

**IN THE SEYCHELLES COURT OF APPEAL**

**[Coram: F. MacGregor (PCA), A. Fernando (J.A), J. Msoffe (J.A)]**

**CriminalAppeal SCA15/2013**

**(Appeal from Supreme Court Decision57/2008)**

---

Francis Crispin

Appellant

Versus

The Republic

Respondent

---

Heard: 17 August 2015

Counsel: Mr. Nichol Gabriel for Appellant

Mr. David Esparon for Respondent

Delivered: 28 August 2015

**JUDGMENT**

A.Fernando (J.A)

1. The Appellant appeals against his conviction for sexual assault contrary to section 130(1) of the Penal Code read with section 130(2)(a) of the Penal Code and punishable under section 130(1) of the same Act, which was the second count set out in the indictment levelled against the Appellant.
2. The particulars of the offence in respect of this count of which the Appellant was convicted had been to the effect: “Francis Crispin of Dan Bel Air, Grand Anse Praslin, on the 21<sup>st</sup> June, 20008, at Grand Anse Praslin, sexually assaulted A. J a girl of 8 years of age by committing an indecent assault against the said A. J by sucking the vagina of the said A. J”.
3. The first count that was levelled against the Appellant in the indictment had been under section 130(2) (a) of the Penal Code, namely sexual assault by penetration of a body orifice of A. J, namely her vagina for a sexual purpose. The said count was deemed withdrawn by Court.
4. The Learned Trial Judge at paragraph 2 of his judgment had said that: “From the outset, we should note that Defence counsel had earlier made an application for the first count to

be withdrawn when the Doctor testified to the effect that there was no 'penetration'. This was after he had examined the body of the victim. This matter is not disputed. In his submissions *the Prosecuting Counsel* said that he was "making the said submissions in respect of the second count which the evidence proves beyond a reasonable doubt, and since there was no 'penetration' proved." The Learned Trial Judge citing the case of **Rep VS Milena Robert Cr. No. 68 of 2005** had found fault with the Prosecuting Counsel and stated in the judgment; "He left the court and the defence in a quagmire, wondering whether by so stating he was actually withdrawing or abandoning the first count. He is in charge of the indictment. He should therefore have indicated his new position to the court in no uncertain terms". We are in agreement with the comment made by the Learned Trial Judge as regards the conduct of the prosecuting counsel in leaving the court and the defence in a quagmire. The Learned Trial Judge had gone on to state: "In the circumstances, this court considers count 1 as having been withdrawn". There was much to be desired in the way the doctor was examined by the Prosecuting Counsel especially in view of the evidence of the victim and her age. It is no surprise that the Defence Counsel had no questions to ask by way of cross-examination. It is not the function of this Court to teach the prosecution how to lead the evidence of a doctor in a case of sexual assault of a young victim.

5. **PW2**, K. J who was 13 years at the time of the incident and the brother of the victim A. J stated that around 4 pm on the 21<sup>st</sup> of June 2008 he had been with K. C (**PW3**) when he saw his younger sister A. J who was going to collect some medicinal plants for their mother. He had asked her not to be long and to hurry back home. He had thereafter seen the Appellant who was cleaning his jeep. A little later when he passed the place where the Appellant was earlier seen cleaning his jeep, he did not see the Appellant. Since his suspicions were aroused due to certain stories he had heard about the Appellant, he had gone looking for A. J. He had then seen his sister A. J in the bushes near a big albezia tree with the Appellant. He had then gone on to describe what he witnessed by saying that A.J's dress had been lifted and her panties were pulled down to her feet and the Appellant had been sucking her private part. She was at this time lying on a big latanier leaf, that had been placed on the ground. K. C had then asked the Appellant what he was doing and the Appellant had challenged him and asked as to what K. C was doing there. K. C had been with him when he witnessed the incident. K. J had then left the place and reported the matter to his mother. He had said that he did not come to the rescue of his sister as he feared that the Appellant will beat him. K. J had also reported the matter to the Appellant's wife who had asked K. J to go and report it to the police station. Thereafter he had reported the matter at the police station. Under cross examination K. J had stated that he had walked away from the scene of crime because he was afraid that the Appellant would hit him. According to K. J, when she came home A. J had denied that such an incident had taken place. In view of the denial by A. J; and K J not having taken steps to come to the rescue of his sister A. J when he saw her under the albezia tree

with the Appellant, it had been suggested to him by the defence that his version was a fabrication.

6. **PW3** K. C who was about 14 years old at the time of the incident and a friend of K. J and a relative of the Appellant, had corroborated K. J's testimony almost in its entirety. K. J and K. C's testimony of having seen A. J lying on a 'latanier' leaf placed under an albezia tree had been corroborated by **PW4** Lance Corporal D. Denousse who had visited the scene in the company of K. J soon after K. J had lodged a complaint at the police station and seen two 'latanier' leaves close to the tree. K. C's testimony had also been challenged by the defence as a fabrication since both him and K. J had not done anything to come to the rescue of his sister A. J.
7. **PW5**, J. J, the mother of the victim A. J, had corroborated the testimony of both A. J and K. J by stating that she had sent A. J to collect some medicinal plants around 4.30 pm on the day of the incident. She had produced the birth certificate of A.J which showed that A. J was 12 days short of 8 years at the time of the incident. According to her A. J having gone to collect the medicinal plants had returned around 5.pm with the medicinal plants and started to watch cartoons. A. J had not told her anything, but "looked scared". Thereafter K. J had come home and told Julianne that he had seen an incident in the bushes next to a big tree between A. J and the Appellant, namely he had seen "A. J sleeping on the floor and Francis was sucking A. J". Her immediate reaction had been to the effect "kids sometimes create problems I thought that maybe it was not true". After K. J came home and told her about what he had seen; J. J had questioned A. J about the incident, and A. J had denied that such an incident took place. Under cross examination J. J had said that she did not see anything abnormal in A. J when she returned, save the fact "her face looked like she had done something". In answer to Court J. J had said that she did not try to even check her daughter in any way.
8. **PW6** A. J the victim in this case and who was 8 years old at the time of the incident and 10 years when she testified before the Court had stated that on the day of the incident around 4pm while on her way to get some medicinal plants at her mother's request she had met the Appellant who had had told her "to come with him to do some vicious things (mal elve)". She had rejected his request and the Appellant had then held her by both her hands and taken her under a tree. When questioned as to how she felt at that point of time when the Appellant pulled her by her hands she had said "My heart was beating fast". He had then taken out his knife cut some latanier leaves and had made her lie down on the leaves. He had then lifted up his dress and inserted his penis in her vagina. When she complained that it was painful he had just rubbed it on the side. Thereafter he had licked her vagina. A. J had gone on to state that her brother K. J had come there and inquired from the Appellant what he was doing and the Appellant in return had asked K. J what he was doing there. She had not told her mother about this, fearing that she would be beaten. The cross-examination of Angel by the defence was to discredit her entire testimony on the basis that her story was a fabrication and told at the instance of her mother and brother. The defence had however not suggested any reason to any one of the prosecution

witnesses, why a 8 year old girl was made to fabricate an allegation against the Appellant when undoubtedly it would embarrass her and affect her future. The defence in cross-examination had also made the 8 year old girl to admit that the Appellant had sexual intercourse with her knowing well that her story does not find support from the testimony of the doctor, (**PW1**) who had examined her 24 hours after the incident, and who found her hymen and genital parts intact. This line of cross-examination would have had value and impacted on the credibility of A. J, if it was the version of **PW2** and **PW3** that they had also witnessed the Appellant having sexual intercourse with A. J. A reasonable Court trying a case of sexual assault on a minor, one who was 8 years old at the time of the incident and 10 years when she testified, should be able to understand the psychology of a small girl and not be guided purely by the semantics arising through persistent cross-examination and be distracted from the reality. A Court should also bear in mind whether an eight year old girl could understand the nature of an act of sexual intercourse. We are also surprised as to why the doctor had not been questioned by the prosecuting counsel as to the possibility of not seeing any injuries if the Appellant had only rubbed his penis on the vagina, as narrated by A.J.

9. The Appellant in his dock statement had stated that: “I want to tell the Court that I have never had any sexual relationship with A. J. It was a conspiracy that was made by her parents and they are using their children in the or conspiracy, because her parents don’t get along with us they are big hearted and malice and they are using their children to harm us. (me, my wife and children)”(verbatim) He had gone on to state that: “I did not have any access with A. J for me to do these things. I have never done those things” It is to be noted that **PW5**, J. J, the mother of the victim A. J, had not implicated the Appellant in any way as found at paragraph 7 above. In fact her evidence had been to the effect after K. J came home and told her about what he had seen, J. J had questioned A. J about the incident, and she had denied that such an incident took place. Her immediate reaction had been to the effect “kids sometimes create problems I thought that maybe it was not true”. This in our view could not have been the behavior of a mother who had a conspiracy to harm the Appellant and get her young daughter to fabricate a case against the Appellant. Thus the Appellant’s reasoning for fabrication of the case against him at the instance of A. J’s parents does not stand. The Appellant had also not made an effort to get his wife to testify on his behalf as to the truthfulness of the alleged complaint that was made to her by K. J, soon after the incident.
10. The Learned Trial Judge in convicting the Appellant had said: “I found all the prosecution witnesses to be truthful and cogent. The victim was confident and testified brilliantly. Despite the severe cross-examination mounted by the defence counsel, the prosecution evidence remained solid. Moreover, the most important parts of her testimony were well corroborated by K. J and K. C especially when they said that they had seen the accused in between the legs of the victim licking her vagina”. The Learned Trial Judge had gone on to state: “I am unable to agree with the defence’s story that the

allegations are a mere fabrication authored by the parents of the victim and that there is not a scintilla of evidence which suggests or supports this allegation.” These are findings of fact by a Trial Judge after watching the demeanour of witnesses and the Appellant when testifying in Court. We have no cogent reasons to disturb those findings.

11. The sentence of 8 years imposed on the Appellant in our view is not manifestly harsh and excessive.
12. We therefore dismiss the appeal, both on the conviction and the sentence.

A.Fernando (J.A)

**I concur:.** .....

F. MacGregor (PCA)

**I concur:.** .....

Msoffe (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 28 August 2015