

**Republic v Pierre
(2007) SLR 200**

Ronny GOVINDEN for the Republic
Wilby LUCAS for the defendant

Judgment delivered on 8 October 2007 by:

KARUNAKARAN J: The defendant above named stands charged before this Court with the offence of sexual assault on two counts contrary to section 130 (2) (d) and 130 (2) (a) and punishable under Section 130 of the Penal Code under Count 1 and 2 respectively. Section 130 reads thus:

(1) Any person who sexually assaults another person is guilty of an offence and liable to imprisonment for 20 years.

(1) For the purposes of this section "sexual assault" includes -

- (a) an indecent assault;
- (b) the non-accidental touching of the sexual organ of another;
- (c) the non-accidental touching of another with one's sexual organ, or
- (d) the penetration of a body orifice of another for a sexual purpose.

(3) A person does not consent to an act which if done without consent constitutes an assault under this section if -

- (a) the person's 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 fifteen years; or
- (c) the person's understanding and knowledge are such that the person was incapable of giving consent.

(4) In determining the sentence of a person convicted of an offence under this section the Court shall take into account, among other things –

- (a) whether the person used or threatened to use violence in the course of or for the purpose of committing the offence;
- (b) whether there has been any penetration in terms of subsection (2)(d); or
- (c) any other aggravating circumstances.

The particulars of the charge under Count 1 allege that the defendant on 20 March 2003, at Mont Buxton, Mahe, without consent, penetrated the body orifice of A for a sexual purpose.

The particulars of the amended charge under Count 2 allege that the defendant on 20 March 2003, at Mont Buxton, Mahe without consent, indecently assaulted B by holding and examining inside the buttock of B.

The defendant denied the charges. The case proceeded for trial. The defendant was represented and duly defended by counsel Mr W Lucas. The prosecution adduced evidence by calling ten witnesses to prove the case against the defendant. After the close of the case for the prosecution, the Court ruled that the defendant had a case to answer in defence for the offence charged. Accordingly, he was called upon to present his defence, if any. He was put on his election in terms of section 184 (1) of the Criminal Procedure Code. The defendant elected to give evidence on oath and called no witnesses for the defence.

The facts of the case as transpire from evidence are these:

C (PW6), aged 62, a pensioner, is a resident of Mont Buxton, Mahe. He is a religious man. He used to do his regular prayers. He always kept a candle on a table in his bedroom for that holy purpose. The first complainant in this matter Ms A (PW3), aged 35, is his daughter. She is a housewife living on social security benefits. The second complainant, B (PW4), aged 22 is the nephew of the first complainant. B is a person of weak intellect. He is mentally retarded and has been under medical treatment since his childhood. They all live together in the same household at Mont Buxton as a joint family.

The defendant Mr Frederic Pierre was, at all material times, a police officer with the rank of Lance Corporal. He joined the Seychelles Police Force in 1995. He had been serving the Force until he was suspended from service because of the instant criminal case registered against him. In late 1990s he was working as police officer on La Digue having been attached to La Digue Police Station. Later he was transferred to Mahe. He started working at the Mont Fleuri Police Station as a Process Server under the supervision of the Police Inspector Ericson Charles (PW9).

Since the defendant held the rank of Lance Corporal, a non-commissioned rank in Police Force - that is above private and below corporal - he was not assigned any criminal investigations. Investigations that involve sexual offences were and are assigned to a special investigation branch called "Family Support Squad" that falls under the Criminal Investigation Department. Be that as it may, the defendant is also a resident of Mont Buxton, living in the same area where the complainants are living. In fact, the defendant's house is situated within a kilometre above the complainants' residence on the mountain. Since they all live in the same neighbourhood C (PW6) and both complainants (PW3 and PW4) had known the defendant very well as a police officer having seen him many times in the uniform. At times, the defendant while

passing by used to visit them on his way and talked to them.

The first complainant A (PW3), aged 35, testified in essence that the second complainant B (PW4) was her nephew being the son of her sister. On 20 March 2003, in the morning at around 11am, whilst A was at home with her father and the nephew, the defendant, who was in a red pair of shorts and T-shirt came to her house and told her that the doctor had sent him to do a medical test on her. That time her father was taking a bath outside. The defendant having thus entered the house took A into her father's bedroom, bolted the door from inside, made her remove her knickers and put her in the bed. He then took the holy candle from her father's table and inserted the bottom part of it into her vagina and pulled out. Then, he inserted it into her anus. It was very painful. After doing these acts of penetration, the defendant took his penis, inserted it into her vagina and had sexual intercourse with her. She tried to resist but the defendant told her to shut up and not to make any noise. She noticed that her nephew, the mentally retarded B was also watching this incident from outside through some opening in the door. After ejaculation, the defendant released her, opened the door and came out of the bedroom. He saw B, the mentally retarded man, sitting outside in the living room. Soon the defendant took B into the same bedroom and did something to him. B (PW4), the second complainant, who appeared to be a person of average intelligence and capable of understanding the nature of the oath testified in this respect, in essence thus:

On 20th March 2003, at around 11 am, the Defendant, whom he (B) knew as a police officer came to the house at Mont Buxton, where the latter lived with his grandfather C (PW6), grandmother D and aunty A (PW3). That time the defendant was wearing a red pair of shorts. After entering the house, the defendant sat in the living room, spoke to his aunty A for some time and then took her into his grandfather's bedroom and closed the door. B out of anxiety wanted to know what the police officer was doing to his aunty in the bedroom. Hence, he peeped through the hole from a corner of the bedroom-door.

Inside, he saw the defendant with a candle stick in his hand and inserted it into his aunty's anus and then took it out. After that he inserted his penis and had sexual intercourse with her. At one stage, he also heard his aunty screaming out of pain saying that the act of the defendant was hurting her. After the defendant finished those acts on A, he came out and told B that the doctor had asked him to do a test on B too. Therefore, the defendant asked B to go into the same bedroom. As B went in, the defendant asked him to remove his trousers and made him lie down on the bed. B did. Then the defendant opened B's buttocks and looked in his anus and then released him.

C (PW6), the father of A, testified that on the alleged date in the morning he did not notice the defendant when he entered the house as he was working in the garden that time. After finishing the work, he wanted to take a bath. His soap box was in his bedroom. So, he came into the house to take the soap box; but his bedroom had been

locked from inside. He asked the person whoever was inside to open the door. After three shouts there was no response. Finally, C shouted that if the door is not opened he was going to break the door. He heard a man's voice inside. The door opened. But C did not know who opened it from inside. As the door opened, he did not go inside but he stretched his hand from outside and took out the soap box and noticed his prayer candle was missing from the table. The man, whom he saw inside, was in red shorts. He did not look at his face nor did he talk to him. And, then he went outside, had his bath and came back. The bedroom door was open. He went inside and continued his search for the candle. He could not find it. However, C admitted in cross-examination, that he saw the defendant in his bedroom and the defendant asked him to get a pencil and paper to make some accounts on it. Also he denied that the defendant used to come to his house prior to the alleged incident.

Further he stated in cross-examination that the defendant on that day told him not to watch what he was doing in his house by using some obscene languages.

Ms Janette Thelermont (PW7), a woman Police Constable testified that following a complaint made by A on the same day of the alleged incident, the police immediately arrested the defendant and brought him to the Central Police Station. He was informed of the complaint of sexual assault and of his constitutional rights. He voluntarily gave a statement to the police at 17.30 hrs on the same day of the alleged incident. This statement was produced in evidence and marked as exhibit P5, which reads thus:

Today the 20th day of March 2003 at around 12.45hrs I came from the shop at Mont Buxton and went to the house of C who is one of my friends. The reason of going to his residence is to talk regarding an incident that been occurred to his step son B as he was sexually abused by one Daniel JULIE. From the time I arrived at the residence of C I saw his daughter namely A sitting next to the house gate and we were talking regarding the sexual abuse to B from Daniel JULIE. So A invited me inside the house for us to talk, while I agree that she brought me in the house corridor and told me to sit on the table for us to talk, the same moment C came and told me to get inside the bedroom if I wanted to talk to A; frankly me and A we got inside the bedroom of C where we sat on the bedroom and talked to each other regarding what had happened with B.

The bedroom door was well pushed but was unlocked, fifteen minutes of talk, later after the talk I went away. From the moment I was in the bedroom with A nothing happen between her and myself. I never touched her, even used candle inside her vagina nor ass, and I had never done sexual intercourse with her. But what I remember is when I was busy talking to A in the bedroom she made me aware that I have large penis and asked me about when I will give it to her, that was the indecent words that she was talking with me when we were inside the bedroom together. It was the moment that I informed A that I would never make any action of love with her as my girlfriend E is her godmother. That was when I leave the place.

If there is allegation that I threaten A that I will burn the hair on her vagina if she don't have any sexual intercourse with me is totally wrong. If there is also allegation that I said that the doctor who has sent me to make a test with A is again totally wrong.

Police Constable Mariano Orphee (PW1) testified that on 20 March 2003, while he had been to Mont Buxton on a duty related matter, at around 2pm, he received a complaint from A stating that a police officer by the name of Pierre had been involved in an incident with her. Following some investigation, he received a candle from C. He brought that candle to the Central Police Station and kept it in his safe to be produced as an exhibit in this case. Accordingly, the said candle was produced in evidence.

Mr Wilson Denis (PW2), a Police Officer, testified that on 20 March 2003, while he was on duty at the Central Police Station he received a complaint of sexual assault against the accused. As a result he went to Mont Buxton to apprehend the defendant at his residence, where he found a pair of red shorts left on the cloth line for drying. He arrested the defendant and seized the red shorts and the same was produced in evidence.

Inspector Neige Raoul (PW8) of the "Family Support Squad" unit testified that on 19 March 2003, she received a phone call from the defendant who informed her that one B of Mont Buxton had been sexually abused by one Daniel Julie and so he sought her advice on this matter. Mrs. Raoul advised the defendant to tell B to go to the police station and make his complaint. Then the complainant would be sent for medical examination and the suspect would be arrested. Moreover, she testified that she never instructed or authorised the defendant to investigate any case involving sexual assault on B. Further she stated that medical examination on the victim of sexual assault cases should be done only by the doctors at the Victoria Hospital, not by any police officer for that matter.

Police Inspector Ericson Charles (PW9), testified that the defendant was working under his supervision during the period of the alleged incident and he never instructed or authorised the Defendant to carry out any investigation in any sexual assault case involving B or A. The defendant was at that time working under his supervision at the Mont Fleuri Police Station only as a Process Server. Since the defendant held the rank of Lance Corporal, a non-commissioned rank in the Police Force, he was not assigned any criminal investigation at any point in time.

Dr Daniella Malulu (PW10), a psychiatrist, testified that B had been a known patient of psychiatric department of the Victoria Hospital, ever since he was 7 years of age. He has been on treatment and medication on and off for aggressiveness due to mental retardation. The doctor Malulu also produced a medical report on B in this respect.

After the close of the case for the prosecution, the Court ruled that the defendant had a case to answer in defence. The defendant elected to give evidence on oath. He testified

in essence, that it was true that he had sexual intercourse with the first complainant A, on the date, time and place as alleged by the prosecution. However, according to the defendant, he had that sexual intercourse with the consent of A. He further stated that it was not the first time he had it, but he used to have such sexual intercourse with her in the past, at least ten times, at different venues before the alleged one. However, as far as the venue was concerned, it was the first time he had such sexual intercourse at her house in her father's bedroom.

He further testified that on the alleged date in the morning while he was in his uniform, A met him in a shop at Mont Buxton and asked him to come and see her in a few minutes at her home. So, the defendant went to his house, changed his uniform, put on a red pair of trousers and then went to A's home as usual, since he was in the habit of going to her place often to play dominos. In A's house he first met her father C, who told him to go inside the house and talk to A.

When he went in, he saw A, who took him into her father's bedroom stating that she had to tell him, something about her nephew, B, who was allegedly sodomised by one Daniel Julie. So, he asked her to give him a piece of paper to note down what she was going to say about the incident of B. However, A told him that the real purpose of her invitation to her house was to have sex with him. Then, she closed the bedroom door and pulled him down and got him sit by her side and, told that they were going to have quick sex. The crucial part of his evidence in this respect runs thus:

She told me Pierre, we have to do it, let us hurry up. I did not touch her. She pulled up her skirt very quickly... and she removed her underpants on the left leg. The right side was still on her. She was on the bed and she leaned against the wall and put her legs up. I looked at her private part. She told me 'Pierre look at it, let us have sex quickly'. At this point I had an erection. I was tempted, and the way she was encouraging me to do it... I did not use force on her. I did not harass her. I did not have the intention to come there and have sex. As a police officer, I had come there to help them about the incident of B. She then opened the door and went out.

Besides, the defendant stated that he never inserted any candle into her anus or vagina. As regards his statement (supra) given under caution to the police, the defendant testified that he lied in his statement stating that he did not have sexual intercourse with A because of the following reasons:

- (i) He felt embarrassed to tell the truth since he was working as a personal body guard to the Speaker of the National Assembly at that time.
- (ii) He panicked to tell the truth.
- (iii) Things did not make any sense at that time

- (iv) He did not get a chance to take any legal advice when he gave the Statement to the police.
- (v) Inspector Denis pressurised him, so he could not tell the truth.
- (vi) Investigating Officer Cecil Valmont threatened him saying that he was going to put him in a cell and that is what made him give a statement containing lies.

As regards the allegation of sexual assault on B, the defendant testified that on 'Clean up the World Day' - which in fact, fell from 19 to 21 September 2003 - he went to C's house looking for B as the defendant wanted to get help from him to dispose of some rubbish from his house. When he went to C's house, he noticed that B was rubbing his abdomen. The defendant asked him what was wrong with him. In response, B told him that he had been sodomised by one Daniel Julie of Hangard Street. Having thus replied, according to the Defendant, B voluntarily lifted his T-shirt and showed him his waist, where the said Daniel Julie had been holding him around while having anal intercourse with him. The defendant noticed that there was a blue mark and scratch on him. Furthermore, the defendant testified that he did that in his capacity as a police officer vested with power to investigate any complaint made to him. Having thus testified in the chief-examination, the defendant admitted in cross-examination that the incident happened on the morning of 19 March 2003.

Further, the defendant testified that the police officers Land Corporal Julie, Sergeant Bell, WPC Janette Thelermont and WPC Marie Souffe have all fabricated the story and framed him falsely in this case. Hence, the defendant claimed that he was innocent, he has never committed any indecent act either on B or A.

I shall now proceed to examine the evidence pertaining to the charge in question in the light of the submissions made by counsel on both sides. Before doing so, I should state that all the witnesses called by the prosecution in this matter appeared to be very credible. I believe them all in every aspect of their testimony.

The entire evidence adduced by the prosecution is reliable, consistent, cogent, and more so corroborative in all material particulars.

As regards the charge under count 1, I believe A (PW3) in her testimony that the defendant did insert the candle into her anus, vagina and then had sexual intercourse with her using his male organ. Indeed, the defendant does not dispute the fact that he did commit the act of sexual intercourse on her, presumably using his penis, on the date and place as alleged by the prosecution. However, according to the defendant, A did give her consent to the sexual intercourse. Therefore, the defence contends that the defendant's act cannot, in law, amount to a "sexual assault" which is the essential ingredient of the offence alleged. Now, the only issue before the Court for determination is whether A had consented to the alleged acts committed by the defendant on her body.

Firstly, on the question of credibility, I believe the complainant A in her testimony in that she did not give her consent for the defendant to commit the act of sexual intercourse that is, using his male organ on her, on the alleged date and place. I do not believe the defendant's version to the contrary. Hence, on the strength of the first complainant's evidence alone, I find the defendant did commit an act of sexual intercourse on her without her consent.

In any event, even if one assumes for a moment that she had given her consent implicitly for the defendant to commit the said act of sexual intercourse on her using his male organ, still I find that she never gave consent to the acts of the candle being inserted by him into her anus and vagina. These acts of sexual perversion of the defendant namely, by inserting an external object into her anus and vagina for a sexual purpose in my view, on their own - dehors the defendant's act of sexual intercourse using his male organ - constitute a "sexual assault" in law, by virtue of section 130(2) (d) of the Penal Code, which reads thus:

- (2) "For the purposes of this section "sexual assault" includes –
the penetration of a body orifice of another for a sexual purpose.

Therefore, in law sexual assault means not only the penetration of another's body orifice by using one's sexual organ but also it includes any such penetration made by using any other part of one's body or by using any other external object or material whether solid, liquid or gas, which entity may even include radiations such as laser beams etc. What is important here is the act of penetration using any tangible entity and the purpose for which such penetration is made. If it is made for a sexual purpose, then it completes and constitutes the act of sexual assault as defined in section 130 (2)(d) of the Penal Code. It does not matter, what is being used for the penetration or which orifice in the body is penetrated. Obviously, the defendant in this case has committed and completed the act of sexual assault in the eyes of law on A by the simple fact that he inserted a candle into her anus and vagina, without her consent for a sexual purpose, and so I find.

Misrepresentation

On the other hand, even if one assumes for a moment that A had given her consent for the defendant to carry out any of those acts on her whether of sexual nature or not, the fact remains that she consented to those acts being performed on her because of the misrepresentation made by the defendant whom she knew as a police officer, who told her that he had been asked by a medical doctor to carry out those tests presumably of a medical character. In fact, any consent so obtained by such misrepresentation as to the character of the act is not a valid consent in law, in terms of section 130 (3) (a) of the Penal Code (vide supra) which reads thus:

- (3) A person does not consent to an act which if done without consent constitutes an assault under this section if –

- (a) the person's consent was obtained by misrepresentation as to the character of the act or the identity of the person doing the act...

Hence, even if the defendant had obtained consent as he claims, from A to commit those acts on her, it was evidently obtained by misrepresentation. Hence, a conclusive legal presumption is activated against him by operation of section 130 (3)(a) of the Penal Code. That is, the complainant did not consent to any such act, and the defendant is presumed to have committed that act without consent in law. Therefore, I find the defence of consent raised by the defendant in this respect is not maintainable in law.

Corroboration

I note that corroboration of the evidence of the complainant is looked for as a matter of practice and the Court should warn itself of the danger of acting without it, in all cases of sexual offence, irrespective of the sex of the complainant or the party involved.

Corroborative evidence aliunde

Although this Court can completely rely and act upon the truth of the evidence of the complainant in the present case, and after warning may proceed to convict the defendant without looking for any corroboration (see *R v Rose* (1972) SLR 43, still I find that there is strong and overwhelming evidence of the eye-witness B (PW4), which aptly corroborates the evidence of the complainant in all crucial facts relating to the act of sexual assault and the involvement of the defendant in the commission of the act on the complainant. This witness categorically testified that inside the bedroom, he saw the defendant with a candle stick in his hand and inserted it into his aunty's anus and then took it out. After that he again inserted his penis and had sexual intercourse with her. At one stage, he also heard his aunty screaming out of pain saying that the act of the defendant was hurting her.

Lies as corroboration

As rightly submitted by Principal State Counsel Mr. Govinden, it is trite law that a false statement made by the defendant to the Police before the commencement of proceedings may amount to corroboration. In *R v Lucas* (1981) 1 QB 720 it was held and subsequently followed in *R v R* Cr LR 736, that a defendant's lies during a police interview can be treated as corroboration, provided the following criteria are considered before a lie can be said to amount to corroboration:

- (i) The lie must have been deliberate
- (ii) It must relate to the material issue
- (iii) The motive for the lie must be a realisation of guilt and a fear of the truth
- (iv) The statement must be clearly shown to be a lie by evidence other than that of the person who has to be corroborated, that is to say, by admission or by evidence from an independent source (see Archbold

(1993 ed) 1229, mid paragraph, and *Victor v Ally* (1990) SLR 121)

Admittedly, the defendant lied to the police when he gave the voluntary statement under caution. This is also clearly shown to be a lie by the officer Ms Janette Thelermont (PW7), who recorded the statement, and by the evidence of A (PW3) and B (PW4). In fact, both complainants testified that the defendant unlawfully had sexual intercourse with A. The defendant's evidence under oath also confirms this revelation of the lie as it directly contradicts his statement to the police under caution. The motive of this lie as to the sexual intercourse was clearly a realisation of guilt. It was made to set a defence of total denial of a charge in the first instance to the police. However, the defendant in Court, having observed the strength of the evidence of the prosecution in respect the act of sexual intercourse, obviously changed his story and the lie, again this time in an attempt to prove consent.

The lie, evidently, relates to the material issue that is the act of sexual assault. Finally, I find that the lie was deliberate. There was nothing accidental about the falsehood of the defendant's statement under caution. It was a deliberate lie which he told the police during the course of an interview. Obviously, none of the reasons he gave in Court for lying to the police to my mind, appears to be plausible and convincing. Hence, I find the lies told by the defendant in his statement to the police under caution can also safely be used on its own for the purpose of corroboration in this matter, although there is overwhelming independent evidence available and used from other sources for this purpose, as discussed supra.

As regards the second count, I believe B (PW4) in every aspect of his testimony. I find on evidence that the defendant, whilst he was representing himself to be an investigating officer, did tell B that he had been asked by the doctor to conduct a medical examination on him. Having thus misrepresented the facts, the defendant asked B to remove his trousers, opened his buttocks and then looked in B's private parts. On the question of his police authority to investigate the alleged cases of sexual offence, I believe the Inspector Mrs Neige Raoul (PW8) in her evidence that she advised the defendant that any complaint of sexual assault should be reported by the complainant at the police station and the complainant would be sent to Victoria Hospital for medical examination. Besides, I believe the Inspector Eric Charles (PW9) in his evidence when he testified that in his capacity as the superior officer he never instructed the defendant to carry out criminal investigations in respect of any case, since the defendant was only a non-commissioned officer serving the police force as a process server. I do not believe the defendant's version to the contrary stating that he had authority to investigate and B removed his shorts on his own and voluntarily showed the defendant his waist for examination.

In the circumstances, I find that the unauthorised examination of the defendant on the private parts of B amounts to an indecent act, which obviously falls well within the definition of "sexual assault" in terms of section 130 (2)(a) of the Penal code.

On the question of consent, I believe B in his testimony that he did not give consent in

law, since I find that such consent was obtained by misrepresentation. This finding is based on similar reasons discussed supra in the case of A. In any event, the medical evidence shows that B is a mentally retarded person of weak intellect, whose understanding and knowledge in my view are such that he could not have given valid consent as contemplated under section 130 (3)(c) of the Penal Code, which reads thus:

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

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

On the question of corroboration, I find there is no need for it in the case B, as I completely rely upon the truth of the evidence, which he has given before this Court (see *R v Rose* (1972) SLR 43).

As regards corroboration, although there is no need for it as I completely rely upon the truth of the evidence of the complainant - see *R v Rose* - still I find there is strong and overwhelming evidence of the defendant's confession to corroborate the evidence of the complainant on the question of sexual assault by the defendant.

In my final analysis, I have considered the whole of the evidence. I believe both complainants to be truthful and satisfactory witnesses. I accept their evidence in total. I find that neither the complainants nor the police officers have concocted this story to incriminate the defendant falsely in this matter. In the circumstances, I find that the prosecution has proved beyond reasonable doubt that not only the offences of sexual assault have been committed against the complainants under counts 1 and 2 respectively, but also the defendant who committed those offences during the month of March 2003, particularly on 20 and/or 19 March, at Mont Buxton, Mahe.

I therefore, find the defendant guilty of the offence of sexual assault on two counts contrary to section 130 (2)(d) and 130 (2)(a) of the Penal Code under Count 1 and 2 respectively of the Penal Code and convict him of the offences accordingly

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