IN THE SEYCHELLES COURT OF APPEAL

WESTON CHANG PENG TIVE APPELLANT

versus

THE REPUBLIC RESPONDENT

SEYCHELLES SUPREME COURT LIBRARY

Criminal Appeal No: 14 of 1999

[Before: Pillay, De Silva, & Matadeen, JJ.A]

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Mr. F. Elizabeth for the Appellant
Mr. W. Lucas for the Respondent

JUDGMENT OF THE COURT

(Delivered by De Silva, JA.)

The appellant was convicted of the offence of sexual assault on a female below the age of 15 years, an offence punishable under Section 130(1) of the Penal Code (as amended by Act No. 15 of 1996), read with Sections 130(2)(d) and 130(3)(b) of the Penal code. He was sentenced to a term of 8 years' imprisonment. He has appealed against his conviction on two grounds, namely:-

(1) that he was not properly represented and defended at his trial and was therefore not accorded a fair trial;

(2) that the conviction is unsafe and unsatisfactory.

Moreover, there is an appeal against his sentence on the basis that it is out of proportion to the gravity of the offence and is manifestly harsh and excessive.

Learned Counsel for the appellant submitted that the defence taken at the trial was in law no defence at all to the charge. We agree that "consent" to sexual intercourse by a girl below the age of 15 years is not a defence, nor is it a defence to allege that the girl has had sexual intercourse on a previous occasion.

Learned Counsel contended that this was a case in which counsel defending the appellant at the trial should have advised him that on the facts there was no defence available to him and, in the circumstances, it would be advantageous to him to tender a plea of guilty. It was argued that the failure of Counsel in the trial Court to properly advise his client resulted in the appellant being deprived of a fair trial and, in the circumstances, it is unsafe to permit the conviction to stand.

It was not the contention of learned Counsel that a defence was available in law to the appellant and that such defence was not raised at the trial. If we understood him correctly, his position was that no defence at all was available to the appellant. In these circumstances, we find ourselves unable to agree with the submission that the appellant was not accorded a fair trial. The failure to advise the appellant to plead guilty to the charge is not a matter which can possibly affect the conviction based on the evidence led at the trial. Learned Counsel made no complaint in regard to the findings of the learned Trial Judge.

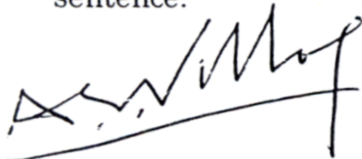
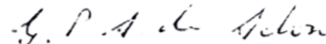
It seems to us that the failure to plead guilty to the charge at the outset and show remorse may have affected, if at all, the sentence imposed on the appellant. But here again the facts of the case have a direct bearing on the question of sentence. The appellant was the uncle of the girl who was the victim of the sexual assault. He was the brother of the girl's mother. Sylvette Hoareau, the mother of the girl, stated in her evidence that the appellant had told her that he had "nowhere to stay" and, at his request, she had provided him with accommodation at her house. The

appellant sexually assaulted his niece at night while she was asleep. This was nothing short of a complete betrayal of the trust his sister had in him when she permitted him to reside in her home for he had nowhere else to go.

At the trial, Counsel appearing for the appellant did submit to court that the appellant was a first offender and that the Court should be merciful in the matter of sentence.

On a consideration of the facts, it is manifest that the circumstances of aggravation far outweigh any matters that could have been pleaded in mitigation of sentence. On any reasonable view of the facts, the offence committed was of a very serious nature. The law provides for a maximum sentence of 20 years' imprisonment. The sentence imposed on the appellant was only 8 years' imprisonment. It would not be fair to characterise the sentence as "manifestly harsh and excessive". To contend that a plea of guilt tendered at the commencement of the trial would have enured to the benefit of the appellant would amount to no more than speculation on the particular facts and circumstances of this case.

For those reasons, we dismiss the appeal against the conviction and sentence.

A. G. PILLAY	**G. P. S. DE SILVA**	**K. P. MATADEEN**
JUSTICE OF APPEAL	**JUSTICE OF APPEAL**	**JUSTICE OF APPEAL**

Delivered at Victoria, Mahe this 11th day of ***April*** 2000.