

SUPREME COURT OF SEYCHELLES

Reportable
[2023] SCSC 375
CO59/2021

In the matter between:

THE REPUBLIC
(rep. by Gulmette Leste)

Republic

and

BA
(rep. by Joel Camille)

Accused

Neutral Citation: *Republic v BA* (CO 59/2021) [2023] SCSC 375 (26 May 2023)

Before: Burhan J

Heard: 05 November 2021, 11 August 2022, 07 November 2022 and 27 February 2023.

Delivered: 26 May 2023

ORDER

Accused found guilty and convicted on Count 1

JUDGMENT

BURHAN J

[1] The accused in this case was charged as follows:-

Count 1

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

Mr. BA of [REDACTED] Mahe on 17th April 2019 at [REDACTED], Mahe, sexually assaulted another namely, KM aged 12 years old at the time of the incident by inserting his penis into the vagina of Ms. KM for a sexual purpose.

- [2] The accused denied the charges and the prosecution opened their case by calling the victim KM who stated she is 15 years old and knew the accused BA through Facebook and the accused had thereafter visited her in her house after school with one of his cousins. She admitted he had kissed her and then left. He had come again to her house on another day the date she stated she cannot remember. The accused had come alone and come into the bedroom. They had started kissing and then had sex and the accused had put his penis into her vagina.
- [3] She further testified that at some point one of her mother's friend namely TU had come and had seen the accused and witness in the bedroom. When TU had seen them they were just on the bed and she was wearing a dress. Witness stated she could not remember what position she was on the bed when TU saw her. After that they had had sex and the accused had left. On the same day, witness stated her mother had taken her to the police station and a woman police constable had taken her outside to question her and thereafter a lady took her to the hospital and a few tests were done on her private parts. She stated that the accused had had sex only once with her.
- [4] In cross examination the victim KM admitted that she met the accused through a 'friend request' on Facebook and they became friends. When they became friends they had constant contact until they were in a relationship; boyfriend/ girlfriend and she could not recall for how long. When the accused came to her house the first time, he had come with his cousin and she admitted she was already in a relationship with the accused at that time. On the second occasion he had come alone. KM testified that at the time of the incident she was in Secondary school and the accused was at SIT school. She had been at home as it was half term holiday. Witness further stated that she had agreed for the accused to come visit her to spend a little time together because they were boyfriend and girlfriend. Witness stated that the accused had first kissed her and thereafter they had sex together. After having sex, the accused had got dressed and gone away.

- [5] When TU came she had run behind the door to hide because she did not want him to see her with the accused. KM further stated that when her mother came from work, she had told her that she needed to take her somewhere but did not specify where they were going and had brought her to the [REDACTED] police station. At the police station, a police constable had asked her what had happened and she had not told the police that she had sex with the accused. She admitted she herself never wanted to go to the police station to complain. She was then taken to the Mont Fleuri Hospital with her mother and examined and tests were taken. The accused had not used protection when he inserted his penis into her vagina. She could not recall for how long they had the penetrative sex. After the incident she had not met the accused.
- [6] In re-examination the victim admitted the accused came to her house twice. The first time the accused came they just kissed whilst the second time he came they had sex.
- [7] The next witness the mother of the victim SVS stated she has two daughters and she had come to court to give evidence in regard to a person having had sex with her underage daughter. On the 17th of June 2019, when she was working around 9 a.m. in the morning she had got a call from one of her close friends TU. He had told her that he had brought fish for her and she had asked him to take it home as her daughter was at home as it was mid-term and also to check on her. He had phoned and told her that her daughter was having sex with a guy at the house. After receiving the call, witness continued with her work until 4 p.m. After work she had gone home and taken her daughter to the police. When they got to the [REDACTED] police station they were assisted by the police until the social worker, a lady, came. After that her daughter was taken to the hospital and examined and tests done on her. Thereafter, they had discussed with the social worker the procedures and went back home. The case was thereafter filed in Court.
- [8] Witness Anna-Paule Nathalie Doudee stated she is 26 years old and had been a social worker for the past two and a half years. Witness stated that when the case was referred to her, she proceeded with the child protection procedures; attended the taking of the police statement with her client the victim and thereafter visited her client at school and assisted her with Court preparation.

- [9] In cross examination, she explained what she meant by assisting the client with Court preparations was she only went with the victim for Court preparation to the prosecutor and met up with the prosecutor at the Attorney General's office. The birth certificate of the victim was admitted by both parties indicating the victim was born on the 17 July 2006 Exhibit P1.
- [10] Dr Robert Philip Michel, stated that he has been a specialist in gynaecology and obstetrics for 28 years and is qualified in medicine as a medical doctor and specialised in women care and is based at the Seychelles Hospital. He stated he has given evidence several times before Court and his expertise was accepted. Witness further testified that Dr Jose Luiz has worked with him for several years and at present Dr Jose Luiz had left Seychelles as his contract was over and was back in Cuba and would not be coming back. Witness further stated that if he sees Dr Luiz' handwriting he will be able to recognise it. Witness identified the signature of Dr Luiz on the medical report and the stamp of the Seychelles Police [REDACTED] Police Station. The document he stated is dated the 17th June 2019. Witness further stated that the medical report which he produced as Exhibit P2 concerned a young lady KM and stated as follows; On examination, patient oriented and conscious. No external skin lesion. No blood. No laceration. No tear. Hymen not intact. Vaginal wall intact. No laceration. No tear. No vaginal discharged. Cervix looks healthy. Pre-exposure prophylaxis for HIV/AIDS and send pregnancy test.
- [11] Dr Philip Michel was asked what does it mean for the hymen not to be intact and what can cause a hymen to not be intact. He stated that it means that the person is no longer a virgin. It has been tampered with and it is usually sexually, meaning that the hymen is just a tissue that breaks after it has been tampered with. The hymen can become not intact or lacerated if it is tampered with the finger, with instruments or with the sexual part of somebody. In cross examination he agreed that from the report he can confirm that Dr Luiz in his report, confirmed that he saw KM on the 17th June 2019.
- [12] The doctor further confirmed that from his experience the observations made in the report were consistent with somebody who would have had sex previous to the 17th June 2019. Witness was asked to confirm if there is no test in regards to spermatozoa that was found

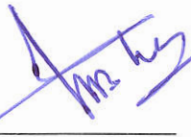
in the vagina of KM. Witness stated that he did not see this written in the document. Witness was asked about sexual intercourse, whereby there would have been ejaculation; would it be consistent for sperm to be found if there is unprotected sex after there is ejaculation by the male penis into the vagina. Witness stated that it all depends if they got the moment of ejaculation then you will find it there. Thereafter the prosecution closed its case.

- [13] The accused chose his right to remain silent. A statement of agreed facts was filed in respect of the age of the accused together with the birth certificate which indicates that the accused was born on the 18th of November 2001. This would mean he would have been 17 years of age at the time of the incident.
- [14] Both parties thereafter made submissions.
- [15] The main contention of the defence is that TU the person who had seen the victim with the accused in the house was not called to give evidence by the prosecution. It appears that as per paragraph 5 of the submissions as arising from cross examination, the defence does not deny the accused being at the home of the victim but denies the fact that they had sex and admits to only kissing. The evidence of the victim KM is clear on this issue and she too states that that her mother's friend TU had seen them on the bed when he had come to the house. The evidence of the mother indicates that it was TU who informed her that her daughter was with a guy and it is apparent from the evidence that her daughter, would have never told her as she believed she was having a relationship with the accused. I therefore hold that the failure of the prosecution to call TU as a witness is not fatal to the case of the prosecution. Further the doctor when cross examined further stated that the absence of semen or sperm could be explained as it would be present only if "you got to the moment of ejaculation". The victim too in her evidence does not describe such details other than to say the accused put his penis into her vagina. It also should be borne in mind that the accused too was a juvenile at the time he committed the said offence.
- [16] The evidence of the victim that she had sex and was sexually active is corroborated by the fact that her hymen was not intact. She identifies the accused as the person who had sex

with her and admits she was in a relationship with him and that he was in the room with her that day and it was not just kissing as suggested by learned Counsel for the defence.

- [17] Learned Counsel for the defence also contended that the evidence of the victim was not corroborated and therefore should be disregarded. In the case of *Lucas v Republic (2011) SLR 313* it was held that corroboration is not necessary when Court is satisfied that the child is not being untruthful. It is observed that material facts in the evidence of the victim can be accepted as no serious contradictions exist in her evidence and the medical evidence supports her evidence to a certain extent that she was a sexually active person. The evidence of her mother in respect of the sequence of events that occurred that day also corroborates the evidence of the victim. I am further satisfied that the victim is speaking the truth and one does not have to look for corroboration for her evidence to be accepted. I observe that though the victim cannot remember the date of the incident from the evidence of other witnesses and the medical report, the incident occurred on the 17th of June 2019. The erroneous date on the charge should be corrected accordingly. On perusal of the admitted birth certificate of the victim I am satisfied she was 12 years old at the time of the incident.
- [18] For all the aforementioned reasons, I am satisfied the prosecution has proved beyond reasonable doubt all the elements of the charge contained in Count 1 and I proceed to find the accused guilty on Count 1 and convict him of same.

Signed, dated and delivered at Ile du Port, Victoria on 26 May 2023.



Burhan J