brought to the Police to give evidence on whoever took her virginity, or whatever. So, I was shocked when I found out that my name came up, after we have been, I mean, like brothers and sisters, like friends and families. What I can say is that I have never had any sexual intercourse or sexual affairs with her, and something else I would like to add, of what the lady said, I never went in her backyard or whatever, to stand nude and showing my private parts to the girl, and she said that I am not talking to her, but now can I do it, I am under a caution of Rs10,000 and she is a witness? One*

thing I can say is that, my wife, she is still in good terms with my wife, even though I am not talking to them. My wife goes there and exchanges some ideas. I do not know what they say, but I never go there. That is all my statement".

Robin Quatre (DW1) testified that he was living in the house of the Alcindor family at Anse Royale. At that time, only Channel Alcindor was living with him there as the rest of that family had left. He lived there only for the month of April 2005. During that time, the Complainant came there to inquire about Channel. He had not seen both of them inside the house, or talking to each other. On being cross examined, he stated that he knew the accused. He further stated that Channel Alcindor was an irresponsible person, and had "*trouble with the Police".* His parents asked him to build a wall on the property and to look after the building materials. As he was there only in April 2005, he could not testify as to whether the Complainant visited Channel in January 2005. He further stated that Channel Alcindor made him go to Prison for 8 years, and hence he did not want to see him implicate anyone else and get away for what he has done.

As was stated by the Court of Appeal in the case of ***Raymond Mellie v. R (S.C.A. No. 1 of 2005)***

"……..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.

…… there are situations or cases requiring corroboration, but that the same cannot be easily available. In such cases, the trial court can still

convict an accused on uncorroborated evidence after warning itself. Failure to do so, an accused must be acquitted".

Analysing the evidence in the present case, the alleged incident involving the accused occurred on 28th January 2005. The Complainant had not informed her mother or Bertha Renaud about that. It was only in April 2005 after Bertha Renaud informed the mother of the Complainant, about seeing her at the house of Channel Alcindor that she was taken for a medical examination. Considering Count 1, the gravaman of the charge is that the accused sexually interfered with the Complainant by having sexual intercourse with her on 28th January 2005. The medical evidence is that her hymen was not intact, and that there were "*old laceration marks*" there is no evidence as to whether those marks were caused by sexual intercourse or by any other act of indecency. The Complainant did not explain what she meant when she stated that the accused had "*sex*" with her despite questions from both Counsel and the Court. The closest she get was when she stated the accused touched her vagina. In these circumstances, it is unsafe to convict the accused under Count 1.

As regards Count 2, the Complainant's "*expressed"* evidence is that the accused touched her breasts and her vagina. Some corroboration of this evidence can be found in the medical evidence that there were old laceration marks on the hymen. Corroboration is required in sexual offence cases, especially when young children are victims, due to the danger that allegations can be easily fabricated, and it becomes extremely difficult for the accused to refute. However, as a matter of law, such corroboration is not required to be corroborated where the trial Judge is satisfied, after warning himself of the danger of convicting on uncorroborated evidence, that the victim is truthful. These are all matters of fact. In the case of ***Lespoir v. R (1989) SCAR -*** The acceptance of the evidence of Police Officers and a doctor regarding the distressed condition of the Complainant soon after the

incident, coupled with the findings of a knife which implicated the accused as proving corroboration, was approved by the Court of Appeal.

In the present case, the accused in his statement under caution and the statement from the dock maintained that his relationship with the Complainant was purely platonic, and that he never committed any sexual act with her. He also expressed knowledge of a sexual relationship of the Complainant with Channel Alcindor. The evidence of Robin Quatre (DW1) also shows that the Complainant had some relationship with Alcindor. The Complainant herself stated that he knew him, but denied that she had anything to do with him. Although the Complainant was medically examined only in April 2005 after Bertha Renaud informed the mother of the Complainant about Complainant visiting Channel Alcindor's house, yet, who committed the act of indecency to cause the laceration on the hymen of the Complainant is not conclusive. The evidence of the Complainant therefore stands uncorroborated on that issue. Although the Complainant was initially unresponsive to questions being put regarding the acts allegedly committed by the accused, she became emotional and vociferous when evidence immerged about Channel Alcindor. She attempted to defend him and inculpate the accused. On the totality of the evidence the friendship between the Complainant and Channel Alcindor had existed prior to April 2005. The Court has here to consider that she made no complaint about any act of indecency done by the accused on 28th January 2005 in particular, until she was questioned by her mother in April 2005 about her friendship with Channel Alcindor. On 20th April 2005, six days before the medical examination, she made a second statement to the Police stating that she did not wish to proceed with the charge against the accused. However subsequently, her mother prevailed upon her to proceed. In these circumstances, the Court cannot attach any credibility to the evidence of the Complainant. The accused must therefore be given the benefit of the doubt.

The Prosecution having failed to establish the charges against the accused under both Counts 1 and 2, he is acquitted.

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A..R PERERA

ACTING CHIEF JUSTICE

Dated this 24th day of January 2008