

IN THE SUPREME COURT OF SEYCHELLES

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**Reportable**

[2023] SCSC ...  
CN 96/2020

**THE REPUBLIC**

(rep by Mrs. Luthina Monthy)

**Prosecution**

and

**[Redacted]**

(rep. by Joel Camille)

**Accused**

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**Neutral Citation:** *Republic v J.P. H* (CR13/2022), [2023] SCSC delivered on 23<sup>rd</sup> January 2023

**Before:** Vidot J

**Summary:** Sexual assault contrary to section 130(1) as read with section 130(2)(d) and punishable under section 130(1) of the Penal Code, Cap 158  
Sexually assaulting a dependent child contrary to section 136(1) (a) read with section 136(2) (d) and punishable under section 136 of the Penal Code  
Incest contrary to section 151A (1) read with section 151A (2) (a) and punishable under section 151A (1) of the Penal Code; and  
Act intended to procure the miscarriage of a woman contrary to and punishable under section 147 of the Penal Code

**Heard:** 18-02-21, 08-11-21, 09-11-21, 17-05-22 and 09-06-22

**Delivered:** 23<sup>rd</sup> January 2023

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**JUDGMENT**

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**VIDOT J**

**The Charges**

[1] The accused stands charged with the following offences to which he has pleaded not guilty;

Count 1

**Statement of Offence**

Sexual assault contrary to section 130(1) as read with section 130(2)(d) and punishable under section 130(1) of the Penal Code, Cap 158.

**Particulars of Offence**

[redacted], on dates unknown to the Republic between the years 2014 to 2018 at [redacted], Mahe, sexually assaulted [redacted], a girl of 14 years at that time, by way of penetration, namely by inserting his penis into the body orifice, namely vagina of [redacted] for a sexual purpose.

Count 2

**Statement of Offence**

Sexually assaulting a dependant child contrary to section 136(1)(a) as read with section 136(2)(d) and punishable under section 136(1) of the Penal Code.

**Particulars of Offence**

[redacted], on dates unknown to the Republic between the years 2014 to 2018 at [redacted], Mahe, sexually assaulted his dependent child [redacted], a girl of 14 years at that time, by way of penetration, namely by inserting his penis into the body orifice, namely vagina of the [redacted] for a sexual purpose.

Count 3

**Statement of Offence**

Incest contrary to section 151A (1) as read with section 151A (2)(a) and punishable under section 151A(1) of the Penal Code.

Particulars of Offence

**[redacted]**, on dates unknown to the Republic between the years 2014 to 2018, being the father of **[redacted]**, did sexually assault the said **[redacted]**, by way of penetration, namely by inserting his penis in the body orifice, namely the vagina of **[redacted]** for a sexual purpose.

Count 4

**Statement of Offence**

Act intended to procure a miscarriage of a woman contrary to and punishable under section 147 of the Penal Code, Cap 158

Particulars of Offence

**[redacted]**, on dates unknown to the Republic between the years 2014 and 2017, at **[redacted]**, Mahe, with intent to procure the miscarriage of one **[redacted]**, unlawfully administered to the said **[redacted]** noxious thing unknown to the Republic by inserting the said noxious thing into the vagina of the said Ellie Shanna Edmond.

**Evidence**

**(a) Prosecution**

[2] The first person to testify was the virtual complainant, ESE. She complained that her father, the accused, sexually assaulted her and got her to procure an abortion. These incidents happened when she was 14 years to 18 years that is from 2014 to 2018. She said that it first happened in 2014, when she gone to her father's place at **[redacted]**, as it was nearing her birthday. She normally goes to the Accused's place during the weekend. They talked. The accused talks openly to her about sex. That day, he told her that sex is fun and that when she reaches a certain age she could have sex with men. He stood up, took her hand and asked that she comes with him and said he will show her how it is done. She was only 14 years old then.

- [3] He took her to the bedroom, started kissing her on the lips and neck, touched her breast, undress her, then laid her on the bed and gave her oral sex whilst he explained to her what he was doing. Then he started to penetrate her, then stopped and asked if it was painful, to which she answered in the affirmative. He stopped, got dressed and dress her up and went back to sit in the sitting as if everything was normal. By penetration she meant that the accused took his penis and tried to insert it into her vagina. She became very terrified.
- [4] She went home, went straight to take a shower and tried to explain to her mother what had happened, but could not do so as she did not believe that her mother would believe her. She decided not to go the Accused,s apartment anymore, but the Accused came and asked permission to take her to his house for the weekend. However, when she reached there the assault continued, she could not tell her mother even if she tried. He had sex with her and he succeeded to fully penetrate her on multiple occasions. Similar assaults continued every weekend she spent with him. He would even have sex with her when she was menstruating and when having sex with her he never used condoms, save when she was in her period. Her mother would always ask her to go so as to keep the Accused company and even if she did not want to go to the Accused's home, she found herself going there every weekend. She was scared of telling her mother because the accused could be aggressive when he drinks. When she told the Accused she did not want to have such acts with him, he would punch the headboard of the bed and then would hold her face in his hand and pressed it. He would continue sexually assaulting her and she would then stay in the bedroom and cried.
- [5] However, when she went to Sri Lanka to the Accused, when he was living there, he hit her for the first time. That was in the face and thereafter he hit her a few more times and in the presence of his friends who did not do anything to stop him. She told her mother upon her return about the physical aggression.
- [6] Since no protection was used when the Accused was having sex with her, at some point she stopped seeing her period. She was then in Sri Lanka. She told the Accused and he got her to give a urine sample, which she gave to a Sri Lankan lady he knew to take to

hospital. After test was done, it came back that she was pregnant. She was then 16 years old. The next day, he told her to do the necessary to have an abortion. She was taken to a clinic by the same Sri Lankan lady and the doctor confirmed she was pregnant and prescribed a pill which she took back to the Accused. The Accused took the pill and inserted it in her vagina. This was an abortion pill. After the pill was inserted in her, she started to bleed. The doctor had explained of that possibility.

[7] After she had returned to Seychelles, she lived with the Accused permanently. The Accused had come with excuse that it was easier for her to catch the bus at the Victoria terminal to go to school, that despite the fact that her mother lives close to the road. She was attending the ShTA. So, he continued to have sex with her. She just allowed everything to happen but she was bothered by it. At times she just drank above the limit to get herself to sleep. Sometimes when she woke up she would notice that she was naked. When at 18 years she first started her relationship with her boyfriend, the Accused send her a video of him having sex with her and he insisted that she breaks up with her boyfriend. After she met her boyfriend, the sexual assault happened once or twice but then it stopped as she went to live with her boyfriend. The accused became really angry as a result.

[8] She notes that in 2014, the Accused had already broken up with **[redacted]**, one of his girlfriends. She disagreed with Counsel for the Accused that it was not possible for her to have gone to the accused's home during the weekend as **[redacted]** was there. **[redacted]** was later to confirm that at some occasions ESE would stay over at the Accused's residence. Furthermore, **[redacted]** testified that she ceased staying with the Accused sometime in 2015 and never resumed their cohabitation.

[9] She disagreed that she never complained to anyone about the alleged sexual assaults because they did not take place. She was adamant that these assaults took place but that she was ashamed and was scared of the Accused, due to his aggressive disposition. The Accused had threatened her and boys who befriended her. She had also looked up to the Accused and did not wish to get him into trouble. She denied that she fabricated the allegations only because the Accused did not approve of **[redacted]**, her boyfriend as he

was a drug trafficker. She admits that the boyfriend was a drug user but not a trafficker however adds that once she overheard the Accused asked to **[redacted]** helped him to traffic drug. She also denied that the reason for making for these allegations was because the Accused would not advance her SR10,000.00 which she had asked for.

[10] She adds that that situation was affecting her psychologically and thus the reason she decided to come forward. She even reported to the hospital to get psychological help. She said that she was going insane. She was also losing weight.

[11] ESE's testimony is corroborated to some extent by the confession made by the Accused. That statement under caution which was made on 19<sup>th</sup> December 2020 was deemed admissible by this court after a voir-dire was held. That statement was recorded by Bryna Charles, investigating officer in this case and witnessed by Tressica Sinon, Police officers.

[12] In that statement he expresses doubt as to ESE's paternity and explains that he doubts that ESE was his because he mostly worked at sea and ESE's mother had another partner. He had separated from the mother but on rare occasions they were having sex. When ESE was about 6 years he started contributing toward ESE's maintenance. When the latter was about 12 to 13 years, she had private tuition in town and at times she would spend the night at his home. However, when deponing he denies that this was so and through cross-examination of ESE, his Counsel also challenged ESE that this was not the case. He admits that when she came over to sleep, ESE slept in his bed as there was only one bed in his apartment.

[13] In the confession the accused explained that when ESE was 14 years, she told him that she had a boyfriend and questioned about kissing and he showed her how to kiss, by kissing her on the lips. The following weekend, ESE talked about kissing and he kissed her again. ESE then removed her T-shirt and they went to the bedroom. ESE was wearing her panty as she had already removed her other clothes in the sitting room. He removed her panty. He took his penis out of his short and inserted it in ESE's vagina, but only the head went inside. ESE said it was painful and they stopped. He describes other times that he engage in sexual acts with her.

- [14] When ESE was 16 she came to live with him to facilitate her going to school in the morning. When she was 17 years old, he was travelling to Sri Lanka and coming back for short periods of about one week. One night, they had consumed alcohol and they had sex. He went back to Sri Lanka and when he came back, ESE informed him that she was not menstruating. He bought a pregnancy test kit and ESE tested positive. He was in possession of 2 pills he had bought for someone else and they were abortion pills. So, inserted one into ESE's vagina. ESE started bleeding.
- [15] In 2016, ESE came to Sri Lanka. He again had sexual intercourse with her. In 2017, he also had sex with her in Seychelles. Then ESE came back to Sri Lanka. Once again, ESE had to perform a pregnancy test and again tested positive. He adopted same procedure to procure an abortion. In 2017, he returned to Seychelles but did not pursue any further sexual relationship with ESE.
- [16] The confession went on to state that ESE always consented to have relationship with him and that he did not exercise any threats on her and that she came voluntarily to sleep at his apartment. He admits that he took naked pictures of ESE using his phone but does not recall filming her when having sex, but it could be that he did so when drunk. He regrets having sex with his daughter.
- [17] WPC Bryna Charles also testified that she also executed a search warrant at the residence of the accused and seized electronic devices such as phones, pendrives, hard disc. Nothing illegal was found.
- [18] **[redacted]** who is ESE's fiancé testified that at the time of testifying, they had been in a relationship for two and a half years. He came to know about the allegations at a time when they were having problems within their relationship. He asked for space and that he be allowed to return to his family. She she cried and said she could not return to her family, that things happened and that she does not feel safe. He asked her to be frank to him and that is when she told him about the alleged incidents. The following day, which was a Saturday, she informed him that she was going to lodge a complaint with the CID.

- [19] He described her relationship with the Accused, the father of ESE, as bad. The accused would control as to when he was allowed to see ESE. The Accused even controlled as to when he would sleep with her. After he came to know of the alleged incident, he kept his distance with ESE's family.
- [20] As regards allegations of his involvement with drugs, **[redacted]** said that he once received a call from the Accused, informing him that he was coming to Pointe Larue, where he lived, with a pack of drugs to give him to sell for him. He however admits that he did not record that in his statement but explained that this is because he was not asked about the same. He further admits that on one occasion the Accused confronted him regarding drugs.
- [21] Cpl. Davis Simeon arrested the Accused on 19<sup>th</sup> December 2020. He was acting on information received from Family Squad of the CID. He was arrested in the Fishing Port Industrial Zone vicinity. He states that he followed all established protocols when effecting the arrest. There were two cars mounting the arrest. Sgt Fred, Sgt Leggaie, WPC Bryna Charles and WPC Simeon were present. I believe Cpl Simeon completely.

### **The Defence**

- [22] Although summoned by the Prosecution, the latter did not call AE, mother of ESE, to give evidence. Therefore, the defence asked that they be allowed to cross-examine her. She testified she only came to know of the alleged sexual assaults after the Accused was arrested. Before that she observed that the accused and ESE were well and not facing any problems and that ESE never told her that she was being sexually abused by her father. ESE had never told her about it.
- [23] AE further testified that when ESE went to post-secondary educational institution, she at times lived with the Accused. That is in contradiction with the testimony of the Accused. She insisted that she did not know anything regarding the alleged assaults. The prosecution confronted her with statement, wherein she mentioned that the Accused told her about the abortion pill which a woman bought, as ESE was pregnant.



- [24] The Accused took the stand and testified that he has doubts as to whether he fathered ESE. He explained the circumstances of the birth of ESE as presented in the confession. He states that between 2014 to 2018 ESE was not coming to his home. He was in a relationship with another person. ESE would visit with her mother and sister when they come to collect money. Sometimes, his girlfriend would tell her that ESE was dropping by and the girlfriend will be present. The latter works with him on the boat. Whenever, he was at sea, she too will be at sea as she was the cook. He denies the allegations of the first time he kissed ESE and had sex with her which is contrary to his statement under caution. He adds that in 2014, ESE never came to sleep over at his home. He testified that from 18<sup>th</sup> September 2015 to 18<sup>th</sup> September 2017 he and his partner were in Sri Lanka. Earlier in the year 2014 to 2015 they were at sea and she was always with him save for the times he had to go to China. In China he went to supervise the construction of a boat. He stayed in China for 4 months (April, May, June and July). Whenever, he came to Seychelles during that time, he went straight to ESE's house so as to give her and her sister gifts. ESE did not come to his home.
- [25] He admits that ESE came to Sri Lanka but denies having sex with her then and she did not share a room with him. When she came to Sri Lanka in 2016, she informed him that she had missed her period. However, she got a lady by the name of **[redacted]** to assist her. She took her to the clinic and she was tested negative for pregnancy. He further states that she was attending the SHTA, she would pass by his home after school for tea.
- [26] The Accused further testified that initially he and **[redacted]** were friends. Then he discovered that he was dealing with drugs, so he became concerned especially for ESE who at that time was against drugs. **[redacted]** tried to get him to smoke drugs. He warned **[redacted]** he would not tolerate the use of and dealing in drugs. He claims that now ESE is a drug addict. However, I can tell that when she appeared before court, she did not appear to be so and I shall go as far as saying she wasn't so. She was very clear and cohesive when testifying. Her disposition was beyond reproach. He threatened to inform the NDEA about the drugs. In response, **[redacted]** threatened him.

[27] **[redacted]** testified that she was in a relationship with the accused from 2012 to 2015 when they shared his apartment. She said that the virtual complainant, her sister and mother would come around but they never slept over but added that she was rarely living with the Accused at that time and that in 2015, she did not end the relationship with the Accused but went to live elsewhere because he was always travelling. Under cross-examination she admitted that sometimes, though rarely ESE would stay overnight. That is when she had extra classes.

### **The Law; Sexual Assault**

[28] 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.”*

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

[30] This is a case where the allegation is that the Accused engaged in penetrative sex with ESE. It is also alleged that such assaults took place over a number of years, from 2014 to 2018

[31] 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 granted or has been withdrawn and proceeds with the sexual act, then that makes out such charge against that accused. Therefore, in assessing whether or not the

charge has been established, the court has to evaluate whether there was/were sexual act(s) that happened and whether it was or they 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.*

### **The Onus of Proof**

[32] I wish to place on record that in evaluating the charges in this case, I have considered all the evidence albeit that I choose to emphasise more closely on certain aspects of the evidence which I find most pertinent. I have given the utmost consideration to the Accused’s defence that the alleged sexual acts never happened but that the allegations were an act retribution and encouraged by ESE’s boyfriend, [redacted] for his refusal to advance money which she had demanded and threats he had made to report [redacted] to the ANB for his involvement in this illicit drug trade. I evaluated his testimony that ESE never slept over at his home alone and the contradiction to that statement made by his onetime girlfriend, [redacted] and AE.

[33] In **DL v R (SCA CR 23/2020 (Appeal from CR24/2020)) [2022] SCCA 19 (29 April 2022)** the Court of Appeal quoted **S v Van der Mayden 1999 (1) SACR 447 (W)** a South African case wherein it was held that;

*“The onus of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is found reasonably possible that he might be innocent. These*

*are not separate and independent tests, but the expression of the same test when viewed from opposite perspectives. In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so also if there is at the same time explanation which has been put forward might be true. The two are inseparable, each being a logical corollary of the other.”*

[34] While the issue of onus of proof is trite, it is nonetheless being addressed here because sexual assaults can be categorised as quite sensitive offences and in most cases the only direct evidence before court is that of the virtual complainant. The accused will normally deny such allegations. This is what happened in this case when the Accused decided to give evidence under oath in denying the prosecution’s case. However, he has made a confession which was admitted as evidence after a voir dire was held. The confession was not entirely inculpatory. The Accused mentioned that there were sexual acts between them both in Seychelles and Sri Lanka but alluding to the defence that he believed that he had consent and states that it was ESE who initiated sex between them, thus suggesting that there was consent and he made out that he is not her father.

[35] Furthermore, corroboration is a matter for the discretion of the judge. It was held in **R v Wifred Volcere [2016] CR68/2014** (unreported) that in cases of sexual assault, corroboration is not an absolute necessity. Corroboration will nonetheless accord weight and credibility in establishing the elements of the offence. It was held in **Raymond Lucas v Republic SCA 17/2019**, that it is a matter for the judge’s discretion whether any corroboration is appropriate in sexual offence cases; see **R v Easton [1995] 2 Crim App. R 469**. In this case the confession remains the most important piece of corroborative evidence of the prosecution’s case but I also found corroboration in the contradiction in the defence’s case and I note that in the confession, the Accused states that the sexual acts only stopped after ESE met her boyfriend, **[redacted]**. Nonetheless, I give myself a corroboration warning.

**Was there a sexual assault and if so, was there consent?**

[36] The Court has to determine whether there was a sexual act that took place between the Accused and ESE. The latter speaks of several assaults that went on for about four years

and which also resulted in pregnancies and abortion procured by the Accused. If the court finds in the affirmative that there was a sexual assault, then the next issue for consideration but which in this case might not be fully relevant since the allegation is that the assaults started when ESE was 14 years of age, at which age she did not have the capacity to give consent is whether there was consent. Since Count 1 is concerned with allegations of penetrative sex, the prosecution has to establish beyond reasonable doubt that such happened. It was held in **Heard [20008] QB 4**, that this requires no more than a requirement that penetration was deliberate. It also depends whether or not the Accused had the necessary mens rea when engaging in the sexual act.

[37] Therefore, in order to establish the offence, the Prosecution need not only establish the actus reus, but equally the mens rea. It has to be satisfied that before or during the commission of the sexual act, the Accused could not have believed or laboured under the impression that he had the necessary consent to engage in that act. Consent is required and can be given when the woman is 15 years or above. If in evaluation of the evidence, that the Accused held a legitimate belief that the virtual complainant with unimpaired capacity was consenting, then the mens rea of the offence of sexual assault is not established. In fact, ESE when referring to sexual acts subsequent to the first such act ESE was asked by Court; “[J] just one thing, any of the alleged sexual assault, did you give your consent to these sexual activities going on?” ESE’s response was; “At certain point yes, I did let him do whatever he wanted.”

[38] On the whole after watching attentively to the demeanour of ESE and the Accused, I find ESE to be entirely credible which is not the same vibe I got from the Accused. Actually, I found the Accused’s answers to questions put to him quite suspicious. ESE went into a lot of details when testifying and when her evidence was tested under cross-examination she did not crack or falter and was consistent in her testimony. She talks as to how she respected the Accused and that he was “everything” to her. She said; “[M]y father was my everything. He was my sun, he was my moon, he was my day, he was my night. I loved this guy and he always used to help me with my education”. She explained the reasons why she did not relate these alleged incidents of sexual assaults to anyone, including her mother, sister and school counsellor. She explained;

*“..... I was scared. I was a teenager. I was alone facing a lot of things; I was facing school pressure. I was scared Mr. Camille. Honestly if I go back and take back all my mistakes, I would, but I was scared and I did not say anything. And it is because of this that today I find myself in need, psychological help, because I did not come forward to tell anybody about what was going on; it’s my fault I know. I let it happened to me.”*

[39] Though I appreciate the Defence has to most the best defence possible for a client, I nonetheless think it is wrong to expect or even worst to reprimand someone for not reporting a sexual assault against him or her. It shows insensitivity and shifts the blame on victim and away from the assailant. As ESE explained she went through many emotions that following from her evidence, she blames herself for what she termed her “*mistake*” for remaining silent. It is not uncommon for victims of sexual assaults to talk about such incidents many years after they took place. An example are children within the Catholic Church who were sexually assaulted only recount the ordeal they endured many years after they became adults.

[40] I believe ESE when she described the first act of sexual assault perpetrated on her. She was 14 year old, thus in terms with section 130(3)(b), she was then incapable of giving consent. In his statement under caution, the Accused describes the incident as follows; ESE “*was facing upwards on the bed, my penis has already been erected. I removed my penis from my short but kept my short on. I opened her legs and then took my penis and put it in her vagina. The head of the penis was in her vagina. I heard ESE made a sound in a way that she was saying that it was painful and it was there that I stopped, and we stayed in bed.*” I wholly believe that part of the confession despite the Accused denying the same whilst giving evidence under oath. That part of the statement corroborates the testimony of ESE. The offence is completed even if the Accused described that he did not have full penile penetration. He states that the head of the penis entered the vagina and that is sufficient.

[41] Based on the above, it is clear that the prosecution established the elements of the offence and therefore discharged the burden of proof to the required standard. Therefore, the Accused is found guilty of Count 1.

- [42] ESE testified that there were several such incidents of assault but the Accused in his statement under caution refers two other such incident. He states that they were consuming alcohol at that time. Self-induced intoxication will not afford the Accused a defence. He also appears to suggest that it was consensual.
- [43] However, I do believe ESE that there were many other such incident. ESE was heavily cross-examined as to why she continued to go to the Accused if such things were happening. Most of these assaults would happen when she was above 15 years old. She even visited the Accused in Sri Lanka when he was working there. ESE testified that she was scared to tell anyone. Her mother and the Accused had insisted that she moves in with him when she started post-secondary schooling. Her mother asked her to stay with the Accused at times because he did not have anyone and he was alone. She followed their instructions and even asked the Accused to take her back to her mother's home but he did not do it. She also testified that her father was once aggressive when she refused to have sex with him. She talks of an occasion when her father beat her. The first time he hit her was in Sri Lanka. He had seen the Accused threatened boys who were friend of hers.
- [44] At the time she was 15 and above and under the law she could give consent. The Accused can argue that since she allowed him to have sex with her, the mens rea of the offence is not established. The Defence could say that he believed that he was having her consent and ESE admits that at time he let him do whatever he wanted. There was no physical or verbal resistance from ESE. In fact, in the statement under caution he maintains and describes instances, such as in Sri Lanka, where he alleges that she was an active participant in sexual acts between them. He talks about her giving him oral sex and he reciprocating it and them both of them having sex.
- [45] In **R v D.L (CR24 /2020)** the trial judge pointed out that consent *“should be one that includes a communicative or affirmative consent standard. Such a standard would require that those in sex demonstrate their consent to another through actions and words.”* The trial Judge had gone on to state that *“..... it is time to look beyond the traditional male perspective as the prism through which sexual offences must necessarily be viewed.”* The Learned Judge quoted **R v Olugboja [1982] QB 320** where Dunn LJ

said that “[T]here is a difference between consent and submission: every consent involves submission, but it by no means follows that a mere submission involves consent.” On appeal in **D.L v R (SCA CR23/2020) [2022] SCCA 19**, that court held that “... to distinguish between submission and consent is difficult and would depend on the circumstance of each case..... to accept that women will simply submit in the face of a sexual assault without trying to escape or putting any form of resistance will be an insult to the character, personality and dignity of a woman and certainly militate against the modern perspective through which sexual offences are viewed.”

[46] I agree with the observation made by the Court of Appeal in **D.L v R (supra)**. The circumstances of this case is very particular but such circumstance happen too often in our society. In this case we are dealing with a minor who was being sexually assaulted by her alleged father. This Court has dealt with such cases before. She was conflicted as to how to deal with the situation. The fact she continued to see her father and at times in situations that were imposed on her did not mean that she consented to what was happening to her. She did not want relate as to what was happening to her to anyone as she did not want to get her father into trouble. She did not want him to end up in prison. She was scared of him as he had exhibited and subjected her to violence before. She says that by allowing her father have sexual intercourse with her as her mistake.

[47] The Accused states in his confession that he drank before they had sex. At one point when she was 17, they were at his apartment they drank wine. He appears to be suggesting that either he was in a state of intoxication or/and that ESE took alcohol voluntarily and engaged in sexual acts with him. I do not doubt that alcohol was involved at times and ESE testified that she took alcohol which seems to have been voluntarily because she did not want accept what was happening and resigned to just let it happened and sometimes alcohol will be provided by the Accused. In any case, ESE being a minor could not have purchased alcohol and the logical conclusion is the Accused purchased the alcohol and gave the same to ESE, whereas a responsible parent would not have been giving nor allowing his child to consume alcohol. If through use of alcohol provided by the Accused, ESE just allowed the sexual assault to continue, it can be concluded that was mere submissiveness did not involve consent. In fact when asked as to her state of



mind when the sexual assaults were happening, ESE responded; “[T]here were instances that I was drunk over the limit and there were also instances that I slept. I don’t even know how I slept. (Proceedings of 18<sup>th</sup> Feb. 2021, A.M, p19). ESE also testified at certain points he consented to allow him to do whatever he wanted. That in itself cannot be interpreted as consent being voluntary. It denotes resignation of just allowing these acts to happen because she just felt helpless. It is to be remembered that as per **D.L v R (supra)**, “[T]o be ‘capable of giving consent’ means both mental and physical ability to freely and voluntarily agree to engage in sexual intercourse.” That consent could not have been voluntary when the ESE was drunk nor when she just resigned to let him do whatever he wanted.

[48] Therefore, apart from the first instance when the Accused engaged in a sexual act with ESE when there was penile penetration, I find that the Prosecution proved that sexual assaults continued until 2018 beyond reasonable doubt. I have already find the Accused guilty of that offence as charged.

### **Sexual Interference with a Dependent Child**

[49] Section 136(1) of the Penal Code makes it an offence for a person to interfere sexually with another person of age of 15 years and older, but under the age of 18 years who is a dependent person under his legal authority, but is not the spouse of that person. Sub-section (2)(d) of that section states that for the purposes of this section a person interferes sexually with another person if the person penetrates any part of the body orifice of the person for a sexual purpose.

[50] It has already been ruled that the Accused sexually assaulted ESE and that such assault included penetrative sex.

[51] In order to make out this charge, the prosecution needed to establish that ESE was a dependent child of the Accused. Unfortunately, the Penal Code does not provide a definition for ‘dependant child’. A dictionary meaning a dependant person is a person, especially a child who depends on another person for home, food, money, etc. however, it does not state whether or not that child needs to reside in the same household as that

other person. The Accused testified that he did not bother much with ESE when she was young as he had doubts as to her paternity. In fact, he claims that he looked more after ESE's sister who was definitely his daughter. He had been told by AE (the mother) that there was a possibility she was not his. Be that as it may, section 136 of the Penal Code does not envisage a situation where the person being sexually abused is necessarily the child of the person committing the abuse.

[52] ESE testified that she lived with the Accused at the time she was studying at the SHTA. When giving evidence, the Accused denied the same. However, AE testified that when ESE went to SHTA at La Misere, “[S]ometimes she stays at my place and sometimes with her father, most time at my place.” Though, there is a contradiction in that ESE states that at the time she was staying mostly at the Accused's place contrary to her mother's testimony, the fact remains that ESE spent time and resided at the Accused's residence. Even [redacted] contradicts the Accused and testified that ESE at times stayed over at the Accused's residence. The Accused states because states that he was living with [redacted], ESE could not have stayed with them, but [redacted] testified that after 2015 she ceased co-habitation with the Accused. It is during those period that ESE was staying with him that the sexual assaults took place. The accused also states in his statement under caution that he was providing financially for ESE even if he was not doing so in the early years of her life. In the statement under caution, the Accused states; “When ESE was 6 years old, I started to contribute by giving AE money for ESE and I that time she started calling me daddy.” The Accused even testified that “I was always try to follow her education, I was there always helping her, even buying a desk for her to study because she always said she can't study properly at her mother's place. I give the money to her mother to buy the proper desk to study with book shelf and everything to encourage her studies, even laptop, etc.” That in itself shows that ESE was a dependant child and the Accused was sexually abusing her.

[53] I am satisfied that the prosecution has established this charge beyond reasonable doubt and convict the convict accordingly.

## **Incest**

[54] Section 151A(1) makes it an offence for a person to engage in sexual intercourse with another person of the opposite sex who is closely related by blood. It is therefore unlawful for a man to have sexual intercourse with among others his daughter.

[55] As has been said above, the Court finds that sexual assault did occur and that such assaults were perpetrated by the Accused. Therefore, to establish this charge, the prosecution needed to establish beyond reasonable doubt the paternity of ESE. The Accused testified that he doubted the paternity of ESE that he did not pay much attention to her until she was around 6. After she was 6, he provided for her and appears to have treated her as a daughter. The Accused and AE were not married. If they were, then under law a child born within a marriage is deemed to be a child of the marriage and the husband deemed be the father of the child. When asked in re-examination who the father of ESE was, AE responded that it was the Accused. ESE also recognised the Accused as her father. However, there is no DNA test that has confirmed that. Therefore there is a lurking doubt as to the paternity of ESE. I tend to believe that the Accused is her father but mere belief is not sufficient and therefore, there being a reasonable doubt as to ESE's paternity, I acquit the Accused of that charge.

#### **Acts Intended to Procure a Miscarriage.**

[56] The fourth count levelled against the Accused is that of procuring a miscarriage of a woman contrary and punishable under section 147 of the Penal Code. That section reads thus;

*“Any person who, with intent to procure a miscarriage of a woman, whether she is or is not with child, unlawfully administers to her or causes her to take any poison or other noxious thing or uses force of any kind, or uses any other means whatsoever, is guilty of a felony, and is liable to imprisonment for fourteen years.”*

[57] ESE testified to one instance where she had missed her menstruation and had advised that Accused about it. She was in Sri Lanka. She had also testified that the Accused was having unprotected sex with her, save when he was having sex with her during her period when he would use a condom. She recounted how the Accused enlisted the help of a Sri

Lankan women, [redacted], to have a sample of her urine tested. She tested positive for pregnancy. [redacted] then took her to a clinic and it was confirmed that she was pregnant. The Doctor prescribed some pills, which she then handed over to the Accused who inserted it into her vagina, after which she started to bleed.

[58] The Accused in his testimony before Court denies that. He states that ESE informed him that she could be pregnant, he asked her to have a test done which proved negative. Section 47 is clear that it does not matter that the woman is pregnant or not. It suffices that the person who seeks to carry an abortion administers such poison or other noxious thing, or uses force or any other means in an attempt to procure the abortion. However, in the statement under caution he admits when in Sri Lanka, ESE had informed him that she had missed her period. He had a conversation with [redacted]. ESE took a urine test and it was positive. [redacted] took her to the hospital and that there at the hospital procedures were made for an abortion. ESE returned to Seychelles the next day. In his statement under caution, he referred to another incident when he had come from Sri Lanka, ESE had again informed him that she was missing her periods. She was in possession of two abortion pill which he had gotten for someone else. She inserted the pills in her vagina and half an hour later, she had abdominal pain and started to bleed.

[59] The particulars of offence states that the offence happened in Seychelles. This is contrary to the testimony of ESE but consistent with the statement under caution in that it talks of one incident that happened in Seychelles and another in Sri Lanka. Either ESE or the Accused is confused but that does not obliterate the fact that the Accused in the statement admits that it happened. Therefore, I do not consider such particulars as fatal. It is clear that there was an attempt of procurement of abortion of ESE by the Accused in this jurisdiction and this Court finds him guilty as charged.

## **Conclusion**

[60] The Accused is an intelligent man but with a very sick mind. When in Court he has portrayed a very deceitful disposition. He has insisted that ESE never stayed the night at his home and yet his own witnesses testified to the contrary. The statement under caution has provided certain information that could only emanate from the Accused himself.

However, he was clever enough to have provided himself with defences in that statement such as consent to the sexual acts. He disputes that the statement arguing that it not made voluntarily. However, this Court considered the statement under caution as a whole. He had argued that he was not in a good state, yet he was in a state good enough to report to work to view emails and he knew well before the statement was recorded that he had right to legal representation.

[61] The Accused betrayed the trust of a young girl who had always known him as father and whom she loved and called him “*my everything*”. He has caused damage to a young woman who now has to have psychological treatment.

[61] The Court finds the Accused guilty of counts, 1, 2 and 4 and convict him accordingly and acquits him of count 3.

Signed, dated and delivered at Ile du Port 23 January 2023

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Vidot J