

IN THE SUPREME COURT OF SEYCHELLES

Reportable
[2013] SCSC .334
CN 75/2021

REPUBLIC
(rep by Luthina Monthy)

Prosecution

and

A.B
(rep. Alexia Amesbury)

Accused

Neutral Citation: *Republic v A.B* CR 75 of 2021 [2023] SCSCdelivered on 05 May 2023

Before: Vidot J

Summary: Sexual Assault contrary to section 130(1) read with section 130(2)(a) and (b) and section 130(3)(b) of the Penal Code; Consent, defence of accused believing that the virtual complainant was above 15 years of age.

Heard: 12-02-22 and 28-11-22

Delivered: 05 May 2023

ORDER

The Accused is found guilty of all four counts and convicted accordingly

JUDGMENT

VIDOT J

[1] The Accused stands charged with four counts of sexual assaults. These are;

Count 1

Statement of Offence

Sexual Assault contrary to section 130(1) as read with sections 130(2)(a) and (b) and section 130(3)(b) of the Penal Code and punishable under section 130 (1) of the Penal Code

Particulars of Offence

A.B of [REDACTED] Praslin, on a date and month unknown to the Prosecution during the year 2019, at [REDACTED] sexually assaulted another namely AML, aged 14 years old at the time, by touching AML all over her body from her breast to her vagina.

Statement of Offence

Sexual Assault contrary to section 130(1) as read with sections 130(2)(d), and section 130(3)(b) of the Penal Code and punishable under section 130 (1) of the Penal Code

Particulars Of Offence

A.B of [REDACTED] Praslin, on a date and month unknown to the Prosecution during the year 2019, at [REDACTED] sexually assaulted another namely AML, aged 14 years old at the time, by inserting his penis into the vagina AML.

Statement of Offence

Sexual Assault contrary to section 130(1) as read with sections 130(2)(a) and (b) and section 130(3)(b) of the Penal Code and punishable under section 130 (1) of the Penal Code

Particulars Of Offence

A.B of [REDACTED] Praslin, on a date and month unknown to the Prosecution during the month of December 2019, at [REDACTED] sexually assaulted another namely AML,

aged 14 years old at the time, touching AML all over her body room her breast to her vagina.

Statement of Offence

Sexual Assault contrary to section 130(1) as read with sections 130(2)(d) and section 130(3)(b) of the Penal Code and punishable under section 130 (1) of the Penal Code

Particulars Of Offence

A.B of [REDACTED] Praslin, on a date and month unknown to the Prosecution during the month of December 2019, at [REDACTED] sexually assaulted another namely AML, aged 14 years old at the time, by inserting his penis into the vagina of AML.

Synopsis of Evidence

- [2] The Accused admits that he had sexual intercourse with AML but said that he was under the belief that AML was above the age of 15 years old. As a result of one of the sexual encounters AML got pregnant and gave birth to a child.
- [3] When AML testified before Court she was already 16 years old. She stated that she lives at [REDACTED] with her mother, three brothers and her son. The Accused would stay with them when he came over from Praslin. The Accused is the father of two of her brothers.
- [4] She alleges that she was "*raped*" by the Accused. She qualified that by stating that she was forced by the accused to have sexual intercourse with him. She explained that on one occasion when her mother was working, the accused came to her room, took off her clothes and had sex with her. She testified that the accused inserted his penis in her vagina and after he had done that, threatened to beat her up if she reported it to anyone. That was a date unknown in 2019 but the second time it happened, it was in December 2019. She adds that she felt terrible when these things were happening to her.
- [5] She said that at some point she fell ill and she went to hospital with her grandmother, and that is when she found out she was pregnant.

- [6] J.L is the grandmother of AML. She is the one who accompanied ALM to the hospital. AML had called her and she has volunteered to go to the hospital with her. However, she had been informed by AML's mother that AML would come to collect her in a taxi to go with her to the hospital. Her ex-daughter-in-law also went with them. At the hospital, AML was screened and tested as she was suffering from pain in her abdominal area. The doctor called her in and informed her that AML was pregnant. At that point AML was crying. AML was sent for consultation and was seen by Dr. Mohamed. AML informed her that she was impregnated by the Accused. Later she called AML's mother and reported to her that AML was pregnant.
- [7] CL is AML's mother. She lives at [REDACTED] with her four children. She has not lived at [REDACTED] with her children all the time. At some point, the Accused lived with them for about a month to a month and a half. The Accused is the father of her last two children who are now 6 years and 3 years old.
- [8] She recounted that on the 02nd July 2020, her daughter AML complained of belly ache. She was unable to take her to hospital because she was caring for her other children, so she called her mother to assist. She got a vehicle to pick up her daughter, then to go and pick up her mother. At some point in time, her sister-in-law who had accompanied AML and her grandmother to the hospital called and said that the doctor was querying as to when AML had her last menstruation. She responded that AML has had her period regularly that she was to have it soon. Thereafter, the grandmother took the phone and revealed to her that the doctor had said that AML was pregnant. She was in shock. Thereafter, she tried to think who could it be that got her pregnant and she realised that the only person who came to their home was the Accused. Then later her mother called and asked her not to get angry but that it was the Accused who impregnated her daughter.
- [9] Later, her mother returned to her home with AML. They talked and her daughter said that she had not told her what happened as she was scared. She did not even talk to a school counsellor as the Accused was still living in her home and that he could fight her as he had done before. She tried to contact the Accused, but she did not hear from him. The next day she lodged a complaint with the Police. She also testified that the Accused knew that AML

was underage. One reason for that is that even before the incident, she had lived on Praslin, where she met the Accused and the latter lived with her, though not permanently and AML who at that time was in primary school, would come to Praslin. The Accused, at times would go and pick her up.

- [10] Dr. Mohamed Alla testified that he examined AML, a girl of 14 years, at 10.30 pm at the Casualty Department of the Victoria Hospital. He explained that a female came in complaining of abdominal pain, one of the first thing performed was a pregnancy test and if it is positive, they assume that it is labour pain. She was tested for pregnancy and the test was positive. Therefore, she was sent to the gynaecologist.
- [11] Dr. Sekari Brioche works with the obstetrics and gynaecology department of the hospital stated that she examined the virtual complainant. However, a medical report which was not signed by her was produced but it was only admitted as an item. It will not be relied upon. However, she said that she does not remember examining the patient.
- [12] Ms. Nourrice is a social worker who worked on this case. The case was referred to her on the 03rd July 2020. She did some counselling with AML before she gave a police statement. Present at recording of the statement were the mother of AML, Police Officer Antoine Athanase and herself. She also continued to do her counselling work with AML and made referral for her to see a psychologist.

The Defence

- [13] The Accused made a short dock statement to state that he admits doing the criminal act, but that he was not aware of AML's age. He thought that she was older than 15 years old. Whilst cross-examining the prosecution witnesses, it became clear that the defence of the Accused was that he was not aware of AML's age and in fact that AML physically looked older than 14 years old.

Sexual Assault; The Law

- [14] Section 130 (1) of the Penal Code provides as follows;

“Any person who sexually assaults another person is guilty of an offence and is liable to imprisonment for 20 years

Provided that the victim of such sexual assault is under the age of 15 years and the accused is of or above the age of 18 years and such assault falls under section 2(c) and (d), the person shall be liable for a term of not less than 7 years and not more than 20 years.

Provided also that if the person is convicted of a similar offence within a period of 10 years from the date of the first conviction the person shall be liable to imprisonment for a period of not less than 14 years and not more than 20 years.”

[15] Section 130(2)(d) adds that sexual assault includes the *“penetration of a body orifice of another for sexual purpose.”*

[16] The allegation in this case is that the Accused engaged in penetrative sex with AML which resulted with AML giving birth to a child. AML testified that the assaults took place on two occasions at her mother’s house at [REDACTED]. The Accused was in a relationship with AML’s mother, with whom he already has two children. However the Accused’s defence is that he believed that AML was above the age of 15 years old.

[17] Consent is an important element in establishing sexual assault. If consent has not been granted or been withdrawn after it has been granted and an accused being indifferent that consent has not been granted or has been withdrawn and proceeds with the sexual act, then that will assist in establishing such charge against that accused. Therefore, in assessing whether or not the charge has been established, the court has to evaluate whether the sexual act(s) that happened were consensual. A person under the age of 15 years does not have capacity to give consent to engage in a sexual act. However, section 130(3) of the Penal Code provides that;

“A person does not consent to an act which if done without consent constitutes an assault under this section if;

(a) the person consent was obtained by misrepresentation as to the character of the act or the identity of the person doing the act;

(b) the person is below the age of 15 years old; or

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

[18] To be capable in giving consent therefore, necessitates that one has both the mental and physical capacity or ability to freely and voluntarily agree to engage in sexual intercourse. There is no evidence in this case that AML did not have such mental or physical ability. It was stated in **DL v R (SCA CR 23/2020(Appeal from CR24/2020)) [2022] 19 (29 April 2022)** that “[I]t is the capacity to understand what is happening and making informed decision and a choice one makes without any form of unlawful pressure or manipulation.”

[19] In this case, the Accused did not raise consent as a defence. In fact in his dock statement the Accused never mentioned that he laboured under impression that he had consent nor that he believed then that he had consent. However, 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 complainant is not consenting.

Discussions

[20] It is non contentious that the sexual acts happened. The only point of contention is that the Accused believed that AML was 15 years old or above. It should be remembered that the Accused was in a relationship with AML's mother with whom he has two children. He has lived in the same household as AML and that is not denied. AML and her siblings went to Praslin at times when her mother worked there and the Accused will pick them up from the pier. AML agreed with Defence Counsel that she always was a big girl. When she testified in Court she was 16 years old. The mother also testified that the Accused knew the age of her children. The Court takes note that in fact she looked big for her age when she testified before Court.

[21] The Court has no reasonable doubt that the Accused knew that AML was underage. He was in a relationship with AML's mother with whom he has two children. I am sure he would have been told and /or observed that AML was under the age of 15 years irrespective

that she appeared big for her age. It was just nasty that the Accused decided to indulge in sex with AML and equally with her mother. The defence that the Accused believed that AML was above 15 years old has no merit.

[22] Though not raised as a defence, I have to address the issue of consent. AML was below the age of 15 when the sexual acts happened, but the Accused testified that he was under the impression that she was above that age. If the Court was to believe, (which it does not) such averment, then one has to consider whether consent was given by AML. It is not always that a complainant would verbally express her disapproval. To be able to give consent means having both the mental and physical ability to freely and voluntarily agree to engage in sexual intercourse. Therefore, there is requirement that those engaging in sex demonstrate their consent to another through actions and words. **DL v R (Supra)** it was stated that there *“is a difference between consent and submission; every consent involves submission, but it by no means follows that a mere submission involves consent.”* *but to distinguish between submission and consent is difficult and would depend on the circumstances of each case.”*

[23] It seems that in this case AML did not verbally express that she was not giving consent to the Accused to indulge in sex with her. I find that in this case she was rather submissive. She did not express a willingness to have sex with the Accused. AML testified that the Accused *“forced”* her *“to do things with him..... He forced me to have sex.”* That suggests that the Accused was exercising authority over AML. Consent cannot be obtained through the use of force. It is important to note that AML was not challenged on her testimony that the Accused used force against her. She also testified that after she *“was raped”* by the Accused, the latter threatened her not to tell anyone or he will beat her up.


Findings

[24] I find that the prosecution has established beyond reasonable doubt the charges of sexual assault levelled against the Accused. For reasons stated above, the Court does not accept the defence put forth by the Accused.

[25] Therefore, this Court finds the Accused guilty of all four counts of sexual assaults against and proceed to convict him accordingly.

[26] The Accused has a right of appeal against this judgement within 30 working days from today.

Signed, dated and delivered at Ile du Port 05 May 2023


Vidot J