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# IN THE SUPREME COURT OF SEYCHELLES

The Republic

Vs

Robert Vidot Defendant

CriM.l Case No: 37 of 1999

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Mr. G. Dodin for the Republic
Mr. C. Lucas for the Defendant

## JUDGMENT

D. Karunakaran, J.

The defendant above-named stands charged before this court with the offence of" sexual assault" contrary to and punishable under *section 130(1)* of the Penal Code as amended by Act 15 of 1996 and read with *section 130(2)* (a) and *(c)* and *(3) (b)* of the said Code.

As per charge the defendant on a date unknown between 29th and 30th of April 1999, at Le Niol, M. sexually assaulted E.M.N., Mahé, a girl below

the age of 15 years, by having attempted to have sexual intercourse with her.

The defendant denied the charge. The case proceeded for trial. The defendant was represented and duly defended by an able and efficient defence counsel Mr. C. Lucas. The prosecution adduced evidence by calling a number of witnesses to prove the charge against the defendant. After the close of the case for the prosecution, the Learned Defence Counsel submitted on no case to answer and moved the Court for a dismissal of the charge. However, the Court found that the defendant had a case to answer in defence for the offence charged and accordingly, dismissed the motion. The defendant elected to adduce evidence in defence. He testified on his own as well as called three defence witnesses to testify in support of his defence of alibi.

The facts of the case as revealed by the evidence are these: Ms. S.E.-PW6- aged 32, is a working-woman and is living in concubinage with one Mr. B.S.. She has three children and all are of tender age. The first two children are girls. They are Miss. E.M.-PW3- aged 11 hereinafter referred to as “the complainant” and Miss. S.E.-PW4- aged 8, hereinafter referred to as “S.”. The third child is a boy named R., aged 4. This family is residing in a house of their own at Le Niol, Mahé. In the neighborhood lives another family of one Ms. S.L., also known as ‘D.’, who is none other than the mother of the said Mr. B.S.. In the three bedroom-house of D. live her two grownup daughters namely, Ms. Sh.L.-PW5- and Ms. M.R. as well as their cousin sister one Ms. M.N.-DW1- aged *25,* who is working as a dispenser with the Ministry of Health.

At all material times, the defendant Mr. Robert Vidot was the boyfriend of Ms. M.R., the daughter of D.. Both of them were living together as man

and wife in the house of D., sharing the common units with other occupants, save a bedroom of which the couple had an excusive use and occupation. This bedroom had direct access through a door to the living room. This door had a hole, through which one in the living room could easily peep into the bedroom. According to the mother of the complainant, the defendant had been her neighbour for over two years and a good friend of hers. He even used to help her out with some errands. At times, especially on Sundays the defendant used to take her children out and had been maintaining a good relationship with all of them.

In 1999, the complainant was 10 years old. She was in Primary 6. In April 1999, she was having school vacation and staying at home with her younger sister S. and her little brother R.. Whenever their parents were away from home, they used to leave the children at D.'s house in the care and custody of the said Ms. M.N.. The children used to spend their time therein playing and at times watching cartoons on television. On 30th of April 1999, in the early morning, their parents had left home for work. The children as usual, went to D.'s house. They were playing for sometime and then started watching television in the living room. It was around 9 a. m. There were only two adults, the defendant and Ms. M.N. in the house then. M. was sleeping in her bedroom and the defendant was alone inside his bedroom. As the children were watching television, the defendant came in and asked the complainant to go into his bedroom. The complainant did; but the other children continued watching television in the living room. As soon as the complainant entered the bedroom, the defendant closed the door. He made the complainant to lie down on the bed and did something to her, which the complainant herself referred to, in Creole as an act of "mal elve". What does the little girl mean by the term "*mal elve*"? The meaning could easily be gathered from her own words as she narrated an unpalatable

incident, which most of us may not like to hear but nevertheless must be stated. The relevant part of her testimony in this respect runs thus:

> *"We were in the living room... He took off his clothes. He also took off my clothes... He lifted my dress and took off my knickers... He took his thing and put into my thing.... i. e he took his penis and put into my private part... He did "mal elve" to me and after that he ejaculated into me, wiped it off and told me not to say anyone. When this happened I was in a sleeping position. I was facing the ceiling. When he finished, I went to sit in the living room... When the defendant placed his penis into mine, it hurt me... I felt it. When I say he ejaculated with me, there was a white liquid that came out from his private part. When I went back to the living room, my little sister was there. . . . Every time I went to the toilet after that, the white liquid came out. .. . M.N. (DW1) continued sleeping in her bedroom. As I was afraid I did not mention this to my mother. . . . Later she took me to the Beau Vallon Clinic for medical exaM.tion"*

The little sister of the complainant S. testified that while she was watching television with the complainant, at D.'s house that morning, the defendant called the complainant to go into his bedroom. Both went in and the defendant closed the door. S., who was presumably curious to know what was happening to her sister inside the closed bedroom, peeped through the hole of the door. She witnessed the same episode of "mal elve", which the complainant narrated in her testimony.

On 6” of May 1999, that is 6 days later, the mother of the complainant, Ms. S.E. came to learn about the alleged incident through her second daughter S., the peeper-witness. In no time, the mother questioned the complainant about the incident. The complainant admitted and explained the whole incident of “mal elve” to her mother. Furthermore, the complainant told her mother that she did not tell anyone about the incident because the defendant had told her not to and more so the complainant was afraid that her mother would beat her up for the incident. Following this shocking revelation, her mother immediately took the complainant to Beau Vallon Clinic for medical exaM.tion. Dr. Jude Paul Gedeon-PW 1- the medical officer, who was on duty at the Clinic heard the history through her mother and examined the complainant. He found no injury or bruises on the complainant. However, the vaginal exaM.tion revealed that the complainant had a mild white discharge, which looked like an infection. He took swab of specimen and sent it to the medical laboratory for diagnostic analysis. The lab could not process the sample as the specimen was dried. The doctor further testified that the presence of discharge in a child of complainant’s age is very unusual, though a child can get bacterial infection due to unhygienic practice like use of dirty fingers, nails etc. After the clinical exaM.tion, the doctor administered antibiotics for the infection and referred the case to the Child Protection Unit of the Central Hospital in Victoria.

On 31St of May 1999, nearly one month after the alleged incident Dr. Kausalya, the gynecologist of the Central Hospital examined the complainant. According to her findings the complainant’s hymen was torn in the *5’o* clock position. That was an old tear. There was no bleeding or discharge. The hymen was not stretchable. Hence, her impression was that an attempt at penetration of hymen had been made. The matter was reported to the police and the complainant was referred to the department of Social Services for counseling

The police started investigation into the incident. The defendant was arrested, interviewed and now stands charged with the offence first-abovementioned.

On the other side, the defendant does not dispute the fact that he was at the material time, cohabiting with Ms. M.R. at D.'s house and was occupying the bedroom in question. Moreover, he does not deny the fact that Ms. S.E. used to leave her children at the house of D. in the care of Ms. M.N. and the children at times used to watch television in the living room. However, he denied the allegation that he had or attempted to have sexual intercourse with the complainant either on 29th or 30th of April 1999 or on any date before or after. He testified in detail about his movements on 29th and 30th of April 1999. According to him, on 29" f April 1999 he woke up at *5. 45* a. m. He left home at around 6. *25* a. m and went to work as a mason at the residence of one Mr. David Louise at Mare Aux Coshon, where some construction work was going on that time. He testified that one of his coworker Mr. Felix Aglaie, a carpenter came to pick him up from home to go for work that morning. When he left home he did not see the complainant or the children in the house. He went to the residence of said David Louise and worked there until 1. 30 p. m and then moved to a site in the vicinity to complete the job on septic tank. After work he returned home only at 8. 30 p. m. Likewise on 30th of April 1999, he left home at around 6.30 a. m, went to work and returned only in the afternoon at 12. 30 p. m. Therefore, the defendant stated that he was not at his residence, in the morning of either 29th or 30th of April 1999, at around 9 a. m, during which time the incident allegedly took place. Moreover, the defendant testified that he was not in good terms with Mr. B.S., the boy friend of Ms. S.E.. According to the defendant, Mr. Rosaline used to threaten him even prior to the alleged incident stating that he was going to send the defendant to prison. Hence, the defendant

stated that he has been falsely accused of committing the offence in this case by the members of the complainant's family. Ms. M.N.-DW2- testified that in the morning of the 29th as well as the 30th of April 1999, when she woke up at around 7 p. m she did not see the defendant in the house as he had left home for work. The children were watching television that morning but she never received any complaint from them against the defendant regarding his act of sexual abuse. She also testified that Mr. B.S. once told the defendant in her presence that he would sent him to prison but that happened only after the occurrence of the alleged sexual abuse against the complainant, his stepdaughter. However, M. in cross-exaM.tion admitted that soon after the alleged incident when she gave a statement to the police regarding the movement of the defendant she stated that the defendant was staying at home on 29th of April 1999 and did not go to work. Eventually, she admitted in Court under oath that the statement she gave to the police was true and correct version. Mr. Felix Aglae-DW3- testified that on the 29th and 30th of April 1999 he and the defendant were working together in the premises of Mr. David Louise at Mare Aux Cochon. Mr. David Louise-DW4- also testified that the defendant was working in his premises on the 29th and 3O of April 1999, but he could not recall exactly what kind of work the defendant performed during those two days. In the circumstances, it is the contention of the defense that the defendant could not have committed the offence as he was not present in the house of D., at the alleged time on those two material dates cited in the charge. Hence, the learned Defence Counsel urged the Court to dismiss the charge and acquit the defendant.

I carefully perused the evidence on record. I meticulously considered arguments advanced by both counsel in support of their respective cases. First of all, on the question of credibility of the child-witnesses

although the complainant and her sister S. were of tender age, in my assessment, they were competent, mature, reliable, intelligent and truthful witnesses. The competence or incompetence of children is determined not on a class basis, but with reference to the maturity and understanding of the individual child. The test, in broad terms, is whether the child has sufficient understanding of the duty to tell the truth and is sufficiently capable of giving comprehensible evidence to justify the reception of his or her evidence, given the danger of fabrication, exaggeration or capriciousness. I also note that the question is not simply one of age, though age is, of course, an important factor and I accordingly, warn myself of the danger. Both of them gave clinching, intelligible and unbreakable evidence regarding the alleged act of sexual assault committed by the defendant upon the child on the day in question. I believe both of them to be credible in every aspect of their testimony. The evidence given by them is consistent, cogent, corroborative and reliable in all material facts, which are necessary to constitute and establish that not only the offence has been committed but also to prove beyond reasonable doubt that it was the defendant, who committed it. The defendant was not a stranger to them. I find the independent evidence of the eye witness S. is strong and sufficient on its own for any reasonable tribunal to convict the defendant of sexual assault in this matter. I see no reason to disbelieve her. In fact, even corroboration is not required, when there is the evidence of an independent eye-witness. See, the case of R vs. Rose-Case No: 13- 1972 SLR wherein, the accused was charged with the rape of a 7 year-old girl and in the alternative, with indecent assault upon her. At the end of the case the Court found the accused guilty of indecent assault on female relying upon the truth of the uncorroborated evidence of an independent eye-witness, which was not contradicted by any other evidence. On the other hand, I do not attach any credibility to the testimony of the defendant and his witnesses on the issue of “alibi” as none of them

appeared to be reliable in the least. Moreover, I find the evidence given by the defence witness is not consistent, cogent and reliable on material particulars. For instance, DW1, M., one of the household of the defendant testified on the crucial fact that the defendant did not go to work on 29th of April 1999, whereas the other two alibi witnesses testified to the contrary. Obviously, defendant failed to establish the defence of alibi in this matter although, I note in criM.l cases, it is a fundamental rule that the prosecution bear the overall burden of proving the guilt of the defendant including his identity. In a rather broad sense, the defence of alibi may consist of a denial that the crime charged was committed by anyone; it may consist of a denial that the accused was the person who committed the crime; there may be an allegation that the accused was no where near the scene of the crime or it may consist of an allegation that, though the accused had an opportunity to commit the crime, he was wrongly identified as its perpetrator. Therefore, evidence required to rebut an alibi is frequently said to be “proof of Identity”. In the instant case, I find the prosecution has proved beyond reasonable doubt the presence of the defendant at the time and place of the alleged crime. There could not have been any mistaken identity by the complainant or by her sister S..

On the issue of medical evidence, I find there is no rule of law or of practice, which requires that in all cases of sexual assaults, there ought to be a medical evidence to corroborate or to prove the offence. In any event, the medical evidence as to the tear in the hymen of the complainant shows that she had been sexually abused. This fact, obviously does not lead to any inference of innocence in favour of the defendant in this matter.

In the final analysis of the entire evidence on record, I find that the prosecution has proved the charge against the defendant beyond

reasonable doubt and to my satisfaction. Therefore, I find the defendant guilty of the offence of" sexual assault" contrary to *section 130(1)* of the Penal Code and convict him of the offence charged accordingly.

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**D.KARUNAKARAN**

**JUDGE**

**Dated this 3rd day of November 2004**