IN THE NAURU COURT OF APPEAL
AT YAREN
CRIMINAL APPELLATE JURISDICTION

Criminal Appeal No. 06 of 2021
Supreme Court Criminal Case No. 12 of 2019

BETWEEN

THE REPUBLIC

AND

APPELLANT

LUCETTE DETABAUW
KIMAGO COOK

RESPONDENTS

BEFORE: **Justice R. Wimalasena, President**
Justice Sir A. R. Palmer
Justice C. Makail
Justice M.P. de Silva

DATE OF HEARING: **30 October 2023**

DATE OF JUDGMENT:	**02 May 2024**
CITATION:	**The Republic v Lucette Detabouw & Kimago Cook**
KEYWORDS:	Taking images, Private act, pornography, affording privacy, video evidence
LEGISLATION:	Section 8, 19, 121, 122 and 142 of the Crimes Act 2016; Section 22 of Crimes (Amendment) No. 2 Act 2020
CASES CITED:	R v Court [1988] 2 ALL ER 221; Healthcare at Home Limited v The Common Services Agency [2014] UK SC 49
APPEARANCES:	
COUNSEL FOR the Appellant:	**A. Driu**
COUNSEL FOR the Respondent:	**R. Tagivakatini**

JUDGMENT

1. This is an appeal by the Director of Public Prosecutions against the acquittal of the first and second Respondents by the Supreme Court. The amended information filed on 18 November 2020 reads as follows:

First Count

Statement of offence

Taking images of private acts of child: contrary to section 122(1)(a)(b)(c) and (d)(i) of the Crimes Act 2016

Particulars of offence

Lucette Detabouw on the 5th day of February, 2019 at Boe District in Nauru, intentionally took a video of two children under the age of 13,

doing a private act and she was reckless about that fact, and a reasonable person would reasonably expect that a child would be afforded privacy for that act.

Second Count

Statement of offence

Possessing and having control of the offending material: contrary to section 142(1)(a)(i)(b)(c) and (d)(i) of the Crimes Act 2016.

Particulars of offence

Lucette Detabouw on the 5th day of February 2019 at Boe District in Nauru, intentionally possessed or controlled a video of two children, doing a private act and the material is pornography or abuse material and she was reckless about that fact and that the children in the video were under 18 years old and that the said material was likely to offend an ordinary person and she was also reckless about that fact.

Third Count

Statement of offence

Sending the offending material: contrary to section 142(1)(a)(vii)(b)(c) and (d)(i) of the Crimes Act 2016.

Particulars of Offence

Kimago Cook on the 5th day of February, 2019 at Boe District in Nauru, intentionally sent a video of two children, doing a private act to a group of IMO users and the material is pornography or abuse material and she was reckless about that fact and that the children in the video were under 18 years old and that the said material was likely to offend an ordinary person and she was also reckless about that fact.

2. On 30 July 2021, the Supreme Court delivered its judgment, acquitting the first Respondent from counts one and two, and the second Respondent from count three. Subsequently, the Director of Public Prosecutions filed a Notice of Appeal on 30 August 2021 with the following grounds of appeal seeking a retrial:

    i. The learned Judge erred in law and fact in finding the 1st Accused not guilty for Count 1 when there was sufficient evidence proven beyond reasonable doubt to convict the Accused accordingly;
    ii. The Learned Judge erred in law and fact in using the same evidence for Count 1 and Count 2 to assess Count 3; and
    iii. The Learned Judge erred in law and fact in considering other likely offenders who were not charged.

3. The background of the case is that the first Respondent recorded a video with her phone, showing two children allegedly involved in a private act. The first Respondent, who lives next to a school, captured the children on video while they were on school premises, close to a location visible from her house. This video was later transferred from the first Respondent's phone to the second Respondent, who subsequently shared it with other people. The first Respondent claimed that the recording was intended to be shown to the school principal and teachers. However, the video was never shown to school authorities and later went viral on social media.

Ground of Appeal No 1

4. We will now consider the first ground of appeal. The Appellant claims that the learned trial judge's finding hinged on whether the conduct of the two children could be regarded as a 'private act' according to the law. The Appellant's counsel submitted that the evidence presented by the prosecution established that the children featured in the video recording were engaged in activities both

physical and sexual in nature. The Appellant asserted that the acts of the children, which included pulling, leaning against each other, undressing, kneeling, and kissing, were done for sexual gratification or arousal of themselves. Therefore, the Appellant contended that the prosecution proved beyond a reasonable doubt that the children were engaged in a private act.

5. The Appellant submitted that the learned trial judge misdirected himself on crucial and material facts, despite having the advantage of seeing and hearing the evidence firsthand. The Appellant argued that the learned trial judge erred in his Honour's findings regarding private acts and the fourth limb of the offence stipulated in section 122 of the Crimes Act, 'whether a reasonable person would reasonably expect that the child would be afforded privacy for that act'.

6. Before we delve into considering whether the learned trial judge erred in the findings with respect to the private acts and the issue of whether a reasonable person would reasonably expect that the child would be afforded privacy for that act, we will analyze the elements of the offence. For convenience, section 122 of the Crimes Act is set out below:

> "**Section 122 Taking images of private acts of child**
>
> 1) A person commits an offence if:
>
> a) the person intentionally takes an image of another person;
>
> b) the person whose image is taken is a child;
>
> c) the child is doing a private act and the person is reckless about that fact; and
>
> d) in the circumstances, a reasonable person would reasonably expect that the child would be afforded privacy for that act.
>
> Penalty:

i. if the child is under 13 years old - 15 years imprisonment; or

ii. in any other case - 10 years imprisonment.

2) Strict liability applies to subsection (1)(b).

3) The question whether a reasonable person would reasonably expect that a child would be afforded privacy for an act is one of fact."

7. It should also be noted, to avoid confusion, that by Act No. 29 of 2020, the penalty was amended to *'a maximum term of 25 years imprisonment, of which imprisonment term at least one third to be served without any parole or probation'*.

8. Be that as it may, there is no dispute over the fact that on the alleged day of the incident, the first Respondent recorded a video of two children involved in an act. The first limb of the offence requires that the taking of the image be intentional. Therefore, the action of capturing the image must be intentional and not accidental or a mistake. To establish this offence, the prosecution must first prove that the image was captured deliberately. In this case, it is not disputed that the video was taken intentionally. However, we will delve further into how the relevancy of intention was dealt with in the court below later.

9. Also, it should be noted that 'images' in relation to this offence refer to both moving and still images. There is no contention that the video recording captured on the phone of the first Respondent falls within the definition of taking an image. Section 8 of the Crimes Act states:

> "a person takes an image of another person if the person captures moving or still images of the other person by a camera or any other means in such a way that:
>
> a) a recording is made of the images;

b) the images are capable of being transmitted in real time with or without retention or storage in physical or electronic form; or

c) the images are otherwise capable of being distributed"

10. As per the interpretation in section 8 of the Crimes Act, a child is an individual who is under 18 years old. The second limb of the offence requires the prosecution to prove that the person depicted in the recording was a child. It is not disputed that both persons depicted in the recording were children.

11. The main argument of the Appellant is that the learned trial judge erred in his Honour's findings regarding the third limb: that the children were engaged in a private act and the person was reckless about that fact. We will first consider the recklessness of the act. Section 19 of the Crimes Act defines recklessness as follows:

1) a person is reckless about a matter if:
    a) the person is aware of a substantial risk that:
        i. in the case of a circumstance, the circumstance exists or will exist; and
        ii. in the case of a result, the result will occur; and
    b) having regard to the circumstances known to the person, it is unjustifiable to take the risk.
2) The question whether taking a risk is unjustifiable, is one of fact.
3) Where recklessness is specified as the fault element required to prove an offence, proof of intention, knowledge or recklessness will satisfy that fault element for the offence.

12. In this context, the learned trial judge was expected to consider whether the first Respondent knew that the children were engaged in a private act and that taking an image under those circumstances posed a substantial risk to the

children's privacy yet proceeded to record a video showing disregard for their privacy. Additionally, the court had to consider whether, in light of all known circumstances, it was justifiable for the first Respondent to take that risk. However, it does not appear that the learned trial judge gave regard to this aspect of recklessness, as his Honour briefly arrived at the finding that the alleged acts of the children were not private acts.

13. The Appellant argued that the acts that occurred between the two children fall well within the scope of 'private acts' as defined in section 8 of the Crimes Act. On the other hand, the position of the Respondents was that the first Respondent did not record the video for her sexual gratification or to be sexually aroused; rather, she recorded it to show to the principal of the school. Therefore, it was submitted in the submissions of the Respondents that the learned trial judge did not err in finding that there was no evidence to prove that they were engaged in private acts. It was also submitted by the Respondents that the acts of the children, kissing, opening up clothing, and touching each other, were not sexually motivated.

14. Section 8 of the Crimes Act states:

> '**Private act**' mean:
>
> a) an act of the following kind:
>
> i. sexual intercourse;
>
> ii. masturbation or sexual self-penetration; or
>
> iii. any activity that involves physical contact by the person with another person for sexual gratification or sexual arousal of a person, whether of the people involved or some other person;
>
> b) an act involving an intimate bodily function (for example, using the toilet);

c) an act involving undressing so that the body is clothed only in underwear; or

d) an act involving nudity

15. It was the argument of the Appellant that they premised their case on the interpretation that the relevant acts of the children fell within '*any activity that involves physical contact by the person with another person for sexual gratification or sexual arousal of a person, whether of the people involved or some other person*'. The learned trial judge decided that there is no evidence of an act of sexual intercourse, masturbation or sexual self-penetration, intimate bodily function in using toilet or an act of undressing so that the body is clothed only in underwear or an act of nudity. Then his Honour went on to consider whether it falls within the ambit of '*any activity that involves physical contact by the person with another person for sexual gratification or sexual arousal of a person, whether of the people involved or some other person,*' under the heading 'Sexual Gratification' in the judgment.

16. The learned trial judge decided that the first Respondent recorded the video to show it to the teachers. His Honour made this finding based on the evidence given by the first Respondent and her answers in the record of the interview. However, it is not clear how the learned trial judge accepted the answers in the record of the interview and the evidence of the first Respondent as opposed to the prosecution's evidence and the admissions of the first Respondent that the videos were never brought to the attention of the school authorities. It should be noted that the court has a duty to reason out in the judgment why one piece of evidence was considered over another. It is not a proper exercise of judicial function to subtly ignore material evidence without giving due regard.

17. Furthermore, it appears that the learned trial judge believed that in this case, the sexual gratification or sexual arousal had to be established in relation to the first Respondent. This is evident from how the learned trial judge considered

the evidence transpired during the cross-examination of the first Respondent. During this cross-examination, the prosecution asked why the first Respondent did not stop the children within the one minute and 57 seconds of the recording, and the first Respondent stated that the video was stopped when she called out to the children. Based on this evidence, the learned trial judge stated:

> "If it was indeed for sexual gratification or arousal then why would she call out to the children. She should have just continued to watch the children but she called out to them. Why? Because her intentions were to bring it to the attention of school teachers..."

18. As such, the learned trial judge decided that the prosecution failed to prove that the children were engaged in a private act. We will now consider whether the learned trial judge's conclusion regarding the private act is correct in law. It is very clear from a plain reading of the definition of a private act, the third limb, that any activity involving physical contact by the person with another person for sexual gratification or sexual arousal of a person, whether of the people involved or some other person, pertains to the sexual gratification or sexual arousal of either the persons involved in the activity or someone else. It appears that what the learned trial judge considered was whether the first Respondent, who recorded the video, did so for sexual gratification or arousal. His Honour answered this question by concluding that the first Respondent's intention was to show the video to the teachers and, therefore, that the video was not recorded for sexual gratification or arousal.

19. It must be noted with respect, that the learned trial judge was misconceived on this point. It appears that it was never the prosecution's case to establish a private act by asserting that the first Respondent, who recorded the video, did so for her own sexual gratification or arousal. The wording of the provision is very clear that the act could be for the sexual gratification or arousal of a person

either involved in the activity (i.e. private act) or some other person. What the learned trial judge should have considered was whether the two children were involved in the act for their sexual gratification or arousal.

20. In order to assess this, it was necessary for the learned judge to carefully analyze the evidence presented by the prosecution. Particularly, the learned trial judge should have assessed the video recording to ascertain if the activities involved by the children were for their sexual gratification or sexual arousal. However, it appears that the learned trial judge did not judiciously consider the video evidence presented by the prosecution. The video recording was tendered as prosecution evidence at the trial without any objection and had been played in court. There had not been any dispute regarding the relevancy, authenticity or even regarding the quality of the video. The video was tendered as real evidence, and it is the responsibility of the court to view it and attach the necessary weight to that evidence. Generally, when video evidence is presented, the court should give regard to the relevancy of the video evidence, the reliability and authenticity of the recording, and then determine how much weight can be attached to such a recording. If the quality of the video was poor, it is the duty of the court to make a determination on that without treating such evidence in a flimsy manner.

21. How the learned trial judge considered the video recording is evident from the below excerpt of the evidence given by Sgt Illona:

"Judge:	And they kiss each other?
Sgt Illona:	Yes. At one point they started off separately and now they are here.
Judge:	what else?
Sgt Illona:	He's got his face right up to I think they are kissing, and now I think he's trying, she's pulling up a dress and he's trying to pull. I don't know what.

Judge: What do you mean you don't know what, how I am supposed to know what's happening."

22. In paragraph 23 of the judgment the learned trial judge remarked on what was depicted in the video recording as follows:

> "Sgt Illona is a very experienced police officer and she had difficulty explaining as to what the children were doing. She stated in many places that as I said previously: "I think" and "I don't know". This is not a criticism of how she gave evidence as the video itself was not clear but she was really struggling to describe as to what she saw. From what could be seen in the video when it was played in court, as well as the evidence of Sgt Illona and the evidence of the first defendant is that the two children were engaged in the act of hugging/ embracing or kissing each other which is consistent with Sgt Illona's observations when she interviewed the two defendants and put the allegation to them that the children were engaged in "indecent acts".

23. It is very clear that the evidence presented by the prosecution in the form of a video recording has not been duly considered and evaluated by the learned trial judge. Instead, his Honour has relied on what other witnesses said about what can be seen in the video. If the video recording lacked clarity or failed to clearly depict the activity involving the two children, the learned trial judge should have assessed the quality of that evidence independently, rather than relying on how the other witnesses seen the video recording. We are of the view that the learned trial judge erred by not making a determination on what weight his Honour would attach to the video recording, thereby failing to properly consider the prosecution evidence.

24. Then, the learned trial judge quoted the following passage from R v Court [1988] 2 ALL ER 221 and moved on to consider whether a reasonable person would have afforded privacy, without making a finding on what weight his Honour would attach to the video recording, or whether the act of the children to be 'any activity that involves physical contact by the person with another person for sexual gratification or sexual arousal of a person, whether of the people involved or some other person'

> "A wicked intention is an essential ingredient of the offence of indecent assault, as indeed it is of most other crimes against the person. For the most part, the wicked intention can readily be inferred from the facts found proved as to the circumstances of the assault, unless there are indications that those features of the circumstances which are capable of being considered indecent were not intended, as in the instance put of a common assault accidently involving damage to a woman's clothing. In a narrow range of cases, however, the circumstances may not point unequivocally to the requisite wicked intention. The delivery of chastisement to the buttocks of a child is capable of presenting a case of that nature, since such chastisement is not necessarily indicative of an intent to do something indecent. Where, however, there is direct evidence, as there was in present case in the shape of the appellant's statement about buttock fetish, that is it was the assailant's intention to use the victim for the purpose of gratifying a particular self-instinct and this action did in fact amount to a using of her that purpose, such evidence can, in my opinion, can properly, be taken into account so as to resolve any ambiguity about the nature of the act. The contrary view seems to me to fly in the face of all common sense.

25. We do not find any relevance in this passage to the present case. Be that as it may, then the learned trial judge quoted a definition of the reasonable man test from 'Wickipedia' in paragraph 28 and also quoted a passage from Healthcare at Home Limited v The Common Services Agency [2014] UK SC 49 Supreme Court of the United Kingdom 30 July 2014 on the reasonable man test.

26. At this juncture, it should be noted, with respect, that Wikipedia is not a source of reference that should be used by judicial officers as a best practice. Although Wikipedia can be useful for gathering information, it is an open-content encyclopedia maintained by its users. Wikipedia itself includes a disclaimer which states, 'Wikipedia cannot guarantee the validity of the information found here.' Therefore, Wikipedia should not be regarded as a reliable source of reference, particularly when seeking definitions for use in judicial decisions.

27. The learned trial judge then moved on to consider whether a reasonable man would have afforded privacy. In paragraph 30 of the judgment the learned trial judge stated:

> "I sit in this court as both the judge of law and fact and in my capacity as a judge of fact I am satisfied that a right-thinking member of society would have acted in the same manner as the first defendant did in taking the video, and not afforded privacy to the children as the sole purpose of taking the video was, as I have stated earlier, was to show the children's activities to principal and the teachers."

28. Finally, the learned trial judge arrived at the conclusion that the prosecution failed to prove the first count, as follows:

> "31. For the reasons given above I find that the prosecution has not proved the children were engaged in a private act or that a reasonable person would have afforded them privacy for the act

that they were engaged in. These are essential elements of the offence and I therefore acquit the first defendant on count one. "

29. It is not clear how the learned trial judge came to the conclusion that the sole purpose of recording the video was to show the children's activities to the principal and the teachers. It appears that the evidence presented by the prosecution indicates otherwise. The first Respondent did not seem to have attempted to bring the incident to the notice of the teachers or the principal. Besides, there was no need to record a video of children in such circumstances since the first Respondent could have easily reported it to the school as a person who resides right next to the school. Although the evidence presented by the prosecution established that no such report was made to the school and that the video was shared on social media, the learned trial judge, based solely on what was stated by the first Respondent, concluded that the video was recorded to show to the principal and the teachers.

30. Be that as it may, we will now consider whether the learned trial judge misconceived the proper application of affording privacy in the context of this offence. Privacy encompasses a wide scope depending on the context in which it is used. It appears that the legislation has not intended to limit the scope of privacy in the context of the offences under Part 7 of the Crimes Act, as the offences stipulate that the extent of privacy is to be considered in the circumstances of each case. Unwanted recording or observation clearly intrudes into a person's privacy. Violations of privacy also affect the autonomy and integrity of a person. However, a child has limited autonomy compared to an adult in terms of privacy. This does not mean that a child can be video recorded indiscriminately, even if engaged in a sexual act, regardless of how immoral or unlawful such an act may be. Protecting children from sexual activities is of paramount importance. Similarly, when a child is involved in a sexual act, it requires sensitive handling to safeguard the child's identity and dignity.

31. Privacy in this context does not imply affording secrecy to carry on a private act. According to Section 122, 'affording privacy' clearly means that under the circumstances, a reasonable person would expect that the child should be afforded privacy for that act, ensuring there is no intrusion or violation of the child's dignity and reputation concerning their identity. This does not imply that an adult who becomes aware of an offence committed against a child or between children is refrained from reporting it to the relevant authorities. Rather, the offence is designed to prevent individuals from capturing and distributing images of children that can be stored and shared. Even if the child is engaged in a private act as an offender or a victim or otherwise, the court is expected to consider that in the circumstances whether a reasonable person would reasonably expect that the child would be afforded privacy in terms of protecting the dignity and identity of a child.

32. As per section 121 of the Crimes Act, observing private acts of child is also an offence. May it be observing or recording, there are also circumstances where the privacy afforded to children may be limited. For law enforcement and investigative purposes, private acts of children may be recorded or observed. Parents or guardians may also monitor and record their children when they are left with babysitters. Another instance is when children are observed or recorded for medical purposes. However, in all these instances, the observations or recordings must be conducted in such a way as to ensure that the children's privacy is not violated more than is necessary under those circumstances and is always in the best interest of the children. It is up to the court to decide, based on the circumstances of each case, whether a reasonable person would expect that the child would be afforded privacy for that act.

33. This case does not involve a recording that was shown to the teachers or principals for action. Instead, it involves a recording that went viral, with the first Respondent claiming only after the children's privacy was violated that the recording was intended to be shown to the principal and teachers. As stated

in the offence, the facts should be considered in the circumstances of each case. In this instance, not only did the video go viral, but it was also never shown to the teachers or the principal.

34. For these reasons, it does not appear that the learned trial judge objectively assessed the evidence of the case to determine whether, under the circumstances, a reasonable person would expect that the child should be afforded privacy for that act. This is particularly evident when the learned trial judge noted that 'a right-thinking member of society would have acted in the same manner as the first defendant did in taking the video, and not afforded privacy to the children.' Consequently, the learned trial judge erred in applying the concept of privacy appropriately within the context of this offence.

35. Accordingly, we allow the first ground of appeal to the extent that the learned trial judge erred by not considering the prosecution's evidence in the appropriate context, and thereby erred in finding the first Respondent not guilty.

Ground of Appeal No 2

36. The Appellant argued that the learned trial judge erred in law and fact in misapplying his finding on 'private act' from the first count, to decide the second and third counts as well. However, this point is not well articulated in ground two. Nevertheless, we will consider this argument in respect of count two and three since the parties made submissions on that.

37. The second count is based on the offence of dealing with offensive material involving child. As per the information the first Respondent is charged under section 142(1)(a)(i)(b)(c) and (d)(i), which reads as follows:

> "(1)A person commits an offence, if:
>
> (a) the person intentionally:

(i) possesses or control material:

(b) the material is pornography or abuse material and the person is reckless about that fact;

(c) a person described, depicted or represented in the pornography or abuse material is, or appears or is implied to be, under 18 years old; and

(d) the way that the material describes, depicts and represents the person is likely to offend an ordinary person and the person is reckless about that fact.

(i) if the other person is under 13 years old—15 years imprisonment [Penalty section has been later amended by Amendment Act No 29 of 2020]

38. The learned trial judge stated in the judgment that 'the definition of a private act and pornography is almost identical,' and concluded that the material in the video was not pornography, since his Honour had already determined in the first count that the prosecution failed to prove the children were engaged in a private act. However, when this comparison was made, it appears that the learned trial judge omitted parts of the definitions. Paragraphs 33 and 34 of the judgment set out the comparison by the learned trial judge as follows:

"33. I have already made a finding on count one that the children were not engaged in a private act. The definition of a private act and pornography is almost identical. Private act entails:

i) Sexual intercourse;

ii) Masturbation or self-penetration;

iii) Any activity that involves the physical contact by a person with another person (other than that person) for sexual gratification or sexual arousal of any person (whether the person involved or some other person)

34. Pornography also entails the following:

i) Sexual intercourse;

ii) Masturbation or self-penetration;

iv) Any activity that involves the physical contact by a person with another person (other than that person) for sexual gratification or sexual arousal of any person (whether the person involved or some other person)"

39. Regrettably, the above comparison does not seem correct, as the trial judge omitted 'in a sexual context' in his comparison. The definition of pornography found in section 8 of the Crimes Act, in fact reads as follows:

"pornography means any material that describes, depicts, or represents a person, or part of a person:

(a) doing an act of the following kind:

(i) sexual intercourse;

(ii) masturbation or sexual self-penetration; or

(iii) any activity that involves physical contact by the person with another person, other than a dead person, for sexual gratification or sexual arousal of a person, whether the people involved or some other person; or

(b) **in a sexual context**"

40. The Appellant submitted that the learned trial judge should have evaluated the evidence for the second count independently of the first count and argued that the images of the children captured in the video recording clearly depicted them 'in a sexual context'.

41. There is no doubt that the learned trial judge misconceived the definition of pornography as well as the elements of the offence of 'dealing with offensive material involving child' under section 142 of the Crimes Act, which bears no relevance to the issue of private acts. Although the Appellant did not specifically plead this in their second ground of appeal, possibly due to an inadvertence, the Appellant argued this in their submissions. We are of the

view that the learned trial judge thereby erred in his Honour's findings with respect to the second count.

42. The third count against the second Respondent involves dealing with offensive material involving a child, contrary to sections 142(1)(a)(vii)(b)(c), and (d)(i) of the Crimes Act. The only difference between counts two and three is that count two pertains to possessing or controlling materials, whereas count three pertains to sending, communicating, transmitting material, or making it available.

43. The learned trial judge identified the ingredients of the offence in count three as follows:

> "36. In relation to this count there is no dispute that the second defendant sent out the video to Lanieta Waqa and it was subsequently sent to the IMO Group. The ingredients of this offence on this count are that:
>
> a) The children were doing a private act which was in the video;
> b) That the material in the video is pornography.

44. It should be noted that, as stated above with respect to the second count, 'private act' is not an element of the relevant offence under Section 142 of the Crimes Act. For the same reasons outlined regarding the second count, we are of the view that the learned trial judge misconceived the definition of pornography and erroneously linked the issue of private acts to this particular offence. Consequently, we conclude that the learned trial judge erred in his findings with respect to the third count as well.

45. In the circumstances, we allow the second ground of appeal to the extent that the learned trial judge erred in both law and fact by misconceiving the offence in count two and three, thereby leading his Honour to erroneously find the first and second Respondents not guilty.

Ground of Appeal No 3

1. Although the Appellant advanced the third ground of appeal, arguing that the learned trial judge erred in law and fact by considering other likely offenders who were not charged, during the hearing the Appellant did not thoroughly pursue this ground. There is no doubt that it is the prerogative of the Director of the Public Prosecution to decide laying charges against a person or not. However, the Appellant argued this point minimally, and it appears that this ground of appeal does not significantly impact the final outcome of the case.

2. Thus, we do not wish to delve into this ground any further. We dismiss the third ground of appeal.

Orders of the Court

1) The acquittal of the first and the second Respondents by the judgment of the Supreme Court dated 30 July 2021 is set aside.

2) Retrial ordered.

Dated this 2 May 2024

Justice Rangajeeva Wimalasena

President

Justice Sir Albert Rocky Palmer

I agree.

Justice of Appeal

Justice Colin Makail

I agree.

Justice of Appeal

Justice Mahanil Prasantha de Silva

I agree.

Justice of Appeal