

IN THE SUPREME COURT OF SEYCHELLES

Reportable

[2021] SCSC 16

CO48/2020...

In the matter between

THE REPUBLIC
(rep. By Ms Monthy)

REPUBLIC

and

S [REDACTED] E [REDACTED]
(rep. By Mr Andre)

ACCUSED

Neutral Citation: R v S [REDACTED] E [REDACTED] (CO 48/2020) [2021] SCSC (13th January 2021). ¹⁶

Before: Govinden CJ

Summary: Sexual Assault on a minor; corroboration; alibi evidence; accused convicted

Heard: 3/12/20 and 7/12/20

Delivered: 13 January 2022

ORDER

The accused is found guilty beyond a reasonable doubt as charged.

GOVINDEN CJ

The Charge

- [1] The accused person, S [REDACTED] of Anse Aux Pins, Mahe, stand charged with the offence of Sexual Assault, contrary to section 130 (1) of the Penal Code, read together with sections 130 (2) (d) and (3) (b) of the same. According to the particulars of offence he, during the month of February 2019, at Anse Aux Pins , Mahe, sexually assaulted another namely Ms A N, aged 13 years old at the time, by inserting his penis into the vagina of Ms A N.

Burden/ standard of proof

- [2] The prosecution bears the burden of proving that the accused committed the alleged crime beyond a reasonable doubt.

The Prosecution's case

- [3] The first witness called by the prosecution was M-M B D, who is also the mother of the victim. She testified that in June of 2019, she and the victim met with Dr. Xavier Alvarez (prosecution witness number 3). This visit was prompted by concerns over missed periods and pain in the lower abdomen. During this visit, it was learned that the victim was 20 weeks pregnant. The witness also highlighted what she viewed as change in behaviour by the victim. According to the witness, her daughter had become emotional and avoided interacting with anyone within the home. This also extended to activities in school, where the victim became disinterested in participating.
- [4] The second witness called by the prosecution was Julia Aphonse, a social worker from the Child Protection Department. She was present when the victim gave her statement to the police. One of her observations was that the victim was traumatised and afraid to speak about the sexual assault incident. This was also the case as she took the victim through counselling and during school and home visits.
- [5] The third witness was Dr Xavier Alvarez, a medical doctor who examined the victim. A clinical examination of the victim raised suspicion that she may be pregnant. To confirm this, Dr Xavier Alvarez had to ask for a urine pregnancy test to be conducted. It was established during the same visit that the victim was pregnant and this fact was reported at the Seychelles Police, Child Protection Unit.
- [6] The fourth witness was the victim, who gave her account of events and are summarised as the following. The victim says on 11 February 2019, she was on her way home from her father's place [REDACTED]. Around 5.45 p.m. she arrived at the Anse Aux Pins bus station and contemplated getting a taxi pirate to finish off her journey home. The victim highlights that she looked for a taxi pirate driver who she knew and could not see anyone. A few

minutes later, the accused is said to have seen her and a brief conversation is said to have occurred between the victim and defendant, where the latter asked the former two questions: "What are you doing here?" and whether or not the victim was going home. The victim responded to the latter question by saying she was going home, to which the defendant offered to take her home. It is also the victim's account that there was another female passenger in the front seat, who was dropped off first.

[7] When the female passenger was dropped off, the victim says a series of requests were made by the accused as he drove her home. First, the accused is said to have asked the victim to move to the other side of the back seat in order for him to look at her. Second, the accused is said to have indicated that he is waiting for the victim to turn 18 in order for him to be in a relationship with her. To this, the victim said 'no' and further reminded the accused that he has a wife. The accused is said to have insisted on a relationship with the victim. In response to the insistence, the victim reminded the defendant that she was only 13 years old.

[8] Upon reaching the road that leads to the victim's home, the accused is said to have taken a different route. The victim questioned this and the accused laughed. The victim further states that the accused took another turn into a narrow road where he parked the car, disembarked and passed urine. After this, the accused is said to have opened the backdoor of the car; entered and sat next to the victim; and repeated his romantic interest towards the victim. The victim further states that the defendant said "baby I will just excite you". The accused asked that the victim remove her clothes, to which the victim said 'no' and questioned why he was asking her to do so. In response to this, the accused says it is to excite her and then proceeded to place himself between her legs and tried to remove her skirt. The accused removed the underwear of the victim, started to kiss her and eventually removed his short and boxers. Following this, the accused forcefully inserted his penis into her vagina and ejaculated. When the accused was done abusing the victim, he wore his clothes and drove her off to her house. He asked her not to tell anyone about what happened and informed the victim that she is free to ask him for money should she need any.

The defence case

- [9] The defence's main defence against the charge is an alibi. To support this, the defence brought three witnesses, including the accused.
- [10] The first witness called on by the defence was the accused himself, who says he was not in Anse Aux Pins on 11 February 2019 and thus could have not been anywhere near the victim. He says his car was being repaired by a mechanic (the defence witness number 3) who was referred to him by his uncle (defence witness number 2).
- [11] The second witness called by the defence is A [REDACTED] G [REDACTED], who is also an uncle of the accused. The second witness says he helped the accused to tow his car to the mechanic.
- [12] The third witness called by the defence is A [REDACTED] A [REDACTED], the mechanic who both the accused and second defence witness refer to in their testimonies. The defence submits that the alibi given by the accused is well corroborated by this witness as he confirms that he was repairing the car of the accused on the day of the alleged offence.

Analysis and determination

- [13] The victim has her account of events submitted as evidence before the courts. The case for sexual assault to be reported was prompted following a doctor's visit by her and her mother in June of 2019. Had it not been for this visit, probably her account of events would have never been told.
- [14] Before I go on to address the issue of whether the facts adduced has proven the offences beyond a reasonable doubt, I will deal with the issues relating to credibility and the need for corroboration evidence in this case. This case involves the evidence of a 13-year-old girl who is the alleged victim of a sexual assault. Traditionally this would have called for a corroboration warning on two fronts, one because it's the evidence of a victim of sexual assault and second because it is evidence of a child. However, our modern law has moved on the issue of credibility in these instances.

[15] In the case of *Raymond Lucas v Republic* SCA17/09, the Seychelles Court of Appeal held as follows;

“We therefore hold that it is not obligatory on the courts to give corroboration warning in cases involving sexual assault offences and we leave it at the discretion of judges to look for corroboration when there is an evidential basis for it.”

[16] Accordingly, corroboration warning is no longer obligatory in sexual assault cases in this jurisdiction and it is at the discretion of the court to look for it on a case to case basis as and when they are required.

[17] As regards to the evidence of a child, the Evidence Act has been amended so as to include the following provisions;

11A. *“ At any trial the evidence of a child shall be received unless the child appears to the court that the child is incapable of giving intelligible evidence”.*

[18] The court can accordingly, convict on a child’s uncorroborated evidence.

[19] On the other hand, I am aware that although the Court can convict on the sworn uncorroborated evidence of a child, it must, after warning itself of the danger of convicting without it, express itself to be convinced of the truth of the child’s story notwithstanding that danger (*Jean-Baptiste v R* (1961) SLR 262). Hence, although there is no requirement that the sworn evidence of a child should be corroborated as a matter of law, it is still prudent to find corroboration as there is the possibility that a child, who understands the nature of the oath, would still have been “*coached*” and hence truth may be distorted.

[20] In the case of *R v Baskerville* [1916] 2 KB 658, it was stated as a principle that no piece of evidence amounted to corroboration unless it came from a source independent of the witness to be corroborated, and confirmed not merely the general truthfulness of the child’s evidence, but also the truth of that part of its evidence which implicates the accused with the offence. However, medical evidence that the child has been sexually assaulted does not usually amount to corroboration where someone other than the accused could have

committed the offence. But where the accused admits that he was with the child, but denies committing any offence, the medical evidence would be very relevant.

- [21] The account of the victim suffices where the trial judge finds the same to be given by a 'competent, mature, reliable, intelligent and truthful' witness as averred in the case of *R v Vidot* CriM.1 Case No: 37 of 1999. In *R v Lucas* (3 of 2006) [2010] SCSC 84 (27 May 2010), Gaswaga, J found the victim to be 'young but very intelligent and confident girl who seemed to be very sure and coherent of what she was saying.' The court can rely on the account of the victim, which need not be corroborated as per *Raymond Lucas v The Republic* SCA No. 17/09. However, bearing in mind the above constraints, I have taken a cautious approach to the prosecution evidence.
- [22] Is the victim in casu, competent, mature, reliable, intelligent and truthful? This can be assessed based on the evidence and testimony given by the victim. In the present case, I found the victim's evidence to be cogent, credible; and consistent and therefore I will act on it totally
- [23] A victim's account is knowledgeable too if it is free from factors such as vindictiveness, among other things. In *R v DV* (CR 70/2019) [2020] SCSC 436 (20 July 2020), what cast reasonable doubt on the account of the victim was the victim's own admission that she was angry the accused had left her mother for another woman, among other things. In this case, there seems to be no similar qualms or animosity between the defendant and the victim and her family, whether personal or otherwise relating to his trade from which the victim and her family know him.
- [24] On the other hand, the court is presented with a different account by the accused, to refute the claims made by the victim. In particular, the defendant submits he was not in Anse Aux Pins on 11 February 2019. He further notes that during the whole month of February, he neither gave nor offered services of a taxi pirate to the victim.
- [25] The accused is therefore submitting an alibi defence. He contends he was with the DW3 at the date and time the victim alleges the sexual assault took place. The DW3 attempts to corroborate this story by confirming that on the date and time of the alleged crime, he was

with the accused. However, can this court rely on this alibi and take it as one which casts reasonable doubt on the account of the victim?

[26] In *R v Vidot* Crim.I Case No: 37 of 1999, the accused put forward an alibi defence. He stated that he was at work and two other persons corroborated this. However, the trial judge was not convinced of the alibi mainly because one initially said the accused had gone to work. The same witness later retracted this by stating the contrary, and supposedly putting the accused at the place of the crime. Another testimony was given by the colleague of the accused. The colleague of the accused testified that they were working together at the time and date of the alleged incident. It is worthwhile to note that in his testimony to establish an alibi, the colleague of the accused could not ascertain the job both him and the accused undertook. Against this background, the trial judge found the evidence given by the defence witnesses as that which is 'not consistent, cogent and reliable on material particulars.' This means an alibi must fulfil the three part test of (i) consistent; (ii) cogent; (iii) reliable on the material facts.

[27] It is important to remember that an alibi is a full defence, which seeks to absolve the accused of the crime by putting him at another place at the time of the crime. As such, it is imperative that the evidence is clear and unambiguous which in turn makes it consistent, cogent and reliable.

[28] In their submissions, the Prosecution dwell on the colour of the vehicle which DW3 purports to have repaired and state it is not one belonging to the accused. Upon inquiry by the Prosecution, the DW3 refers to the colour as 'silver-brown'. On the other hand, the accused describes the colour of his own vehicle as red and red bluish. The victim describes the colour of the car as red, a much closer if not identical description of the car of the accused.

[29] In my view, the question of the colour of the car is a reasonable one posed by the prosecution. It sought to verify that at minimum, the vehicle repaired is in fact one belonging to the accused. With this, the Prosecution submitted that the car DW3 purports to have repaired is not the one belonging to the defendant. I am inclined to agree with the Prosecution in this regard because on the material and indisputable facts, red/red blush

Hyundai i10 is the colour of the defendant's car, and not silver-brown as described by DW3.

- [30] The Prosecution has not highlighted additional inconsistencies in the alibi defence witness which were glaring and apparent before the courts. However, I am satisfied that there are inconsistencies so glaring that it is impossible for me to overlook. The first inconsistency in the testimony of DW3 is his reference to dates and year. In addition to this, I find it curious that DW3 expressly mentions COVID-19.
- [31] The account given by DW3 is that on 11 February 2019 or 2020, between 12pm and 8.30pm, he was with the accused. He stated that he remembers this day in particular because he did not go to work for the night shift because it was his daughter's birthday. This is curious because the DW3 also says the 10th of February is his child's birthday. I find this to be inconsistent. Surely, DW3's child cannot have two birthdays.
- [32] Another inconsistency I took note of as the DW3 testified is how unsure he was about the year he repaired the accused car. He remembers for a fact that he met with the defendant on the 10th and 11th of February, because these were his child's birthday, but cannot remember the year.
- [33] In examination in chief, defence counsel inquired DW3 about when he repaired the gearbox of the accused. In response to this, DW3 says "it would have been *maybe* around the year of 2019 and 2020". Defence counsel asked the same question moments later, and the DW3 responds "*I think* in 2019 or 2020". In cross-examination, the DW is consistent in his uncertainty. He says, "It could have been in the year 2019 or 2020". The witness is sure however, that in 2017, he repaired the door of the defendant's car. This is interesting because he is specific for 2017 but fails to say with certainty whether the gearbox repair was in 2019 or 2020 on three occasions during both examination in chief and cross-examination.
- [34] Another interesting statement by DW3 is the specific mention of COVID-19. One questions the relevance of mentioning COVID-19 in response to a question posed on his shift hours as a police officer. In my view, COVID-19 was not relevant in the need to answer the question posed by the prosecution.

- [35] In February 2019, COVID-19 was unheard of, so the reference of “not much covid – there was no covid” is bizarre. I may be persuaded that for February 2020, reference of COVID-19 sought to distinguish 2019 from 2020 in respect to his police patrol shifts which presumably changed following lockdown measures in March 2020. However, I still find reference to the pandemic bizarre for mainly two reasons. This is based on the following facts which this court takes Judicial Notice. First, what stands out about February 2020 and COVID-19 is that Seychelles issued a travel advisory on travelling to The People’s Republic of China. Second, the first COVID-19 investigatory case was in March 2020 and subsequently, the first lockdown was on the 16th of March 2020.
- [36] What is before the courts is that DW3 is not certain whether he repaired the accused’s car in 2019 or 2020. He is sure that on that on 11 February, he was with the defendant but unsure of the year. Yet, both the date and year are important since they both form part of the crux of the alibi defence presented by the accused. This court cannot rely on the vagueness of the alibi defence as it fails and is ambiguous about whether it was 2019 or 2020 when the repairs were done.
- [37] In my view, the testimony by DW3 fails the three part test established in *R v Vidot*. The DW3 fails to be consistent with the colour of the accused’s car. In addition to this, DW3 fails to provide evidence which is cogent because he states 10 and 11 February to be his child’s birthday and thus remembers being with the defendant. Cogency is also lacking in the evidence given him because he cannot state with certainty that it was 2019, and insists on giving us 2020 as an alternative year. Based on failure to be consistent and cogent, the testimony renders itself unreliable. The alibi does not cast doubt on the victim’s account which is intelligible.
- [38] I therefore find the accused guilty beyond a reasonable doubt as charged in this case.

Signed, dated and delivered at Ile du Port , Victoria on the 13th day of January 2021.

A handwritten signature in blue ink, consisting of several loops and strokes, positioned above a dotted line.

GOVINDEN CJ