

SUPREME COURT OF SEYCHELLES

Reportable/Redact

[2023] SCSC

CO 101/2021

In the matter between:

THE REPUBLIC

(Represented by Ms Corrine Rose)

Prosecution

and

S.W.M

(Represented by Mrs Alexia Amesbury and Mr Daniel Cesar)

Accused

Neutral Citation: *Republic vs S.W.M* (CO 101/2021) [2023] SCSC (17 February 2023)

Before: Adeline J

Summary: Prosecution for sexual assault/ Section 130(1) read with Section 130(2) (d) of the Penal Code/ [REDACTED] old at the time of the sexual assault/ In law victim cannot consent to sexual intercourse/ Section 130(3) (b) of the Penal Code.

Heard: 21 March 2022, 22 March 2022, 24 March 2022 and 29 March 2022.

Delivered: 17 February 2023

FINAL ORDER

In the final analysis, from a holistic examination of the totality of the evidence adduced before this court in this case, I hold the view that, the prosecution has discharged its burden of proof with regard to all the elements or ingredients of the offence of sexual assault with which the accused has been charged, and has done so at the standard required in a criminal case as the instant one, that is, beyond reasonable doubt.

For this reason, I find the accused S.W.M of [REDACTED] Seychelles guilty of one count of sexual assault contrary to Section 130 (1) read with Section 130 (2)(d) of the Penal Code and punishable under Section 130 (1) of same Act. I accordingly convict him for one count of sexual assault

JUDGMENT

Adeline, J

INTRODUCTION

- [1] As I ponder about the facts of this case and put my brain and thoughts into gear and focus entirely on the evidence on record as I write this judgment, I have come to realise that, I need to be guided by the legal provisions of Section 143 of the Criminal Procedure Code, (“the CPC”) in order not to fall short of the legal requirements prescribed by law. It is therefore appropriate, from the inception, to spell out the legal provisions of Section 143 (1) and (2) as it is couched in our statute book, the CPC. Section 143 reads;

“Every judgment shall except as otherwise expressly provided by this code, be written by the presiding officer of the court in the language of the court, and shall contain the point or points for determination the decision thereon, and the reasons for the decision, and shall be dated signed by the presiding officer in open court at the time of pronouncing it”

- [2] Section 143 (2) goes further as to say;

“(2) In the case of a conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law underwhich the accused person is convicted, and punishment to which he is sentenced.”

- [3] In the instant case, as per the statement of the offence, SWM, (“the accused”), is indicted with one count of a felony featuring in the formal charge sheet filed in court on the 22nd October 2021, that reads as follows:

“Sexual assault contrary to Section 130(1) read with Section 130 (2) (d) of the Penal Code and punishable under Section 130(1) as read with Section 130(4) (a) & (b) of the same (Act 5 of 2012)”

- [4] The particulars of the offence that also features on the same charge sheet, reads;

“SWM of [REDACTED], sexually assaulted one [REDACTED], by penetrating the body orifice, namely the vagina of the said [REDACTED] with his penis for sexual purpose”.

- [5] In the court’s proceeding of the 4th November 2021, the accused pleaded not guilty to one count of sexual assault, and accordingly, a not guilty plea was entered on the court’s record against him. The case proceeded to trial and the prosecution called six witnesses. The accused opted to make a statement from the dock and called three defence witnesses to give evidence in his defence.

SYNOPSIS OF THE FACTS

- [6] [REDACTED], PW1, the complainant/victim and a vulnerable witness for the purposes of Section 11B (1) and 11B (2) of the Evidence Act, was only [REDACTED], when on her way to her [REDACTED] where her mum works, a black serion car driven by a man she identified as the accused, stopped close by her and began to persuade her to give him her telephone number in return for money. At first she hesitated, but as the man threatened her she conceded and accepted from the man SCR 300.
- [7] As the man talked to PW1, he told her that he sees her every day going up and down with her mum, sometimes in her school uniform and sometimes in her casual clothes. Threatened by the man with a pointed object placed at her back for her to get inside the car, PW1 did get inside the car and sat on the front passenger seat. The man driver drove the car towards [REDACTED] road. At [REDACTED], the man told PW1, to switch seat

and to sit in the back passenger seat to avoid being noticed given that the car rear windows were tinted, which she did.

- [8] The man driver then drove the car along a farm and headed to a store on the farm. As he approached the store, he stopped the car, got out of it and walked a short distance away to speak to a man who was close by. PW1 understood him as having told the man to go to the Cable & Wireless post. The man driver then returned to the car and asked PW1 to get out of the car and walk to the store. Seeing some dogs close by, PW1 got out of the car, ran to the store and got inside.
- [9] Inside the store, PW1 saw a bed and some groceries on a shelf close to the bed. The man driver soon joined her inside the store. Once inside the store, the man removed his brief then placed a condom over his penis, and he asked PW1 to remove her panty and lie on the bed which PW1 did. The man driver then moved on the top of PW1's body, inserted his penis inside her vagina and had sexual intercourse with her. After his first ejaculation into the condom, the man driver removed the condom and had sexual intercourse with PW1 for the second time. This time around, he did not wear a condom, and therefore, he ejaculated sperm inside PW1's vagina. After the 2nd round of sexual intercourse, the accused took a towel that was close by, wiped his penis and then threw the same at PW1 asking her to wipe her vagina with it.
- [10] Thereafter, the man driver put back his brief, whereas, PW1 put back her panty. Leaving the store, they both walked towards the car, got inside as the man driver drove away towards the [REDACTED] road headed to [REDACTED]. The car stopped close to [REDACTED] Supermarket at [REDACTED]. As PW1 got out of the car the man told her to send him a missedcall. Once she was out of the car, PW1 saw her mum [REDACTED], PW2, and her sister [REDACTED], PW4, in another car taking them to her [REDACTED] house. The driver of that car gave her a lift as he drove them all to the [REDACTED] house. That was the end of the 1st episode.

- [11] The 2nd episode happened the following day, the 20th October 2021. PW1 had gone to the shop to buy some groceries for her [REDACTED]. There, she met her aunt [REDACTED], PW3, who was on her way to her [REDACTED]. PW3 asked PW1 of her whereabouts the previous day the 19th October 2021 because her mum was looking for her. PW1 recounted the incident that happened to her. Once they both arrived at her [REDACTED] house, PW1 shared her experience of the previous day with her sister [REDACTED] in the presence of their mum, PW2, who was not too far away from them. As she over heard what they were talking about, PW1's mother, PW2, started to scold her.
- [12] At one point, PW1 said that, she does have the phone number of the man driver who sexually assaulted her, and then she tried to call him. The man driver, who up to that point they did not know his true and correct name and identity, did not answer PW1's phone call. PW1 gave her aunt, [REDACTED], PW3, the man's phone number [REDACTED]. PW3 then phoned the number and the man driver answered. In their telephone conversation, which could be heard from the phone's speaker the man driver told PW3 that his name is [REDACTED]. He pleaded to PW3 not to report the incident to the police and offered money in return.
- [13] After the conversation ended, PW1's mum, accompanied by her sister, PW3 (PW1's aunt) and her daughter, PW4, (PW1's sister) took PW1 to the [REDACTED] police station to lodge a complaint about the incident. At the police station, PW1 was interviewed about the incident and then taken to the hospital on the same day to be examined by a doctor. At the hospital, PW1 was examined by Dr Maxwell Focktave, a licensed medical officer and gynaecologist who works at the Seychelles Hospital. After he completed his examination of PW1 he wrote a report, exhibit P2. In his report, interalia, Dr Focktave states, that he found no fresh lesion on or around the external genital area or around the anus of PW1. He reported that the hymen was not intact which in his opinion meant that, PW1's hymen had been tempered with, possibly, because of sexual intercourse. In his testimony, Dr Focktave explained that, in normal circumstances, if the hymen is intact at the time of sexual intercourse, lesion would be

found, but if someone is sexually active or had sex in the past, he will not necessarily see any lesion.

[14] The third episode happened on the 21st October 2021. While PW1's mother, PW2, was at her house, she received a phone call from her daughter [REDACTED], PW4, who informed her that, the man who did those things to her sister, and daughter, PW1, will be coming to their house at around 5 pm to be accompanied by a man she knows quite well as [REDACTED]. Later on that day, at a time when PW1 too was at home, three men arrived at their family home. [REDACTED] who was amongst the three men introduced the man to PW1's mum stating the following; *"this is the person who had called and said he wants to see you"*. PW2 then asked the man what happened. His answer was, *"I am the one who did this to your daughter. Please forgive me. I accept that I have done this to your daughter, please don't take me to the police. I will pay you some money"*.

[15] Whilst pleading for forgiveness or mercy, PW2's daughter, [REDACTED], PW4, secretly called her sister [REDACTED] and asked her to call the police because the man who had sexually assaulted [REDACTED], PW1, was at their house. [REDACTED] did call the police that responded to the call as they headed to the family home. As the accused heard the wail of the police siren approaching the family home, he ran away. He only came back after he was asked to come back. The police then arrested him.

SUBMISSIONS

SUBMISSION BY COUNSEL FOR THE REPUBLIC

[16] Learned counsel for the Republic, did make a closing written submission of the prosecutions's case against the accused. She begins by rehearsing the salient aspects of the evidence laid before this court by the prosecution witnesses. Having presented a synopsis of the facts and circumstances of this case in the preceding paragraphs based on the evidence on record. I find no good reason for a repetition. Learned counsel then proceeds to submit on the relevant law to be applied to the facts and circumstances of this case for establishing the accused guilt. She then proceeds to submit on the relevant law of

sexual assault under Section 130 (2) (d) and Section 130 (3) (b) of the Penal Code, as amended, as well as the application of the common law of corroboration in cases of involving sexual offences.

[17] Learned counsel correctly submits that, the law as it presently stands in this country, makes corroboration warning discretionary, in the sense that, it is up to the presiding judge to decide, whether, in the circumstances, a corroboration warning is necessary before convicting an accused of a sexual offence solely on the evidence of the complaint/victim. Learned counsel also submits on the law of identification amid the defence's stance that, the wrong person has been on trial for an offence committed by another person, namely, one [REDACTED]. To illustrate the law of identification, learned counsel relies on the case of *Turnbull and others* [1976] 3 ALLER 549, putting greater emphasis on the guidelines spelt out in the case.

[18] I have to say, candidly, that I have doubts about the application of the *Turnbull* (supra) guidelines to the facts and circumstances of this case, and I wonder whether they have any relevance at all in this case. Identification evidence in a criminal trial is used to identify the person who is alleged to have committed the alleged offence. It is to be noted, that there has been no strong challenge of the corroborative visual identification of the accused in this case. All that the defence has sought to do is simply to rely on the fact that some of the prosecution witnesses, including the complainant/victim, had given the name of [REDACTED] to the police as the person suspected of having committed the offence, and that, therefore, the wrong person was being tried for an offence which he never committed. The defence deliberately and conveniently omitted to add that, the name of [REDACTED] was a false name given to the witnesses, including the complainant/victim, by the accused himself, in order to conceal his correct name and his true identity.

[19] Even if the court is to warn itself and exercise caution before convicting the accused in reliance on the correctness of the identification evidence, the identification evidence against the accused is so strong that it renders the accused's defence feeble. The process

of identification started the moment the complainant/victim, PW1, got into the black serion throughout the journey up to the actual sexual intercourse in the store on the farm, and after and until she was dropped off by the accused. It must also be noted, that the accused is a person previously known to the complainant/victim. This fact transpired in evidence, PW1 having seen him sitting at the bus stop playing loud music in his car.

- [20] I do, however, take note of learned counsel for the Republic's point, as she correctly submits, that given that it is the name of the accused that is in contention, that should not be confused with the identification of the accused by way of evidence which this court finds has been not only credible and reliable, but also, overwhelming, having been guided by the passage in S V Mehlape 1963 (2) SA 29 (A), cited and quoted by learned counsel for the prosecution.

SUBMISSION OF COUNSEL FOR THE ACCUSED

- [21] In the 1st paragraph of her written submission dated 8th November 2022, learned counsel has this to say;

“The Republic in the present case, not being satisfied with charging [REDACTED] instead of [REDACTED] for the crime allegedly committed has now come up with a new person and I quote from the Republic's written submission under paragraph 1 “the accused namely, [REDACTED] stands charge with following offence as per the charge dated 22nd October 2021”

- [22] It is obviously clear, from the 1st paragraph of her written submission, in spite having been written in a sarcastic manner, that it is learned counsel's contention, albeit disingenuously, that, the wrong person has been charged and prosecuted for the alleged offence of sexual assault in this case. This, in fact, is the crux of the accused's defence as he professes his innocence. In essence, one of the issues that is called for a determination, and which will be addressed later in this judgment, is as regards to the identity of the assailant or the perpetrator of the crime allegedly committed. From learned counsel's

prospective, one [REDACTED] is the person who should have been charged and prosecuted in this case, not S. M, thus a case of mistaken identity. As per learned counsel's submission, this is borne out of the police investigation diary after the victim's mother, PW2, and the victim herself, had told the police that it was [REDACTED] who sexually assaulted her.

- [23] In a significant part of her submission, learned counsel discusses the prosecution's burden and standard of proof of the charge levelled against the accused, with emphasis on mensrea and the actus reus of the offence, submitting that, the prosecution must bring evidence to prove beyond reasonable doubt that;

“(i) there was penile penetration of the vagina, and
(ii) it was the accused that penetrated her vagina for a sexual purpose”

- [24] At paragraph 7 of her submission, learned counsel takes issue over the fact that, in her testimony on the 19th October 2021, the complainant/victim had said, amongst otherthings, that she “saw some fluid coming out of her vagina”, when within 24 hours after the alleged incident, Dr Focktave who examined the complainant/victim found “no abnormal discharge”. This learned counsel submits, “is enough to cast serious doubt on the alleged sexual assault. I have read paragraph 8 of learned counsel's submission and notes her emphasis on the words “if really happened”.

- [25] Clearly, this is a deliberate misconstruction of Dr Focktave's testimony because it was never his testimony, that the alleged incident did not really happen. It is the submission of learned counsel that, based on the doctor's testimony, coupled with the fact that there was no forensic analysis result of the swabs taken from the complainant/victim's vagina, that the prosecution has not adduced evidence to prove, beyond reasonable doubt, that there was penetration of the vagina of the alleged victim for a sexual purpose, and therefore, the accused should be acquitted.

[26] At this point, I am not inclined to venture into what would simply be a university style academic discussion. Suffice to say, that the proposition made by learned counsel is unconvincing and misleading because there is a plethora of cases where a conviction has been secured in sexual assault cases without forensic evidence, but on other evidence as well as evidence of identity linking the alleged assailant with the crime. In fact, it is borne out of the evidence, that there are other substantive evidence linking the accused with the alleged crime that would be discussed later in this judgment.

[27] In her submission, learned counsel also raises concern about the police failure to ascertain ownership of the vehicle which allegedly picked up the complainant/victim as per her testimony, as a weakness in the prosecution's case. In my considered opinion, the failure to ascertain ownership of the vehicle, being the black serion, does not in any way makes the prosecution's case against the accused weaker because even if that had been done it would not have been relevant, and therefore, not considered to be evidence to prove or disprove the fact in issue, which is, did the accused sexually assaulted the complainant/victim.

[28] In her review of the prosecution witnesses' testimony, learned counsel described the evidence of [REDACTED], (PW2) and that of the alleged complainant/victim, PW1, as unreliable, and in the case of [REDACTED] as well, also fraught of hearsay evidence. Learned counsel referred the court to the fact that the police had recorded in the investigation diary that [REDACTED] had told the police that her daughter told her that she was sexually assaulted by [REDACTED]. She quoted [REDACTED], PW2, as having said the following;

"When my sister [REDACTED] spoke to him, he informed my sister that his name is [REDACTED]"

[29] Learned counsel refers the court to the testimony of [REDACTED] (PW3) to further emphasise her contention that, the alleged complainant/victim was sexually assaulted by

[REDACTED], whilst referring to [REDACTED]'s testimony, she having said the following;

“She called the number given to [REDACTED] by the man who allegedly sexually assaulted her, and the man told her that he is [REDACTED]... and the man admitted that he had slept with her, please don't go to the police. I will come and give you a sum of money”

[30] At paragraph 20 of her submission, learned counsel points to the testimony of prosecution witness police constable [REDACTED] (PW5) whom she said told the court that “a report was made by [REDACTED], (PW2), in which she told the police that the person who committed the offence is [REDACTED]. Learned counsel also submits, that when constable [REDACTED]'s “own statement was put to him and asked about the alias of the person accused of this crime, he said that he is S. M also known as [REDACTED]”. The point which learned counsel seeks to make, is that the name “[REDACTED]” that came up in the evidence is the nickname of [REDACTED], not the accused, S.M, as she sought to rely on the evidence of defence witness, [REDACTED].

[31] In her submission, learned counsel stated, that [REDACTED], DW1, did say in his testimony that, he “accompanied the accused to the house of the family and when he was at the house of the family he was arrested”. Learned counsel emphasised that, when under cross examination [REDACTED] was asked whether the accused confessed to the family that he had sexually assaulted the child his answer was “no, he did not”.

[32] Learned counsel refers the court to the testimony of Sgt [REDACTED], DW3, who testified for the defence. As per her submission, Sgt [REDACTED] who recorded the statement of [REDACTED], told the court that Ms [REDACTED] did say that her daughter was sexually assaulted by [REDACTED], and gave factual account of how it happened, and that she, Sgt [REDACTED], wrote the name of [REDACTED] because she told her [REDACTED]. Learned counsel submits, that as per Sgt [REDACTED]'s

testimony, [REDACTED] was contacted by another officer who told her that he was fixing a boat at Belombre.

- [33] Learned counsel also refers the court to the exchanges of questions and answers between the prosecution and Sgt [REDACTED] in cross examination. Learned counsel quotes one of the questions and answers that reads as follows;

Question: Did [REDACTED] tell you how she got the name [REDACTED]?

Answer: She said it was the man that gave her the name.

- [34] In essence, to exonerate the accused's culpability, in her submission, learned counsel has capitalised on the fact [REDACTED], (PW2), the mother of the alleged victim, and the complainant/victim herself, PW1, had told the police that the person who committed the sexual assault is [REDACTED] whose nickname is "[REDACTED]", not S.M, the accused, whose nickname is "[REDACTED]". What the evidence shows, which learned counsel has failed to state in her submission, is that, it is S.M, the accused, who gave both, the complainant/victim and her mother [REDACTED] that false name, [REDACTED] to conceal his true and correct identity.

THE LAW

- [35] In the instant case, the accused has been charged and tried for the offence of sexual assault, an offence prescribed under Section 130(1) read with Section 130 (2) (d) of the Penal Code. This statutory enactment reads as follows;

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

(2) for the purposes of this section, sexual assault includes;

(a) ...

(b) ...

(c) ...

(d) *the penetration of a body orifice of another person*".

[36] In a criminal case, as the instant one, to secure a conviction for the charge of sexual assault, the prosecution carries the burden of proof (with the exception of affirmative defences which the Defendant must prove). That is to say, the prosecution had to present sufficient evidence to prove each element of the crime or offence, alleged to have been committed by the accused beyond reasonable doubt, failing short of the standard of proof, the accused must be acquitted.

[37] The English case of *Woolmington vs DPP* 1935, AC, is a landmark House of Lords case, where the presumption of innocence was reconsolidated for application across the common wealth countries. The law lords in this case stated, that it is the duty of the prosecution to prove the accused's guilt. If at the end of, and on the whole of the case, there is a reasonable doubt, the alleged offender must be acquitted. The Lords went on as to say, that, proof beyond reasonable doubt generally means that, the court must subject the entire evidence to such scrutiny as to be satisfied, beyond reasonable doubt, that all the important elements placed on the prosecutions by the substantive law are proved. If not satisfied, the accused must be acquitted.

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

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

[39] Based on the offence of which the accused has been charged, that is to say, sexual assault contrary to Section 130 (2) (d) of the Penal Code, the prosecution had to prove the following elements or ingredients of the offence beyond reasonable doubt, namely;

- (i) That the complainant/victim experienced penetrative sexual intercourse
- (ii) That the accused participated in the sexual intercourse, and
- (iii) That the complainant/victim could not have consented to the sexual intercourse being below 15 years old.

[40] Section 130 (3) (b) of the Penal Code is very pertinent to the issue of consent in this case and is therefore worthy of illustration. It reads;

“ 130 (3) (b) A person does not consent to an act which if done without consent constitutes an assault under this section if;

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

(c) ...”

DISCUSSION AND ANALYSIS OF THE EVIDENCE IN THE CONTEXT OF THE LAW

[41] On account of the evidence laid before this court at trial, the first issue to be determined, is whether the prosecution did prove, beyond reasonable doubt, that the accused experienced penetrative sexual intercourse on the [REDACTED] in a store on a farm at [REDACTED]. The relevant evidence that bears proof of this allegation is the evidence of the complainant/victim, PW1 herself, and the evidence of Dr Focktave, crucially, which although not conclusive, the latter's finding that the complainant/victim, PW1's hymen was not intact suggesting that her hymen had been tampered with through sexual intercourse. Had Dr Focktave found that PW1's hymen was still intact, it would have followed that, PW1 did not have sexual intercourse on the [REDACTED] as she claims or on any other day before, rendering the charge against the accused unsustainable.

- [42] As per PW1's testimony, the actual sexual intercourse took place inside the store on a farm. Once she and the accused was inside the store, the accused removed his brief, place a condom over his penis, and after she, PW1, had removed her panty, she lied facing up on a bed that was inside the store. The accused then moved on the top of her body and inserted his erected penis inside her vagina thus had sexual intercourse with her. The accused did the same act twice. The 2nd time he did it he did not place a condom over his penis. He ejaculated sperm inside PW1's vagina. It must be remembered that, PW1 gave her evidence not so long after the incident when her memory could not be said to have faded away with the passing of time.
- [43] Interestingly, and perhaps without giving thought to the possible adverse effect vis a vis the accused defence, Mr [REDACTED], DW1, did confirm that the accused does own a farm at [REDACTED] and that he visits his farm everyday. He also confirmed, that he was present at the family home when the accused visited [REDACTED], PW1's family home, although, he did not say for what reason he and the accused had to go to [REDACTED] PW1's family home in the first place. When asked, whether the accused did confess to having sexually assaulted [REDACTED], PW1, and offered the family money to dissuade them from reporting the incident to the police, DW1 said that he is not aware of such conversation, but if it did happen not in his presence. Therefore, the significance of DW1's testimony is that it at least corroborated the evidence of PW1, PW2 and PW4 that the accused did come at the family home of AM, PW1.
- [44] In considering PW1's testimony one would need to consider how credible was her testimony. I did observe carefully the demeanour of PW1 as she deposed under oath, after having been adjudged of being capable of giving intelligible evidence. She recounted the events of the 19th October 2021, even before she got inside the black serif car and driven to a store on a farm at [REDACTED], where the accused had sexual intercourse with her. Considering the veracity of her evidence, I found that PW1 was consistent, cogent, coherent and a truthful witness whose evidence is worthy of belief. In fact, in her written submission, learned counsel for the accused, did not make any significant comment or observation about PW1's testimony beside her remark that she was

unreliable, although in cross-examination, she was challenged on few aspects of her testimony which she dealt with with great confidence, while she stood her ground. Her responses to question put to her in cross-examination were remarkably candid. The vexed question that therefore follows, is, whether a conviction is possible in a sexual assault case as the instant one, without evidence corroborating the evidence of the complainant/victim who in this case is PW1.

- [45] It is now settled law in this country and indeed in other common wealth countries, that, the English law of corroboration that requires the judge in a criminal trial of an accused for a sexual offence to give a corroboration warning has now been made discretionary. This new legal position has been incorporated into the law of this country by way of case law authorities, notably, *Raymond Lucas v R* (SCA 17/2009). In *Raymond Lucas* (Supra), inter alia, the court had this to say at paragraph 28;

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

- [46] Therefore, on account of the evidence of [REDACTED] solely, I am satisfied, that the prosecution has proved, beyond reasonable doubt, that on the 19th October 2021, a man penetrated the vagina of PW1 with his penis for a sexual purpose. That is not to say, that there is no corroborative evidence at all in this case. To the contrary, many aspects of the prosecution’s evidence are corroborated to a material extent by the evidence of other prosecution witnesses as well as the defence witnesses in some respect.

- [47] The 2nd issue to be determined is, did the accused participated in the sexual intercourse amid learned counsel’s contention that, it was not the accused S.W.M who did it, but rather, one [REDACTED] known as [REDACTED]. Learned counsel’s contention that, the person who sexually assaulted [REDACTED], PW1, is [REDACTED] rest on the fact that PW1, her mum, PW2, and her aunt, PW3, had told the police that it was

[REDACTED] who committed the sexual assault and that is featured in the police investigation diary, D1.

[48] In their testimony PW1, PW2 and PW3 explained, that it was in the telephone conversation between the accused and PW1's aunt, PW3, that the former told the latter that his name was [REDACTED]. In other words, it was in order to conceal his true identity that, the accused, whose real name is S.W.M told PW3 that his name was [REDACTED] when in actual fact, his true and correct name name is S.W.M. If a true perpetrator of a crime, when arrested by the police on suspicion of having committed a crime gives a false name to the police, if at all that person exists, doesn't make him liable for the crime and exonerate the perpetrator. In her review of the evidence as featured in her written submission, learned counsel deliberately and conveniently ignores some crucial aspects of the evidence that points to the accused as the culprit in this case, understandably so, because they weaken the accused's defence.

[49] The crucial aspects of PW1's testimony which I find to be credible and truthful, and which create no doubt about the identity of PW1's assailant is the fact that PW1 identified the accused S.M even before she got into the car as he stopped the car close to her and spoke to her. PW1 received from him SCR 300. When she was inside the car, PW1 sat in the front passenger seat close to the accused driver S.M until she switched seat. They walked together to the store on the farm where the incident took place. All these events took place in broad day light. PW1 also identified the accused at the family home after he had turned up there to seek for mercy. PW1 also made a dock identification of the accused as the very same person who was the driver of the black serion, who drove her to [REDACTED] on a farm and had sexual intercourse with her in a store. Although dock identification in itself may lack credence, in the instant case, the same is corroborated by other visual identification evidence. Thus, in her evidence, PW1 was emphatic that it was the accused who had sexual intercourse with her on the 19th October 2021. It must be remembered that PW1 gave her evidence at a time when her memory could not be said to have faded with the passage of time.

- [50] PW1's testimony about her making no mistake as to the identity of her assailant, was corroborated by the evidence of her mum, PW2, who in her evidence stated that, the accused whom she identified in the dock is the same person who came to their house on the 21st October 2021 to plead for forgiveness and to offer them money in return in order to dissuade them from reporting the incident to the police, and who on that particular afternoon, PW1 identified him as the person who sexually assaulted her on the 19th October 2021. The evidence of PW1's sister, [REDACTED], PW4, also corroborates the evidence of PW1 and PW2, in so far that it confirms that, the accused did come at their family home to seek for forgiveness, and that it was the same person she identified in the dock.
- [51] Furthermore, the conduct of the accused of coming to the family home to talk to the family about an incident which he is not culpable, and attempting to run away from arrest when the police arrived at the family home is not compatible to that of an innocent person. Therefore, all in all, the evidence of the prosecution witnesses against the accused did place him at the scene and destroyed his defence that it isn't him who had sexual intercourse with PW1 in a store at [REDACTED] on the 19th October 2021, but [REDACTED] instead.
- [52] Thus, amid the abundant of evidence against the accused, the argument that the alleged sexual assault of PW1, [REDACTED], was committed by [REDACTED] does not hold water and is simply a desperate move by the accused who is overwhelmed with guilt. I am therefore, satisfied, that the prosecution has proved, beyond reasonable doubt, that the accused did participate in the sexual intercourse when on the 19th October 2021, PW1 experienced penetrative sexual intercourse perpetrated by the accused by inserting his penis inside PW1's vagina.
- [53] It is now necessary to establish, whether on account of the evidence laid before this court, the prosecution has proved that at the time of the sexual assault, PW1, the complainant/victim, was below the age of 15 years. In cross-examination, PW1, in answer to a question put to her as to whether if one looks at her would think that she is

below 16 – 17 years, stated that she is a 14 year old girl. In her testimony, PW1’s mother, PW2, stated that, she is the mother of five children and that [REDACTED], PW1, is one of her children whom she said is now a 15 year old (on the date she testified on the 21st March 2022). She told the court that, [REDACTED] PW1, was born on the 12th March 2007, and tendered in evidence as exhibit her Birth Certificate pertaining to the Civil Status Register No 258 of 2007.c, P1. I am therefore satisfied, that, on the date of the incident of sexual assault on the 19th October 2021, [REDACTED], PW1, who is the complainant/victim in this case was below the age of 15 years old.

- [54] In the midst of an abundant of evidence against the accused in this case, I am perplexed by the serious and infelicitous criticism of the police at the hands of the accused’s counsel for not having charged [REDACTED] with the offence of sexual assault, but chose to charge the accused instead. I say so, because there is not a single shred of evidence that [REDACTED] is the one who committed the alleged offence of sexual assault. Clearly, therefore, learned counsel for the accused has ignored the evidence because it doesn’t fit her narrative in her quest to exculpate the accused. It is therefore not surprising that, she cannot accept the truth of what happened to [REDACTED], PW1 on the 19th October 2021, and that the accused is the culprit who committed the sexual assault against her.

CONCLUSION

- [55] In the final analysis, from a holistic examination of the totality of the evidence adduced before this court in this case, I hold the view that, the prosecution has discharged its burden of proof with regard to all the elements or ingredients of the offence of sexual assault with which the accused has been charged, and has done so at the standard required in a criminal case as the instant one, that is, beyond reasonable doubt.
- [56] For this reason, I find the accused S.W.M of [REDACTED], Mahe, Seychelles guilty of one count of sexual assault contrary to Section 130(1) read with Section 130(2)(d) of the

Penal Code and punishable under Section 130(1) of same Act. I accordingly convict him for one count of sexual assault.

Signed, dated and delivered at Ile du Port 17 February 2023.

B Adeline, J