

IN THE SEYCHELLES COURT OF APPEAL

[Coram: F. MacGregor (PCA) , M. Twomey (J.A) F. Robinson (J.A)

Criminal Appeal SCA 29/2018

(Appeal from Supreme Court Decision CO18/2017)

F. M.

Appellant

Versu
s

The Republic

Respondent

Heard: 08 August 2019

Counsel: Nichol Gabriel for the Appellant
Gulmette Leste for the Respondent

Delivered: 23 August 2019

JUDGMENT

M. Twomey (J.A)

Background

1. The Appellant, a 75-year-old man, in this case was charged before the Magistrates' Court with the offence of sexual assault contrary to, and punishable under, section 130 (1) (2) (c) of the Penal Code. He was found guilty following trial of sexually assaulting an eight-year-old girl on more than one occasion in her aunt's home. The learned Magistrate found that all the elements of the offence were proven beyond reasonable doubt and convicted the Appellant accordingly. He was sentenced to a term of eight years imprisonment. Aggrieved by the decision, he appealed against his conviction and sentence to the Supreme Court. After hearing the grounds canvassed by the Appellant and the Republic's response thereto, the learned Judge dismissed the appeal.

Appeal

2. The Appellant now appeals against the conviction and the sentence. The grounds are as follows –

Grounds for the appeal against conviction

1. *The learned Supreme Court Judge erred in upholding the conviction of the Appellant in the absence of a fair hearing in the Magistrates' Court.*
2. *The learned Supreme Court Judge erred in upholding the conviction of the Appellant on evidence that was not corroborated by any individual witnesses.*
3. *The learned Supreme Court Judge erred in law and in fact in finding that the witnesses in the trial below were credible.*
4. *In all circumstances the conviction of the Appellant was unsafe and unsatisfactory.*

Ground for the appeal against sentence

5. *The sentence of eight years imposed on the Appellant was manifestly harsh and excessive and wrong in principle.*

Appeal against conviction

Grounds 1 and 4: Fair hearing – shielding the witness

3. The Appellant alleges that the learned Magistrate erred in conducting the trial in a manner which prevented the Appellant from observing the demeanour of the victim by obscuring her from his view with a drawing board. He alleges that his right to a fair hearing, which is enshrined in Article 19 of our Constitution, was violated as a consequence.
4. Article 19 (1) thereof provides as follows –

“Every person charged with an offence has the right, unless the charge is withdrawn, to a fair hearing within a reasonable time by an independent and impartial court established by law.”

5. Furthermore, Article 19 (2) (e) provides that every person who is charged with an offence –

“has a right to examine, in person or by a legal practitioner, the witnesses called by the prosecution before any court, and to obtain the attendance and carry out the examination of witnesses to testify on the person’s behalf before the court on the same conditions as those applying to witnesses called by the prosecution.”

6. The facts reveal that the learned Magistrate tried to accommodate the child witness in the giving of her testimony in open court by having a screen placed between her and the Appellant, thereby concealing her from his view. The transcript of proceedings of the trial court provide in relevant part as follows –

“Case recalled @ 2.25pm – Nichol Gabriel (late)

[special arrangements for virtual complainant giving evidence (screen) confirmed and agreed between counsel]”

7. Following this arrangement between the parties, the trial continued without further ado, and the complainant started to give her evidence. When the complainant gestured to demonstrate how the Appellant removed her underwear whilst she was sleeping in her bedroom, the transcript of proceedings reveals the following exchange –

[Nichol Gabriel approaches bench with Republic – concerned that accused cannot see gestures or demeanour – Court assures him he can take a break for instructions whenever requested and interpreter can attempt to replicate gestures, but that is all we can manage with screen. Nichol Gabriel – Ok.]

8. It must be noted that the complainant in this case was a vulnerable witness as per section 11B (1) of the Evidence Act. Section 11B (2) provides –

“Where the court is of the opinion that it is desirable and practicable that special arrangement be made for the taking of evidence from a vulnerable witness -

(a) to protect the witness from embarrassment or distress;

(b) to protect the witness from being intimidated by the atmosphere of the courtroom;

(c) for any other proper reasons,

and that the special arrangement would not prejudice a party to the proceedings the court may, subject to this section, make an order accordingly.”

9. Section 11B of the Act further provides –

“Special arrangement” means an arrangement for -

(a) evidence of a witness to be given outside the courtroom and simultaneously transmitted to the courtroom by means of close circuit-television;

(b) obscuring a witness’ view of a party to whom the evidence of the witness relates or any other person who might intimidate or otherwise cause distress to the witness to be seen and heard by the court and the parties to the proceedings by allowing the witness to give evidence behind a screen, partition or one-way glass;

(c) a witness shall be accompanied by a relative or friend for the purpose of providing emotional support to the witness but where the relative or friend is visible to and can be heard by the court and all parties to the proceedings.”

(Emphasis added).

10. Section 11B (3) makes further provision that a jury shall be warned not to draw any inference adverse to an accused and not to allow it to influence the weight to be given to the evidence of the witness in respect of whom the order was made.

11. There are other statutory provisions in Seychelles in relation to the taking of evidence of witnesses either in the absence of the accused or not within his/her view. The Witness Protection Act 2015 makes provision for the anonymity of the witness to be preserved and the witness to be screened or their voice modulated to hide their identity. The Criminal Procedure Code (Cap. 54) allows for the taking of evidence in the absence of

the accused and provides that even in such cases the proceedings shall not be deemed or be construed to affect or prejudice the right of the person when defended by an attorney-at-law at such trial.

12. Statutory guidance in Seychelles to assist the Court in deciding whether it is appropriate to grant an application for a witness to give evidence in an alternative way is lacking. In New Zealand, the factors for judges to take into account (under s 103(3) of the Evidence Act 2006) are –

- (a) the age or maturity of the witness;*
- (b) the physical, intellectual, psychological, or psychiatric impairment of the witness;*
- (c) the trauma suffered by the witness;*
- (d) the witness's fear of intimidation;*
- (e) the linguistic or cultural background or religious beliefs of the witness;*
- (f) the nature of the proceeding;*
- (g) the nature of the evidence that the witness is expected to give;*
- (h) the relationship of the witness to any party to the proceeding;*
- (i) the absence or likely absence of the witness from New Zealand;*
- (j) any other ground likely to promote the purpose of the Act.*

13. Section 103(4) of the New Zealand Evidence Act further provides that judges must have regard to –

- “(a) the need to ensure –*
 - (i) the fairness of the proceeding; and*
 - (ii) in a criminal proceeding, that there is a fair trial; and*
- (b) the views of the witness and –*
 - (i) the need to minimise the stress on the witness; and*

(ii) in a criminal proceeding, the need to promote the recovery of a complainant from the alleged offence; and

(c) any other factor that is relevant to the just determination of the proceeding.”

14. In this regard, it is noted that high levels of anxiety are not conducive to effective testimony, whether by adults or by children (Bussey, K, *The Competence of Child Witnesses* in Calvert, G, Ford, A and Parkinson, P (eds), *The Practice of Child Protection: Australian Approaches* [1992] at p 298). Anxiety has been found through research to be associated with the prospect of seeing the accused (Flin, R H, Davies, G and Tarrant, A, *The Child Witness* [1988]), the giving of evidence in open court and being cross-examined (Davies G, *Children in the Witness Box: Bridging the Credibility Gap*, *Sydney Law Review*, Vol 15, p287). Studies in this area have also found that the adversarial context of courtrooms can cause distress to children, and often little is done to modify the court procedure to assist the child witnesses (ibid) –

“The extreme distress of a complainant giving evidence in a rape case and reliving the trauma of the ordeal in the witness box, can be seen in the Courtroom at any time. It is not an uncommon occurrence, and it is done in the name of justice. But there can be no justice in a practice which brutalises the victim of a crime in a way which is repugnant to all civilised persons” (EW Thomas Was Eve Merely Framed; or Was She Forsaken? [1994] NZLJ 368 at 372).

15. It is in this context that special arrangements are made in terms of child and vulnerable witnesses at trial. Challenges to these arrangements in the context of their breaching the constitutional fair trial rights of accused persons are not uncommon. However, in *R v Camberwell Green Youth Court ex parte D* [2005] UKHL 4, [2005] 1 WLR 393, where it was submitted that such special measures precluded the accused face-to-face confrontation with the witness and were incompatible with the equality of arms between the accused and the prosecution because the accused was explicitly excluded, the court held that the special measures were compatible with Article 6 of the European Convention on Human Rights (equivalent to Article 19 of our Constitution). The court stated that purpose of the special measures was to improve the quality of the evidence presented to a court and that there was no absolute right for an accused to be allowed to

face his accusers. The court had an obligation to achieve fairness in each particular case, and that requirement was met by the system.

16. In the present case, the learned Judge on appeal considered the relevant excerpt from the transcript of proceedings and concluded in his Judgment the following –

“[25] ... Any possibility of any prejudice was mitigated when the Learned Magistrate allowed the Counsel for the defence to interrupt the proceedings in order to seek instructions and to call upon the interpreter to repeat the gestures of the testifying witness to the Appellant.

[26] At any rate, it is also clear from the proceedings that the Learned Defence Counsel was in agreement with the special arrangement. It is also abundantly clear that Counsel after initial protest also agreed to the decision of the Learned Magistrate that the gestures of the child witness be re-enacted by the interpreter to the Appellant as and when this was required.”

[27] Face to face confrontation between the Appellant and the accused is of fundamental importance, however the protection of child witnesses as provided for in s.11B of the [Evidence Act] is based on an important public policy which the Appellant’s face to face confrontation [has] to give way. It is clear that such encounters may cause psychological and emotional injury to the child and the encounter may frighten the witness and render the child witness unable to testify, causing the loss of truthful testimony and hence seriously compromising the truth delivery process.”

17. The Appellant also submits that the requirement for court proceedings to be held in public under Article 19 (8) of the Constitution has been breached by the imposition of this special arrangement, and this has thus violated his right to a fair hearing. To this end, Article 19 (10) provides in relevant part –

“(10) Anything contained in or done under the authority of any law necessary in a democratic society shall not be held to be inconsistent with or in contravention of

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clause (1), (2)(e) or (8), to the extent that the law in question makes necessary provision relating to the grounds of privilege or public policy on which evidence shall not be disclosed or witnesses are not competent or cannot be compelled to give evidence in any proceedings.”

- 18.** It would be contrary to public policy to force a vulnerable witness, particularly a child of eight years, to give her testimony in an adversarial setting in plain view of the person charged with having sexually assaulted her. Furthermore, it would be unfair to expect a young child to give cogent evidence in such a context. The Evidence Act makes provision for special arrangements for vulnerable witnesses, and this Court is in agreement with the learned Judge that the trial court was correct in making a special arrangement for the child witness, who was a vulnerable witness, to give her oral testimony. The Anse Royale Magistrates’ Court unfortunately does not have the video link facilities that other courts enjoy. The Magistrate was within her rights to exercise her discretion afforded to her by section 11B of the Act under the circumstances to accommodate the witness by using the tools she had at her disposal; in this case, a screen.
- 19.** This Court is further of the view that the Appellant was not prejudiced as a result of the special arrangement made to accommodate the child witness. The Appellant’s submissions state, “only the bench, the prosecutor and Counsel for the defence had the chance to watch the witness...The Appellant could not observe the victim when she made allusions to him and body movements behind the board.” However, the Appellant could hear the witness’s testimony clearly, and the few gestures she made were replicated by the interpreter for his benefit. Furthermore, the Appellant’s counsel was able to view the demeanour of the witness and to cross-examine her on the Appellant’s behalf.

Fair hearing - witness present in court when other witness testifying

- 20.** The Appellant further alleges that the presence of one of the prosecution witnesses, who was yet to give evidence, during the testimony of another prosecution witness, was another breach of the Appellant’s right to a fair hearing. He claimed that, “It is trite law that a witness summoned to any trial must not be privy to any testimony in Court.” *Sifflore v R* [1982] 96 is authority for the principle that an unexamined witness may be

allowed to remain in court during a trial, but this procedure should not be encouraged. *Sifflore* further provides that, on appeal, a court would have to consider whether the accused was prejudiced by the witness's presence.

21. In this context, the learned Magistrate stated at para [8] of her Judgment –

“PW2, the partner of the accused and the aunt of [the complainant], had been in Court during PW1’s evidence. Objection was taken by the defence but overruled by the Court on the basis that PW1 had deponed solely as to [the complainant’s] age.”

22. PW1 was a civil status officer who was only brought to confirm the complainant’s date of birth. Therefore, this Court is satisfied that the Appellant was not prejudiced by the witness’s presence, and that a breach of his right to a fair hearing has not been occasioned.

Grounds 2 and 3 - Credibility of the witnesses

23. The Appellant further took issue with the fact that the complainant failed to promptly report the incidents to anyone. It is the Court’s view that this ground emphasises another popular myth about sexual offences that has been comprehensively debunked. Judges and lawyers must keep up with social research, not only to inform them, but to assist in their work. Research has found that child victims of sexual assault will expect negative consequences, such as familial disruption or punishment, from the disclosure of the wrongdoing, particularly if they have a close relationship with the perpetrator (Farrell, Factors That Affect a Victims Self-Disclosure in Father-Daughter Incest, 67 Child Welfare (1998) p 462-468). Moreover, children in such situations are less likely to disclose the sexual abuse promptly (Goodman-Browne et al, Why Children Tell: A Model of Children’s Disclosure of Sexual Abuse, 27 Child Abuse & Neglect (2003) p 525-540). As will be seen below, the trial court was satisfied as to the credibility of the complainant, so this Court sees no reason to discount the complainant’s testimony purely on the basis that she did not report the incidents immediately.

24. At this juncture, this Court wishes to admonish certain insensitive tactics and language used by defence counsel in child sexual assault cases generally, which operate to render the experience of vulnerable witnesses particularly traumatic. In the present case, for instance, the learned Magistrate at para [41] of her Judgment noted that, “Defence counsel attempted to shame [the victim] at numerous points during cross-examination.” The transcript of proceedings reveal the following exchanges during the trial between defence Counsel and the eight-year-old complainant -

“Q. Why do you tell lies like this? You know it’s a sin?”

A. Yes, I do know. I’m not telling lies, me.

Q: Ok. What I want to tell you is you’re still young. You do not come to Court and tell lies on person who has taken such good care of you.

A: No, but if he’s done something wrong I am going to tell about it.

Q: You want to send him to prison?

A: I don’t know.”

25. The balance of power between a defence counsel and a child witness in an adversarial courtroom setting will always be skewed in favour of the counsel, and the trial Court must be vigilant to ensure that such witnesses’ special rights of protection in light of their immaturity and vulnerability under Articles 16 and 31 of the Constitution are not breached.

26. There is a deep-seated scepticism among legal practitioners and members of the Judiciary toward the evidence of children. There is a widely held belief that limitations on children’s capacities for attention and memory render their testimony not merely quantitatively, but qualitatively, inferior to that of adults (see: Heydon, J, Evidence, Cases and Materials, 2nd Ed, 1984). Children are thought to confuse fact with the products of their imagination, to be dishonest in court, and to be highly suggestible under questioning (Ibid, p 84).

27. However, these stereotypical beliefs concerning child witnesses have been systematically challenged in extensive studies, which reveal that children as young as five-years-old can provide useful and reliable testimony (Davies, G, *Research on Children's Testimony: Implications for Interviewing Practice* in Hollin, C R and Howells, K, *Clinical Approaches to Sex Offenders and Their Victims* [1991] at p 99; see also Oates, R K, *Children as Witnesses* [1990] 64 ALJ 129). Demonstrable dishonesty by children in studies examining allegations of unlawful sexual contact has been found to be very rare, and rates are lower than for adults giving evidence from the witness box (Bussey, K, *The Competence of Child Witnesses* in Calvert, G, Ford, A and Parkinson, P (eds), *The Practice of Child Protection: Australian Approaches* [1992] at p 69).
28. In *Zialor v R* [2017] SCCA 42, this Court cited with approval *Vilakazi v The State* (636/2015) [2015] ZASCA 103 (10 June 2016) –

“In Woji v Sanlam Insurance Co. Ltd 1981 (1) SA 1020 9A) Diemont JA provided a helpful guide to approaching the evidence of young children. The guide highlights, as the focal point, the trustworthiness of the evidence. At 1028A-E of the judgment the learned Judge said:

“The question which the trial Court must ask itself is whether the young witness’ evidence is trustworthy. Trustworthiness, as is pointed out by Wigmore in his Code of Evidence para 568 at 128, depends on factors such as the child’s power of observation, his power of recollection, and his power of narration on the specific matter to be testified. In each instance the capacity of the particular child is to be investigated. His capacity of observation will depend on whether he appears “intelligent enough to observe”. Whether he has the capacity of recollection will depend again on whether he has sufficient years of discretion “to remember what occurs” while the capacity of narration or communication raises the question whether the child has “the capacity to understand the questions put, and to frame and express intelligent answers” (Wigmore on Evidence vol II para 506 at 596). There are other factors as well which the Court will take into account in assessing the child’s trustworthiness in the witness-box. Does he

appear to be honest – is there a consciousness of the duty to speak the truth? Then also "the nature of the evidence given by the child may be of a simple kind and may relate to a subject-matter clearly within the field of its understanding and interest and the circumstances may be such as practically to exclude the risks arising from suggestibility" (per Schreiner JA in R v Manda [1951] (3) SA 158 (A)). At the same time the danger of believing a child where evidence stands alone must not be underrated."

29. An appellate Court will not readily overturn the factual findings of a trial Court, specifically because the appellate Court "is disadvantaged in that that it has to weigh these matters with only the record of proceedings before it and cannot observe the witnesses at first hand to gauge their truthfulness" (*Beeharry v R* (2010) SLR 470, at para [15]).

30. The learned Magistrate at para [35] of her Judgment stated –

"Since the accused wholly denies sexually assaulting [the complainant], the essential issue is whether [the complainant] is telling the truth. She gave her evidence unsworn. Her conduct on the stand gave the Court no reason for concern that she failed to appreciate the solemnity of the occasion or the potential implications of her evidence for the accused."

31. Further, at para [39], she stated –

"...I accept that [the complainant's] relatively young age and the fact that the Court did not permit her to take the witness oath do in themselves raise doubts about the reliability of her testimony that must be given due weight. I have already warned myself of the danger of convicting on the evidence of a child... I do not regard the medical evidence as casting doubt on [the complainant's] reliability because she did not allege penetration or injury (or even for that matter physical pain).

32. The learned Magistrate further added at para [41] of her Judgment –

“I found [the complainant’s] demeanour as a witness to be compelling. She gave details of the alleged incidents fluently and without hesitation, but not eagerly or in a manner which suggested rehearsal or coaching. She was quick to correct counsel when she felt that she was being misinterpreted. Defence counsel attempted to shame her at numerous points during cross-examination and she did not become flustered or incoherent, except when she had not understood the question...While I cannot exclude the possibility that she learned about the nature of the alleged sexual acts (for example, a man licking a woman’s vagina) from watching pornography, her evidence included details that cannot plausibly be explained as picked up in this way. In particular, her descriptions of how the accused would come and sit with her in the morning and talk to her about what he had done, and how he took soap to lubricate his fingers before touching her vagina in the shower, were both plausible and disturbing. I note that both of these points were unchallenged in cross-examination.”

33. In *Akbar v R* [1998] SCCA 37, this Court stated –

“An appellate court does not rehear the case on record. It accepts findings of facts that are supported by the evidence believed by the trial court unless the trial’s Judge’s findings of credibility are perverse.”

34. The learned Magistrate was satisfied as to the credibility and truthfulness of the complainant. She had the benefit of viewing the witness first hand and of observing her demeanour during her testimony. This Court sees no reason to interfere with her finding.

Corroboration

35. Having come to that conclusion that the child was telling the truth, the necessity to look for corroboration falls away (*Lucas v R* (2011) SLR 313).

36. In *R v Albert* (2008) SLR 348 at 359 Perera ACJ, as he was then, held that –

“[C]orroboration is required in sexual offence cases, especially when young children are victims, due to the danger that allegations can be easily fabricated, and it becomes extremely difficult for the accused to refute. However, as a matter of law,

such corroboration is not required to be corroborated where the Trial Judge is satisfied, after warning himself of the danger of convicting on uncorroborated evidence, that the victim is truthful.”

37. Furthermore, as stated in *R v Whoolly Joseph Pillay* SLR [1984] –

“It is not necessary that there should be corroboration of every detail of the complainant’s story. What is required is that there should be independent testimony corroborative of the evidence of the complainant in some material particular implicating the accused or tending to connect him with the crime with which he is charged.”

38. A Court must warn itself of the danger of convicting without corroborating evidence, before expressing itself to be convinced of the truth of the child’s story notwithstanding that danger (*Jean-Baptiste v R* [1961] SLR 262).

39. In this regard, the learned Magistrate at para [35] of her Judgment stated –

“I do however warn myself of the inherent risk of unreliability in the evidence of a child witness, particularly one who is recounting events that allegedly happened more than two years previously.”

40. At para [36] of the Judgment, the learned Magistrate further states as follows –

“There are no eyewitnesses and no independent evidence that directly implicates the accused. The medical report is consistent with [the complainant’s] account (because the conduct she describes involved neither penetration nor physical violence) but also consistent with the possibility that she was not sexually assaulted.”

41. Furthermore, the learned Magistrate stated the following –

“[37] ... I accept that [the complainant’s] account of what happened in the bathroom is corroborated to some extent by the evidence of PW2, her aunt. PW2 is still the partner of the accused and the mother of his children and what she said (and did not say) in Court must be assessed with that in mind. She confirmed that she found the

accused alone in the bathroom with (the complainant), with the door closed; that she asked the accused why he was there with her, indicating that this was not normal behaviour; that she asked [the complainant] whether the accused had done anything to her, indicating that she had a reason to suspect that he might have; and that she kicked the accused out of the house immediately afterwards. Her evidence was not in any of these respects inconsistent with the evidence of [the complainant]. Indeed, [the complainant's] evidence, which was generally more detailed, fills in some of the gaps left by PW2."

"[42] There was also evidence from [the complainant's] mother about a significant change in [the complainant's] behaviour and attitude dating back to the approximate beginning of the alleged incidents, which was also unchallenged in cross-examination. This is certainly consistent with the effect of unresolved trauma of this nature, as is [the complainant's] simple explanation that after the incident at school, when no one knew about what had happened before with the accused, she just felt that she wanted to talk about it."

"[44] Having regard to the entirety of the evidence and the demeanour of all witnesses and of the accused in Court, I have concluded that the evidence of [the complainant], supported in part by the evidence of her aunt, is both credible and reliable, notwithstanding her immature age and the fact that her evidence was given unsworn. I am satisfied beyond reasonable doubt that she has told the truth about what happened to her. In particular I am satisfied beyond reasonable doubt that the accused sexually assaulted her in the bedroom on multiple occasions by sucking her vagina and also that the accused sexually assaulted her in the bathroom on one occasion by rubbing his penis against her naked body."

42. This Court is satisfied that the learned Magistrate took the relevant precaution in warning herself repeatedly of the danger of convicting without corroborating evidence. Further, this Court is in agreement that the evidence of the complainant is supported in part by the evidence of her aunt. The learned Magistrate expressed her satisfaction with the truthfulness of the complainant, and given that she was in a position to appreciate the

evidence first hand, this Court sees no reason under the circumstances to interfere with her finding.

43. This Court does not find any basis to support the Appellant's ground that his conviction was unsafe and unsatisfactory, in light of the facts and the evidence above. The appeal against conviction is therefore dismissed.

Appeal against sentence

44. The Appellant has appealed his sentence of eight years imprisonment on the ground that the sentence was manifestly harsh and excessive, and wrong in principle. The Legislature has prescribed a minimum mandatory term of imprisonment of 14 years for such cases involving a victim under the age of 15 years and an accused person over the age of 18 years. This Court notes that it is not bound by minimum mandatory sentences (see *Poonoo v Attorney-General* [2011] SLR 424).

45. From the outset, it is to be noted that sentencing is a discretionary power exercisable by the Court. It involves the human deliberation of the appropriate sentence to be imposed for a particular offence in the circumstances of the case; it is not the mere administration of a common formula, standard or remedy (*Poonoo* [supra]).

46. The Appellant in this case was related through marriage to the victim, and often came to the family home. A factor which a Court should take into account before assessing whether a sentence is manifestly excessive is the position of trust held by the offender (*Simon v R* [1980] SCAR 557). The protection of vulnerable members of society and the welfare of children are factors which must guide the court in sentencing sexual offenders (*R v Albert* SSC 30/1999, 17 November 1999).

47. In *G. K v R* Criminal Appeal [2017] SCCA 3 (21 April 2017), Domah JA stated –

“The irreparable harm done to vulnerable children and persons by paedophiles is today well documented. Public sensitization on the matter is well spread. Yet with three cases having come to the Court of Appeal in course of this session, we wonder whether the campaign against such reprehensible and degenerate behaviour should

be more robust. The legislature has provided for a sentence of 20 years in cases of sexual assault. We may not stay insensitive to the call of the day in this area of criminal law. Accused persons convicted of such offences shall not expect leniency from the Court of Appeal or any other Court for that matter.”

48. The Court in *R v Meme* (2009) SLR 32 similarly stated –

“This is unacceptable in our society. Children are a precious gift from God and represent the future generation. They must be jealously protected, properly nurtured and given all the required support and care by each and every adult person instead of taking advantage of them. [The accused] has failed that test. This obviously calls for his removal from the public for quite some time to enable him reform and become a benevolent and useful person.”

49. In *Francis Crispin v R* SCA Criminal Side No. 16/13, this Court held -

“The guiding principles in sentencing are summed up in four words: retribution, deterrence, prevention and rehabilitation ... [The appellant] ignores the mental and physical pain and damage he causes his victims. The society abhors such actions. The Court must add an element of retribution in punishment of this crime to express the pain and disgust of the society when it convicts an accused with such crime.”

50. Further, at paras [10] and [12] of the same Judgment, the Court held thus –

“[10] The Court is conscious of the particular and lasting trauma the victims have suffered and will continue to suffer. One must bear in mind that these two girls will have to live with the stigma of being the victims of sexual abuse for the rest of their lives. Especially in a small community like Praslin with its population of around 6,500 people, where everybody knows everybody, these girls will be always seen as the victims of sexual assault. As a result some people may treat them with pity, the others with disrespect, but, either way they will always be reminded of what has happened to them. The Appellant’s hideous actions scarred the victims for life, some of these scars can be physical, but emotional scarring has long lasting consequences which impacts the individuals, their family and the community.”

“[12] To deter offenders and likely offenders, the court must also mete a severe punishment to the offenders. This is considering that given an opportunity, there is nothing to show that the offender would not repeat his earlier actions. A severe sentence also ensures that the offender is kept away from the victims and likely victims, to prevent him from repeating his heinous actions.”

51. In *R v D.S.* [2019] SCSC 55, I stated –

“[11] The revulsion, fear and disgust of the community in this regard cannot be underestimated. Paedophiles are a curse onto our society and our children need to be protected from their acts. The specific provisions of the Penal Code relating to paedophiles need to be applied by the courts in the way it was intended.”

*“[13] I note the recent trends of 7 or 8 years sentences for such offences (see for example *R v Crispin* CR 58/2008, *EC v R* ([2016] SCSC 788 (29 September 2016), *R v DR* (CR50/2014) [2018] SCSC 185 (22 February 2018), *E.S. v Rep*, CR App 3/17). They are simply not strict enough sentences to reflect the gravity of such offences and the specific indicative sentences of the Penal Code. In my view such light sentences do nothing more than to accentuate such degenerate behaviour, perpetuate the suffering of victims and perniciously normalise such deviant behaviour in an already very dysfunctional society.”*

52. This Court in the case of *Trevor Zialor v R* [2017] SCCA 42, in which the appellant was convicted of one count of sexual assault of a child under the age of 15, held that the sentence of 11 years’ imprisonment imposed by the trial Court was neither wrong in principle, nor manifestly excessive and added –

“With regards to the sentence we wish to make the following comment. There is a worldwide and growing awareness of the particular vulnerability of children and of the fact that child abuse, including sexual exploitation of children, is a serious and ever-escalating problem. The legislature has provided for a sentence of not less than 14 years and not more than 20 years’ imprisonment.”

53. In *JB v The R* SCA 4/2015, a 71-year old man at the time of trial was convicted on his own plea of guilt to the offence of sexual assault of his 4-year-old granddaughter. He

was sentenced to a term of 10 years imprisonment. He appealed the decision and, when warned by this Court that should the appeal fail he ran the high risk of enhancement of the sentence in view of the seriousness of the offence he had committed, he promptly withdrew his appeal.

54. This Court does not find that the sentence of eight years imposed was manifestly harsh and excessive, or wrong in principle. If anything, we are of the view that the sentence, in light of the aggravating circumstances (the position of trust held by the Appellant, the Appellant’s old age, the number of times he abused the child victim and the Appellant’s lack of remorse for his monstrous acts) is overly lenient. Moreover, it fails to impress upon the Appellant and society at large of the seriousness and heinousness of such offences, and the sincerity of the law, and the courts, in protecting our children. A term of eight years imprisonment is not proportionate to the life sentence that this child victim will now be serving, and does little to repair the trauma and harm that she has experienced, and will continue to experience.

55. We were minded, therefore, to increase the sentence to at least ten years, but refrained from doing so after being informed of the Appellant’s medical condition. Thus, we do not propose to interfere with the sentence imposed and his appeal on this ground is accordingly dismissed.

56. The appeal is dismissed in its entirety.

M. Twomey (J.A)

I concur:.

F. MacGregor (PCA)

I concur:.

F. Robinson (JA)

Signed, dated and delivered at Palais de Justice, Ile du Port on 23 August 2019