

IN THE SUPREME COURT OF SEYCHELLES

Reportable
[2023] SCSC ... 339
CN 40/2021

REPUBLIC
(rep by *Lansinglu Rongmei*)

Applicant

and

Y. B
(rep. *Kalyaan Karunakaran*)

Accused

Neutral Citation: *Republic v Y.B* CR 40 of 2021 [2023] SCSC ... 339 delivered on 12 May 2023

Before: Vidot J

Summary: Committing an act of indecency towards a child contrary to section 135(1) as read with sections 130(2)(c) and (d) of the Penal Code and punishable under section 135 (1) of the Penal Code

Heard: 30-11-21, 06-10-22, 07-11-22 and 10-10-22

Delivered: 12 May 2023

ORDER

Accused acquitted of all four counts.

JUDGMENT

VIDOT J

[1] The Accused stands charged of four counts of sexual assault offences. These are;

Count 1

Statement of Offence

Committing an act of indecency towards a child contrary to section 135(1) as read with sections 130(2)(c) and (d) of the Penal Code and punishable under section 135 (1) of the Penal Code

Particulars of Offence

Y.B of [REDACTED] Mahe, on a dates and months unknown to the prosecution during the year 2019, at [REDACTED] Mahe, committed an act of indecency towards a child namely S.B aged between 7 and 8 years old at the time, by inserting his penis in the anus of S.B.

Count 2

Statement of Offence

Committing an act of indecency towards a child contrary to section 135(1) as read with sections 130(2)(c) and (d) of the Penal Code and punishable under section 135 (1) of the Penal Code

Particulars Of Offence

Y.B of [REDACTED] Mahe, on a dates and months unknown to the prosecution during the year 2019, at [REDACTED] Mahe, committed an act of indecency towards a child namely S.B, aged between 7 years old and 8 years old at that time, by inserting his penis into the anus S.B.

Count 3

Statement of Offence

Committing an act of indecency towards a child contrary to section 135(1) as read with sections 130(2)(c) and (d) of the Penal Code and punishable under section 135 (1) of the Penal Code

Particulars Of Offence

Y.B of [REDACTED] Mahe, on a dates and months unknown to the prosecution during the year 2020, at [REDACTED] Mahe, committed an act of indecency towards a child, namely S.B namely AML, aged 8 years old at the time, by inserting his penis into the anus of S.B

Count 4

Statement of Offence

Committing an act of indecency towards a child contrary to section 135(1) as read with sections 130(2)(c) and (d) of the Penal Code and punishable under section 135 (1) of the Penal Code

Particulars Of Offence

Y.B of [REDACTED] Mahe, between the month of February to April 2021, at [REDACTED] [REDACTED] Mahe, committed an act of indecency towards a child, namely S.B namely AML, aged 9 years old at the time, by inserting his penis into the anus of S.B

Synopsis of Evidence

Prosecution

- [2] The Accused and the virtual complainant, S.B are brothers. S,B testified that when he resided at [REDACTED] Mahe, the persons who lived with him were his mother, grandfather, D.B, another brother and sister. When he resided at other places Y.B lived

with them. He stated that when Y.B stayed with them he abused him by committing acts of indecency.

[3] He described an incident when living at [REDACTED] Y.B had offered him some clothes and Y.B removed their pants and inserted his penis into his buttocks. He had told his mother about that incident. There were more sexual abuses after they moved to [REDACTED] and then [REDACTED] When it happened at [REDACTED] he told no one but told D.B about the incidents at [REDACTED] At [REDACTED] when the incident happened, his sister D.B had knocked on the door and then opened up the door, Y.B asked him to go, then D.B asked him questions about what Y.B was doing with him. After he told D.B what happened, she went and told the neighbour and neighbour in turn told his mother who at that time was in hospital. He says that that neighbour was the father of D.B. As a result, the mother took him nowhere. However, thereafter, he states that his mother took him to the Police Station. He states that when these incidents happened there were people in the house. He even mentions that when the incident happened at [REDACTED] the grandfather was present outside the house. He testified that many times before Y.B had abused him.

[4] S.B further testified that Y.B sometimes beat him and at times his mother was present when that happened. He said that after the incident Y.B asked that he does not tell anyone or he would beat him and not give him anything. However, at one point he admitted that he does not know if it was his mother that told him to make such allegations but then he said that was not the case. He then agreed that because his mother wanted Y.B out of the house and that is why he was told by her to make the allegations.

[5] D.B is the sister of Y.B and S.B. She testified that in April 2021, at 2 p.m she had gone to a friend's place to watch movies. At around 6 p.m she returned to the house. When she knocked on the door, it was locked. She called out and Y.B was not answering. She returned to her neighbour, P. R. She queried from her whether her brothers were home. P.R lives in a flat below hers. P.R called Y.B who answered and responded that he had not heard anything. Then she went to sit with S.B and a friend on the common stairwell. She then asked S.B to come to the room and she queried from him what he was doing in

Y.B's room. He answered that Y.B took out his penis and did indecent acts to him. She was disappointed, she went to P.R and asked for her phone so that she could call her mother. However, she said that she did not confront Y.B. because she was a bit scared.

[6] F.B the mother of the household testified that she lives at [REDACTED] with her children. She said that on 13th April 2021 she was admitted at the maternity ward and the next day she delivered her baby. She was released on 16th April 2021. On the 15th April 2021 she received a call. It was from D.B, her daughter who related to her that she came home, the door was locked and she went down to a friend, P. R to ask if there was anyone at her flat to which P. R answered that Y.B was upstairs. Then P. R called Y.B. So, she went back upstairs and the door was unlocked and saw Y.B and S.B inside. D.R told her what allegedly happened between the brothers. D.B had told her that according to S.B, Y.B had asked him to bend over, took his penis out and inserted into him.

[7] When she returned home S.B told her what had happened between Y.B and himself. He had said that Y.B had asked him to remove his pants and try another pair; he did not want to, but Y.B took off the pants anyway. Thereafter, Y.B inserted his penis in his anus. So, she went to Social Services at [REDACTED], but the lady was not present, so she went to the Community Centre. The next day, Mrs. Leitner came to her home. That latter said she had come in respect of the incident that happened between Y.B and S.B. So, she told her what happened. Mrs. Leitner sought assistance from Social Services and Child Protection. When S.B was interviewed by the Police, he was crying.

[8] Mrs. Marie-Nella Leitner is an assistant social worker who worked on the case. She was working on 19th April 2021. She recalled receiving an anonymous call from a female voice. She therefore called the [REDACTED] Social Worker. The names of the parties concerned were not revealed but they got description of the siblings' mother and they could identify her as the social services had done some counselling with her before. That was in respect of alleged physical assault of S.B. There were visible marks on S.B. That happened a year prior. So, the next day, she went to their home as she was aware that F.B, the mother of household was in hospital. When she went to the flat F.B was however present. S.B revealed that the allegation that his brother Y.B had sexually

assaulted him was true at which point the Police was alerted and arrangement made for medical test. That was done on the same day at Anse Boileau Clinic.

- [9] Mrs. Litner who was present during both the medical examination and when S.B was making a statement to the Police, noted that S.B was tearful when such was being done. However, when she was questioning S.B, he was preoccupied in his own world. Sometimes he was hesitant particularly when describing private parts.
- [10] Dr. Barun Kumar Saha is a Senior Medical Officer (Grade One) employed with the Health Care Agency of the Ministry of Health. He was called to produce the medical examination certificate of S.B that Dr. Vivianne Camille had prepared but who at the material time was out of jurisdiction. The certificate is dated 28th April 2021 and it records that S.B was seen on the same date. S.B was then 9 years old. He was seen at the [REDACTED] Health Centre. Her findings as per the certificate were as follows;
- “No abnormal findings. Anus intact, no fissures, no prolapse, child was however complaining of anal pain, that he passed stool with blood once and also generalised itchiness.”*
- [11] The Doctor explained that blood in the stool could have many causes. These could include constipation, injury, gastritis like diarrhea, trauma, any trauma to the anal region or rectum, infection to the abdomen. To determine whether there was sexual assault, there would have been a need to examine everything. The mere presence of blood does not mean that the person suffered sexual assault. Otherwise, there will be certain other features of assault around the anal region. Itchiness can be caused by worms, fungal infection and/or poor hygiene.
- [12] He added that the report suggests that there does not seem to have been a sexual assault and that there would have been some signs if it had happened. At that age the child would have had some tear in the anal area. The doctor who examined S.B had not recorded presence of such. However, in the instance that a person is involved in anal sexual acts, especially at the age of S.B there would be signs or symptoms. However, the Doctor

testified sexual assault could not be ruled out because sexual assault does not necessarily have to connote penetration; even a finger touching the anal area is also a sexual assault.

Defence

- [13] The Defence called several witnesses. The Accused gave evidence on oath. He is 25 years old and is in employment. He testified that his mother left him in the care of his grandmother when he was very young because she was drinking and having fun. After the passing of his grandmother, he went to live with his mother, because he was unhappy and needed the comfort of a mother. His mother was still drinking, smoking and going out. His siblings were not taken care of and he tried to put them of the right path with the assistance of his friend. He tried to discipline them. The siblings were not going to school. They were unhealthy and dirty. His brother [REDACTED] who was still at school would even go out to drink and come home drunk. S.B smoked left over cigarettes that was his mum's. He was stressed and very strict with them. They roamed on the roads and that hurt him. One night at around 1 a.m he saw D. B on the road. He corrected her but the mother threatened to kick him out of the house even after D.B's brothers on the paternal side had threatened him with a knife. He was overwhelmed by the situation that he sought help from Social Services. His mother was unhappy about that.
- [14] Initially, the family lived in a store and the condition was deplorable. Therefore, he assisted by seeking assistance form the D.A's office and they were given an emergency house at [REDACTED] When they lived there, there were always people that came in and out of the house and that was facilitated by his mother. He testified that he acted as a father to his mother. She would buy junk food for the household. So, he had to accompany her to the shop to ensure that what she was buying was healthy and necessary. He was using his earing to assist the family and keeping the house as clean as possible. He was even working extra shift for additional income to assist the family. When he refused to give his mother money, she would ask him to leave the house.
- [15] He says that on the date of the alleged last incident of sexual assault, 15th April 2020, he had been working. He came home at around 8 or 9 p.m. He states that this allegation was all manufactured. His mother wanted him out of the house. He states that this situation is

both embarrassing to both S.B and himself. He believes S.B has been coached to make these allegations.

[16] ██████████ corroborated many aspects of Y.B's testimony. He was a friend of the latter and as a consequence became a friend of the family. He belonged to a group of volunteers and described the deplorable state the family lived. He, with other volunteers did voluntary work trying to improve the family's living condition. The group even assisted the family financially. He sometimes spent the night with the family.

[17] He noted that Y.B cleaned the house and others in the household will not maintain that cleanliness and that would frustrate him. He at times reprimanded Y.B for always giving money to his mother and the money was not well spent. He told Y.B to instead buy things for her. He recalled the night when at around 1 o'clock in the morning Y.B had seen D.B on the road. He and a friend had driven Y.B home. The girl in whose company D.B was, was a known sex worker. Y.B became angry and went to his sister to reprimand her. At that time D.B was 11 years old. He recalls that after that incident the paternal brothers of D. B threatened the Accused and instead of supporting him, his mother told him he should move out and told him that she was tired of suffering when he is around. Because of that threat that day, he got Y.B to stay with him.

[18] He recounts another incident when in the presence of the mother, S.B was smoking and when Y.B saw that, he slapped the cigarette out of his mouth. Shortly afterwards the Police came as a result of him slapping his brother. He testified the incident happened after Y.B had asked for help from Social Services.

[19] He testified that after he had heard of the allegation, he called F.B to query. She answered and appeared to be crying and said that Y.B had had sex with S.B and that "*his anus has been torn and there was semen inside and he went to the doctor to stitch it up.*" He was angry and decided to call F.B again and asked what happened and she responded it has been a while that Y.B has been having sex with S.B.

[20] He also talked to S.B. The latter maintained that the incident took place. Y.B had asked that he removed his pants as there was another pant, he wanted him to try. He did not

want to but Y.B removed them from him and then asked him to bend over then Y.B took his penis and inserted it into his anus. He said it was painful but could not say anything. When it was done, he saw some white fluid coming out of his penis and he wiped it with a piece of tissue.

- [21] Ms. A. [REDACTED] is the aunt of Y.B. She is the older sister of F.B. She talked about F.B leaving Y.B to live with her mother since he was young until the grandmother passed away. She has always lived with her mother until her passing. She talked about her sister being unable to look after Y.B. because she did not assume responsibility. She described Y.B as a righteous person, always trying to put his siblings on a straight road. He tried to instil responsibility into his mother and he tried to control her. When she was staying with her mother, her children too stayed with them and when she went to work she would leave her child with Y.B to care for her.
- [22] She further testified that when F.B was living at [REDACTED], the household was always in a deplorable state. F.B was smoking and selling cigarettes. People were walking in and out of the home. Y.B tried to talk to his mother to let her know that such was not proper and not a positive influence on the other siblings. He was also always trying to talk to the children and put them on the right path. The children were always on the road until late at night.
- [23] Ms. G [REDACTED] came to know of this case after someone called to let her know that Y.B had been arrested.
- [24] Valcy Naiken was the District Administrator. At the time of giving evidence, she had already retired. She knows the Accused. F.B had been allocated a house in February 2020. Shortly thereafter, her office started receiving complaints that the house was dirty and smelly and that the children were being idle and roaming around.
- [25] When she undertook visit at the home together with Social Worker, the house that was supposed to be relatively new when allocated, was deplorable. She tried to encourage F.B to try to put things in order. The family had been given a second-hand sofa set but she found it broken and children were jumping on it. The other furniture was broken. They

tried to help to clean the place but nothing worked. They tried to summon F.B to her office and again they tried to talk to her. Yet due to the situation they had to send Police to the home because of sale of cigarettes and drugs.

[26] Furthermore, F.B's second son was not going to school. They tried to intervene to get him to attend school but F.B would interfere saying he would but he was still not going to school. D.B most times was not going to school either.

[27] Mrs. Naiken approached the Accused and asked him to talk to his smother regarding the home situation. She found Y.B to be clean with a good foundation in education.

The Law

Sexual Assault and Acts of Indecency

[28] Section 135(1) of the Penal Code provides;

“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.”

Section 130(2)(c) considers a non-accidental touching of another with one's sexual organ as one such act of indecency. In this case, Y.B is accused of having had sexual intercourse with S.B a person of less than 15 years old. In such case, it is irrelevant whether or not there was consent. The law provides that consent will be a consideration where the complainant is 15 years or above.

The Accused is charged with committing acts of indecency but the particulars of the offences as per charge sheet refer in actual fact to sexual assaults as the acts allegedly committed involve the penetration of one's body orifice with the alleged assailant sexual organ for sexual pleasure.

[29] In **Re a Minor (No.2) [2008] SLR 348**, it was held that;

- (a) indecency must be manifested by conduct at least to the extent that right minded persons would consider it indecent, without regards to the motivations the defendant may have had;
- (b) if the act is considered indecent, then the uncommunicated motive of the defendant may be considered in order to characterise the conduct indecent or decent according to that motive;
- (c) Whether a particular conduct can be categorized by sexual motive is a matter for the judge; and
- (d) Sexual assault includes an intention to touch another person without that person's content or without lawful excuse.

[30] A sexual act, involving sexual penetration would qualify, in terms with the above, as an act of indecency and in fact a sexual assault. It will not qualify as a sexual assault if there is consent but a person under the age of 15 years cannot give consent.

Corroboration and evaluation of testimony of a child witness.

[31] Furthermore, it is now established by jurisprudence that corroboration is not an absolute necessity. It is a matter of discretion for the judge. It was held in **R v Winfred Volcere [2016] CR 68/2014** that in cases of sexual assault, corroboration is not a necessity. Corroboration, nonetheless will accord weight and credibility in establishing the elements of the offence. In this case several witnesses testified on behalf of the prosecution. The evidence of S.B was is very pertinent. However, the evidence of D.B and F.B are also of importance. In appreciating whether or not the Accused committed the offence the Court has to give due consideration to the defence case. After all, the prosecution carries the burden of proof beyond a reasonable doubt.

[32] S.B is of very young age, but that is not reason to dismiss or disbelieve his evidence. The Court should when evaluating testimony of a person of such an impressionable age find that he might have been easily manipulated. That is not always the case. I shall dare say that this happens in very few cases. It is the defence's position that S.B has been

manipulated into making such allegations. That according to the Accused because his mother wanted him out of house and the fact the he was strict to his siblings and his mother in trying to put them on a right path. The Court needs to appreciate that a child of that age could be under pressure when testifying, but that does not mean that he was not speaking the truth. It should make allowances for discrepancies in his evidence and should before making a finding on such question decide whether such discrepancy was material.

[33] The Court has to evaluate if as alleged by the defence there was necessity for S.B to lie. S.B gave evidence that the Accused used to beat him up but admits that the Accused also used to give him things. In **Zialor v R [2017] SCCA 42**, the Court of Appeal held that when dealing with inconsistencies with a child witness' evidence, the Court has to determine whether or not the inconsistencies were material ones that could affect the complainant's evidence on essential issues that he was sexually assaulted by the appellant. The same evaluation was explained by Twomey JA in a dissenting judgment in the case of **Graham Potin v Republic [2018] SCA 13/2017**. In this case, I have found few discrepancies in the evidence of S.B but have noted some contradictions between his testimony and that of his mother, F.B and sister D.B. The Court needs to evaluate of the evidence and decide whether these witnesses were being truthful and/or if S.B was being manipulated.

[34] In **Woji v Sanlam Insurance Co. Ltd. 1981 (1) SA 1020 9A**, Diemont JA provided a helpful guide in approaching evidence a young children. The guide highlights, as the focal point, the trustworthiness of the evidence. At 1028A-E of the judgment the learned judge said:

"The question which the trial Court must ask itself is whether the young witness' evidence is trustworthy. Trustworthiness, as is pointed out by Wigmore in his Code of Evidence para 568 at 128, depends on factors such as the child's power of observation, his power of recollection, and his power of narration on the specific matter to be testified. In each instance the capacity of the particular child is to be investigated. His capacity of observation will depend on whether he appears "intelligent enough to observe". Whether he has the capacity of recollection will depend again on whether he has sufficient years of

discretion "to remember what occurs" while the capacity of narration or communication raises the question whether the child has "the capacity to understand the questions put, and to frame and express intelligent answers" (*Wigmore on Evidence* vol II para 506 at 596). There are other factors as well which the Court will take into account in assessing the child's trustworthiness in the witness-box. Does he appear to be honest – is there a consciousness of the duty to speak the truth? Then also "the nature of the evidence given by the child may be of a simple kind and may relate to a subject-matter clearly within the field of its understanding and interest and the circumstances may be such as practically to exclude the risks arising from suggestibility" (*per Schreiner JA in R v Manda [1951] (3) SA 158 (A)*). At the same time the danger of believing a child where evidence stands alone must not be underrated."

[35] Inconsistencies must, therefore, be measured by the yardstick of seriousness and materiality which must be linked with overall issue of truthfulness.

[36] The Court needs to evaluate of the evidence and decide whether these witnesses were being truthful and/or if S.B was being manipulated. However, when evaluating or assessing evidence, it is imperative to evaluate all the evidence and not be selective in determining which evidence to consider; see **Nicholas Brin Julie v Republic SCA 21/2017, CO 77/2015 (31 August 2018)**. In **S v Van der Meyden 1999 (1) SACR 447(W) 450** it was 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 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."

Discussions

[37] This has been indeed a difficult case. As I already mentioned there were few discrepancies in the evidence of S.B. However, there were contradictions with the evidence of F.B and D.B. On the hand I consider S.B despite his young age to have been confident in giving his testimony and on the other I consider the Accused to have expressed himself with a lot of credibility. However, their testimonies are opposed to one

another. Therefore, I have to give the utmost consideration to the evidence of other witnesses.

[38] S.B is of an impressionable age. When he testified, he was 10 years old and he did not appear to be embarrassed when testifying. He was ready and willing to give evidence. The situation was made easier for him by the fact that Counsel for the Accused did not ask him pressing cross-examination questions. In fact, questions put to him in cross examination were helpful to the prosecution case. However, I shall not hold that against S.B and not draw any adverse inference against S.B's testimony. I note that in fact questions posed to witnesses in cross-examination were of benefit and assistance to the prosecution.

[39] S.B states that the first incident happened when they were staying at [REDACTED]. Initially, he had stated that Y.B was not living with them at [REDACTED] but then corrected himself. Nonetheless, the Defence does not dispute that Y.B lived with the other family members at [REDACTED]. In fact, Y.B gave evidence that he lived there. Even Y. C. [REDACTED] gave evidence that he and his volunteer friends did work when Y.B lived there with the family. They wanted to improve the living conditions of the family which was deplorable.

[40] However, the way the particulars of offences are formulated, it is not clear whether there were more than one instance of sexual assault, or to be more precise, acts of indecency against S.B under each count.. Counts 1 to 2 state that "*an act of indecency*" was committed on "*dates and months unknown to the prosecution during the year 2019*". As per count 3 an act of indecency was committed in the year 2020. The particulars do not refer to acts of indecency. Nonetheless, the particulars appear to suggest that acts of indecency were committed over a long period of time. However, in such circumstance I have to resolve this confusion in favour of the Accused and will take it that one single act of indecency was committed under each count. It should be noted that despite S.B speaking explicitly of an incident that happened on 15th April 2021, the particulars under count 4 refers to "*an act of indecency*" that allegedly took place between the month of February to April 2021.

Count 1

- [42] S.B recounted an assault that happened when the family lived at [REDACTED] which the Accused vehemently denies. S.B states that this happened when only he and Y.B were in the house and their grandfather was outside. He seems to suggest that similarly to the incident of 15th April 2021, as per count 4, the Accused had asked him to try some clothes under a guise to sexually abuse him.
- [43] S. B said he reported that incident to his mother F.B. However, the latter testified that the incident of 15th April 2021 was the first time any of her children had been sexually abused. She had to be reminded that in the past, D [REDACTED] had suffered such abuse. Though, as I have said, S.B appeared confident when giving evidence, I have to question whether such an incident happened as his mother whose recollection would be better than that of a young child never testified to any report being made to her by S.B. but then the mother had to be reminded about the incident with the other brother, but still never testified that S.B had previously been sexually abused.
- [44] I also take note that at [REDACTED] as per evidence of both Y.B and Mr. C [REDACTED] the family occupied one room for sleeping. Would the Accused have attempted such act with an adult (the foster grandfather) being outside the house. There was also no suggestions that when the alleged incident happened at [REDACTED] that the door was closed or locked.

Counts 2 and 3

- [45] No evidence was led as far as these two counts are concerned. There were no questions asking S.B to explain what happened at [REDACTED] and [REDACTED]. The sole evidence from S.B is that such sexual assaults happened at these places. The Accused denies such allegations. The onus is on the prosecution to discharge the burden beyond reasonable doubt. The Court has to decide whether based on such limited evidence it can convict.

Count 4

- [46] The alleged incident that happened at [REDACTED] is probably the most relevant. S.B describes in details of what he alleged happened. This has been rehearsed above. Again, I state that considering his age, S.B was confident when giving evidence. However, the Accused appeared highly credible.
- [47] However, I find that there was confusion as to what happened. S.B states that D.B knocked on the door and came in whilst D.B said when she came the door was locked and she had to go back to P.R to ask if there was anyone at her home, thereafter after getting confirmation that Y.B was home, P.R had called Y.B. He had had answered saying that he did not hear anyone calling. Then she had gone back to her home. There was no evidence from S.B as to whether he had heard someone knocking on the door and calling Y.B when he was apparently in the room with Y.B nor was there any evidence to conform that P.R called out to Y.B.
- [48] There is also contradictions between D.B's evidence and that of S.B as to what happened following her return to the home. S.B testified that after coming into the house she had come into the bedroom, asked him to come with her to another bedroom and she questioned him as to what was happening between him and the Accused. D.B version is totally different and at times confusing. She said she had come, then went to sit on the stairwell with S.B and other friends, then had asked S.B to accompany her to the bedroom where she queried what happened. At other times she testified that she went to the flat, sat under the veranda, then went to have a shower and then at night asked S.B what he and Y.B were doing. These are totally different versions. I have to evaluate that against the submission by the Accused that S.B had been manipulated to make such allegation. I also find it suspicious why P.R was not called as a witness.
- [49] D.R had then testified that she had thereafter gone back to P.R's house, revealed to her what happened between her brothers and asked for a call and asked that P.R tells her mother what happened which she did. F.B, however says that it was her daughter who told her what happened. S.B on the other hand states that after he had recounted to D.B what happened she had gone to her father's flat and related the incident to him.

[50] F.B was released from hospital on the 16th April 2021. There was a bit of confusion as to when Mrs. Leiter visited the home. The 17 April was a Friday. Mrs. Leitner said the Social Services received the anonymous call on the 19th April and she visited the home the next day. She had received an anonymous phone call from what appeared to be a female voice. It is unfortunate that it appears she did not record the number and hand over to the Police to help with investigation. She testified that S.B related to her what happened. She did the formalities to have the matter investigated by Police and for Social Services' intervention. She mentioned that when being interviewed at times S.B was crying and had difficulty talking about human private parts. When giving evidence, S.B did not appear to have difficulty in referring to private parts, though he referred to the sexual organs as private parts. When asked what he meant by private part, he answered "*penis*". However, the fact that he cried could be interpreted the the incident he was talking about actually happened and traumatized him. However, the Court has to consider that this could have been due to some other factors.

[52] I note that despite the alleged sexual happening on 15th April 2021, Mrs. Litner visiting the family on the 19th, S.B was not seen by a doctor until 28th April 2021, as evidenced by the medical report. The content of the report has been produced at paragraph [10] and suffice to state that it does not support allegation of sexual assault. The anus S.B did not show signs of abnormal findings, it was intact with no fissures or prolapse. I find it absolutely strange that F.B, the mother, to have said to Mr. C [REDACTED] that the Accused had sex with S.B and the latter's "*anus has been torn and there was semen inside and he went to the doctor to stitch it up.*" She did not take or have S.B taken to seek medical attention immediately after she was discharged from hospital. She seem to be implying that she did by saying that there still was semen inside S.B. Actually, it was Mrs. Litner who made arrangement for S.B to be medically examined. I find that she too waited to long. She went to S.B home on the 20th April 2021 but according to the medical report S.B was seen by Dr. Camille on 28th April 2021. I had serious reservation to F.B's testimony. Though she tried to show emotions and shed tears when giving evidence, I had the feeling that such was not genuine. I also hold reservation to D.B's testimony. I feel she was not being entirely truthful.

[53] The Doctor explained that “ *[A]t this age. 9 years a small child. Some adult has sexually assaulted the child, there will be some tear; like doctor has written feature prolapse of the rectum which is very common in such cases*” He noted that Dr. Camille has not observed anything abnormal. S.B had complained of blood in the stool. The Doctor explained that this could be attributable to causes such as constipation, injury, gastritis, diarrhea, trauma in the rectal region, worms or infection. Therefore, that indicates that sexual assault could only have been a possible cause amongst many others. However, the Doctor noted that symptoms such as tear, fissures or prolapse might not occur if the people concerned regularly indulge in anal sex. However, the particulars of offences speak of an act of indecency under each count. That would mean if it is accepted that the Accused committed three acts on indecency prior to the alleged offence of the 15th April 2021. So, would 3 alleged instances of sexual assaults during the years 2019 and 2020 be considered as regular sexual acts? The Doctor was not invited to define what he meant by ‘regular’.

Determination

[54] The Accused complained that his mother wanted him out of the house. As a result, S.B was manipulated to make such allegations. He states that such allegations have created uneasiness and embarrassment between him and S.B. He said that in the past he had lodge complains to Social Services against his mother. This is confirmed by Mrs. Litner and Mr. [REDACTED]. His mother was not happy about it. I have no doubt that the Accused was the one who was holding the family together as is supported by the testimonies of Mrs. V. Naiken, Mrs. A. G [REDACTED] and Mr. C [REDACTED]. He was the head of reason in the family, working hard to maintain the family and trying his utmost best to set his mother and sibling on the right path. F.B had failed as a parent. There was no evidence to the contrary to that. When he was still living with his grandmother, his aunt, Mrs. G [REDACTED] would seek Y.B’s assistance to look after her children without any concerns as she trusted him. I have observed the Accused in Court, he appears to be well mannered and disciplined. However, despite this commendable picture of his character, that does not necessarily mean that he could not have perpetuated such acts of indecency. Often child abusers can appear to be well mannered and of impeccable character. So, the

Court has to satisfy itself beyond reasonable doubt that the Accused committed an act of indecency.

[55] I find that the prosecution failed to satisfy the Court that the alleged incident actually happened. S.B said it did but Y.B denies it. S.B said he had informed his mother regarding that incident but the latter made no mention of it when she testified. She said that the incident of 15 April 2021 was the only time any of her children had been abused. Despite, being reminded that D. [REDACTED] had been sexual abused, she never mentioned other abuses on S.B before that date. I am of the view that allegations of sexual assault, particularly on a child, should not be summarily dismissed. However, the prosecution needs to satisfy the onus of proof and I do not consider that the burden has been discharged as far as count 1 is concerned. Therefore, I acquit the Accused of that Count.

[55] As regards count 2 and 3, there was hardly any evidence adduced to establish these offences to the required standard. The only evidence was that of S.B who said he was assaulted and Y.B denying it. I feel that it will totally unsafe to rely just on such testimony. For that reason, though I remind myself that evidence of a child especially should be closely scrutinised before making a decision. I remind myself that a child might not have the level of recollection as that of an adult. I have to consider whether the evidence of the child is trustworthy. I have stated that S.B appeared relatively confident whilst testifying. However, I found the Accused to be credible. He spoke of his kind of strained relationship he had with his mother, how he dedicated himself to take care of the family, something which Mrs. Naiken and Mrs. G. [REDACTED] confirmed. He wanted to place them on the right and felt that such was not welcome. I am of the opinion that the prosecution needed to have elaborated circumstances surrounding the alleged acts of the indecency. Since the evidence on these two counts were rather sparse, I feel that the charges have not been established. I proceed to acquit Accused of counts 2 and 3.

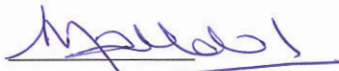
[56] The prosecution adduced more substantial evidence on which Count 4 could be maintained. S.B gave explanation as to how the incident took place. However, there are some contradictions between his evidence of D.B and F.B which I find material. I find it strange that F.B did not take S.B to see a doctor immediately following her release from

hospital and despite Mrs. Litner visiting the household on 20th April, S.B was seen by a doctor on 28th April 2021. The medical report is of significant importance. The medical report does not support the charge. Therefore I find that the charge has not been proved beyond reasonable doubt. I acquit the Accused of that charge.

Conclusion

[57] Since the Accused had been found not guilty on all counts, he is acquitted and the case against him is dismissed.

Signed, dated and delivered at Ile du Port 12 May 2023

A handwritten signature in blue ink, appearing to read 'Vidot J', is written over a horizontal line.

Vidot J