

**IN THE SEYCHELLES COURT OF APPEAL**

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

**Criminal Appeal SCA 22/2018**

**(Appeal from Supreme Court Decision CO 39/2017)**

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**L. J.**

Appellant

Versus

**The Republic**

Respondent

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Heard: 08 August 2019

Counsel: Nichol Gabriel for the Appellant  
Hemanth Kumar for the Respondent

Delivered: 23 August 2019

**JUDGMENT**

M. Twomey (J.A)

[1] The Appellant was convicted on his own guilty plea on a charge of sexual assault contrary to and punishable under section 130 (1) as read with section 130(2) (d) of the Penal Code and sentenced to a term of ten years imprisonment on 22 June 2018.

[2] The particulars of the offence was that L.J., a teacher, on 20 October 2016, sexually assaulted a 13-year-old child, namely JM, by penetrating her vagina with his penis for a sexual purpose.

[3] The facts of the offence were read out at trial and were to the effect that on 20 October 2016, the complainant after school hours went to the School of Dance at Mont Fleuri accompanied by a friend. After the dance training, they headed to the bus terminal. On the way, in the vicinity of the Peace Park, she saw the Appellant, whom she knew as a

trainee teacher in her school. She and her friends talked to the Appellant and then drank beers together. There were other boys and girls present. The Appellant and his friends bought more alcohol and offered it to her and her friends. The Appellant asked them to move into the bushes. He asked the complainant how old she was and when she said she was 13-years-old, he kissed her on her lips. She then told him that she and her friend were proceeding home and he kissed her again. Her friends left. She remained with the Appellant and drank more beer. As it was getting dark, she was reluctant to go home as she had promised to be there by 5 pm. The Appellant asked her to come to his house at Mont Buxton. They went to his house and she was introduced to his mother.

- [4] They went straight to his bedroom and had sex. She slept and in the night she woke up and again had sex with him. She went to her home at Pascal Village the next day where she was scolded by her father. She was distressed and asked to see her mother and she was then brought to the hospital for a medical examination, which revealed that she had indeed had sexual intercourse.
- [5] The Appellant at this stage indicated to the Court that he was disputing one of the facts, namely that on the way to his house he asked whether she would like him to call her mother, but she said no. He also added that it was not the first time the complainant had had sexual intercourse.
- [6] The Court *a quo*, after having considered a probation report on the Appellant and submissions by his Counsel in mitigation, then proceeded to sentence the Appellant to ten years imprisonment.
- [7] The Appellant has appealed both his conviction and sentence. In respect of his conviction, he submits that at the time of entering his plea, being a first offender, he did not fully appreciate the nature of the charge against him and did not intend to admit that he was guilty of the charge; that the guilty plea should not have been entered given that the facts as narrated by the Prosecutor were disputed prior to his conviction; and that in all circumstances of the case the conviction was unsafe and unsatisfactory.
- [8] As stated by the Court in *R v Bistoquet* [2010] SLR 308 –

*“I should stress at this point that a plea of guilty has two apparent effects: first of all, it is a confession of fact; second, it is such a confession that, without further evidence, the court is entitled to and indeed in all proper circumstances will act upon it and it will result in a conviction.”*

**[9]** Section 342 (1) of the Criminal Procedure Code provides that any person convicted on a trial held by the Supreme Court may appeal to the Court of Appeal against his conviction, other than on a conviction based on the person’s own plea of guilty, and against the sentence passed on his conviction (*emphasis added*).

**[10]** For a plea of guilty to be properly taken and entered on the record, the charge must be clearly read out and explained to the accused in a language he understands and comprehends, and he must admit the elements of the offence as discerned from the facts summed up and presented by the prosecution (*R v Bistoquet* [2010] SLR 308).

**[11]** Further, section 181 (1) of the Criminal Procedure Code, provides –

*“The substance of the charge or complaint shall be stated to the accused person by the court, and he shall be asked whether he admits or denies the truth of the charge.”*

**[12]** The Court of Appeal in the case of *Paul Oreddy v Republic* SCA 9/07 held as follows –

*“It is trite law that one cannot appeal against a plea of guilty entered. However, it should be distinguished between a plea of guilty freely and unequivocally entered and one that is obtained through inducement or coercion.”*

**[13]** Apart from inducement or coercion, a guilty plea could be held equivocal if the accused has not himself admitted the facts, but someone else has done so on his behalf. This is borne out by the wording of section 181 (2) of the Criminal Procedure Code, which provides as follows –

*“If the accused person admits the truth of the charge, his admission shall be recorded as near as possible in the words used by him”.*

- [14] This has been interpreted in a number of cases to mean that the accused person must accept the facts himself (see, for instance, *Marcel Damien Quatre* [2014] SCSC CN 10/14).
- [15] In light of the above, I have tried to understand the relevance and purport of the Appellant's submissions given the clear record of the transcript of proceedings. It is apparent from these proceedings that a guilty plea was entered after the charge was fully explained to the Appellant. In particular, I note that that after an amendment was made to the charge, the Court indicated that the accused wanted to plead anew and the charge was read over and explained to him. He then stated "I am guilty".
- [16] I also note that when the facts were narrated by the Prosecutor, the Appellant indicated that he was "disputing an element of the facts". I have already alluded to these matters. They are in this regard not disputed facts but rather additional information. On 15 June 2018, when pushed as to whether they were disputed facts, Counsel for the Appellant stated, "I would plead these in mitigation".
- [17] Subsequently, on 22 June 2018, when the Court noticed that no formal conviction had been entered, the charge was again put to the accused, to which he again stated, "I am guilty". He then proceeded to volunteer a statement from the dock in which he stated that he regretted what he had done and would like a second chance. I am therefore not persuaded by learned Counsel's submission that the facts should have again been narrated to the Appellant. These were known to him and would have been superfluous.
- [18] I am of the view that given the matters above as are clear from the transcript of proceedings, and additionally the fact that the Appellant was a school teacher with obviously a good level of education and discernment, he would have been in a position to understand the proceedings better than most. There is no indication that he did not understand the charge or that his plea was equivocal in any way. I am satisfied therefore that the conviction was safe and satisfactory, and find no merit in these grounds of appeal.

- [19] The Appellant has also appealed his sentence of ten years imprisonment on the ground that the sentence was manifestly harsh and excessive, wrong in principle, and that the learned trial Judge failed to appreciate the Probation Report, whereby the family of the victim had forgiven the Appellant for the offence.
- [20] 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 v Attorney-General* [2011] SLR 423).
- [21] When determining a sentence, the Court should indeed, as has been urged by learned Counsel for the Appellant, consider previous sentences in similar cases; however, it should also acknowledge the differences between them (*R v Aden* [2011] SLR 41). The Appellant drew the Court's attention to several case authorities, most pertinent of which is the case of *Rupert Suzette v R* [2017] SCCA 31, the facts of which admittedly are not very different from the present case.
- [22] In *Suzette*, a young male teacher sexually assaulted a 14-year old child and was convicted following trial for the offence of sexual assault contrary to section 130 (1) of the Penal Code, as read with section 130 (2) (d) of the same, and sentenced to serve a term of imprisonment of nine years. He appealed, and the Court deemed it fit to dismiss the appeal against conviction, but to reduce his sentence to a term of four years and six months.
- [23] Paragraph [27] of the Judgment in *Suzette* reads as follows –

*“Where it concerns sentences for sexual offence, this Court does not take it lightly (sic). Very careful consideration is given to the offence with which an Appellant is charged with, the circumstances surrounding the commission of the offence, the situation of the victim of the offence and any traumatic consequence she suffers and may keep on suffering, as well as, what is the most appropriate sentence that should be imposed on an Appellant after taking into consideration all the circumstances of the case including those of the Appellant.”*

[24] The Court of Appeal then in its deliberations gave great weight to the mitigating factors favouring a lenient term of imprisonment; it considered that the convict was 26-years-old at the time he committed the offence on a 14-year-old girl, that he was married and had two young sons, one with a speech impediment requiring therapy, and that he also cared for his father who had some health complications.

[25] The Court further considered it relevant for the purposes of sentencing that the victim be seen to be suffering ongoing trauma. At paragraph [15] of the Judgment, the appellate Court held –

*“G N was not in any way traumatized immediately after the incident or anytime thereafter.”*

[26] With respect, the Court is in no way equipped to make such a finding, especially at appellate level, unless the victim made a declaration to this effect in evidence or a victim impact statement was produced in regard to her mental state following the incident. That alone points to the fact that the decision was given *per incuriam* and ought to be departed from by this Court, which is in any case not bound by the decision.

[27] In any event, there is no dispute in the present case that the child victim was distressed following the incident. The facts as narrated by the Prosecution and accepted by the Appellant reveal that the victim appeared to her parents to be “very distressed, traumatised [and] scared” when she arrived home from the Appellant’s house.

[28] Learned Counsel for the Appellant has also raised the matter of previous sexual activity by the complainant in the present appeal. At paragraph [18] of the Judgment in *Suzette*, the appellate Court adds –

*“There is no evidence that that was the first time that she had ever had sexual intercourse.”*

[29] This is, of course, another irrelevant consideration. As I stated at paragraph [24] of my dissent in *Nicolas Brian Julie v R SCA* (Criminal Appeal SCA21/2017) [2018] SCCA 18 (31 August 2018) –

*“I have gone to a considerable extent to critique the prosecution of the offence of sexual assault if only, in the absence of statutory intervention, to require a moral and professional shift on the part of the legal profession in Seychelles on the appreciation of the difficulties faced by sexual assault victims (so far always women) and the necessity to orientate ourselves away from the traditional male focus in sexual offences accompanied by the demeaning of woman’s sexuality in the language used and the accompanying stereotyping underscoring the belief that in Seychelles, as in most other countries, it is the complainant of a sexual assault case who is on trial and not the accused, despite liberal platitudes to the opposite effect.”*

[30] Interestingly, the appellate Court in *Suzette* further deemed it compelling that the convicted person, who had been sent to Mauritius on a Government scholarship to study Teaching, could no longer teach, stating that,

*“...the Government lost the services of a Graduate Science Teacher which are already in short supply and who had obviously cost the country a lot of money to educate and train. His teaching career is finished. The State has now to clothe, feed and take care of him at the expense of the public funds.”*

[31] The trial Court in the present case similarly acknowledged the Appellant’s mitigation concerning his teaching career, stating at paragraph [16] of the Judgment –

*“The convict made a statement from the dock and informed the Court that he was under the influence when he committed the offence. Furthermore, he said he has studied and all the time of his studies will be in vain if he is inflicted with a prison sentence. He said he will not have sacrifice[d] all th[at] time in vain, he says that he regrets and he needs to have a second chance.”*

[32] In *Suzette*, as well as in the present case before the Court, the blame for the convicted person’s short-lived teaching career lies squarely at his own doorstep. Teachers who commit offences against morality, particularly offences of this nature against defenceless school children, cannot reasonably expect to enjoy longevity in this respected profession.

Schools cannot risk the safety of their students by employing, and exposing students to, known sexual offenders. Teachers cannot be permitted to abuse their positions of trust by violating vulnerable members of our society.

- [33] The case of *R v Savy* SSC 51/1998 (5 February 1999) reinforces the principle that a sentence of imprisonment for sexual assault will necessarily bring a premature end to a teacher's career and affect a convict's married life; however, the interests of society take precedence over such considerations. The Court in *Savy* further held that an educated background may cast on an offender a higher degree of responsibility.
- [34] 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).
- [35] It cannot be said that the Appellant in the present case did not know that the victim was only 13-years-old on the two occasions he had sexual intercourse with her. It is undisputed that he was formerly a trainee teacher at the victim's school and that he repeatedly gave alcohol to the child victim on the night in question. He further asked the victim how old she was, to which she responded that she was 13-years-old. In reaction to this revelation, the Appellant kissed the victim on the lips. He later brought her to his house, where he proceeded to have sexual intercourse with her. The trial Judge found these to be aggravating factors, and this conclusion cannot be faulted.
- [36] The Appellant in his dock statement to the Court alluded to the fact that he was not in his right state of mind at the material time. Section 14 of the Penal Code provides that intoxication shall not constitute a defence to any criminal charge, unless at the time of the act or omission, the person did not know that such act or omission was wrong or did not know what he was doing, and only if that state of intoxication was caused without his consent by the malicious or negligent act or another, or by reason of intoxication he was insane temporarily or otherwise at the time of the act or omission. It is evident from the



above facts that this defence is not open to the Appellant. Furthermore, this Court cannot accept voluntary intoxication as a mitigating factor in a child sexual assault case.

[37] A minimum mandatory term of 14 years is imposed by section 130 (1) of the Penal Code for offences which involve non-accidental touching of another with one's sexual organ or penetration of a body orifice of another for a sexual purpose, when the victim is under the age of 15 years and an accused person is of or above the age of 18 years. Though the Court is not bound by minimum mandatory sentences (see *Poonoo v Attorney-General* [2011] SLR 424), for the reasons I have stated I do not propose to follow the Court in *Suzette* and alter the sentence to one which is significantly lower than the minimum mandatory sentence as prescribed by the legislature, particularly when faced with the aggravating factors discussed above.

[38] The following exchange in the Court proceedings is relevant to show that the Appellant was well aware of the minimum mandatory sentence prior to his plea of guilt –

*“Court: ... Mr. Ferley, before he pleads to the charge, I think he needs to be aware that there is minimum mandatory sentence in this case.*

*Mr Ferley: I am aware. I have consulted my client accordingly.*

*Court: You are aware of the Act 5 of 2012 and in there section 130 (1) of the Penal Code the sentence to that offence is changed and the term 7 years is repealed and it is substituted by 14 years. So, under the proviso to 130 (1), now it says ‘provided that where the victim of sexual assault under the age of 15 and the accused is of or above the age of 18 and such assault falls under sub section 2 (c) or (d), a person shall be liable to imprisonment for a term not less than 14 years and not more than 20 years.’*

...

*Accused: I am guilty.”*

[39] The Courts have continuously indicated their strong stance regarding offences of this nature. In *G.K, v R Criminal Appeal* [2017] SCCA 3 (21 April 2017), for instance, 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.”*

[40] 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 to reform and become a benevolent and useful person.”*

[41] The President of the Court of Appeal, F. MacGregor, in *Francis Crispin v R SCA* (SCA CR 16/2013) [2015] SCCA 29 (28 August 2015) held the following at paragraph [9] of his Judgment –

*“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*

[42] In *R v Marday & Anor* (2004) SLR 106, Renaud J noted the following –

*“The Court is always mindful of the prevalence and circumstances of crime in society that is detrimental to peaceful and orderly living. Everyone is entitled to enjoy fundamental rights but such enjoyment ought not to impact negatively on society, such as creating fear and panic which at times tends to become the order of the day. The prevalence of certain serious crime is now of major concern, particularly - homicides; drug related offences; sexual assaults on small children; sexual assault using threat or violence;... are offences which society at present strongly abhor... The Court is cognisant of the prevailing concern and will not hesitate to exercise its discretion by placing elsewhere such persons in order to allow other reasonable members of society to enjoy their fundamental rights too.”*

**[43]** Despite the Courts repeatedly espousing disgust for reprehensible crimes of this nature, and emphasizing their resolve to show no leniency in such cases, minimal sentences continue to be upheld or imposed. As I have stated in *R v D.S.* (CR 50/2018) [2019] SCSC 55 (04 January 2019), there is, in my view, an inordinate amount of similar cases where minimal sentences have been meted out. Moreover, there has been no uniformity in sentencing observed in these cases. I wish to repeat what I said at paragraph [11] of the Judgment in *D.S.* –

*“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.”*

**[44]** Further, at paragraph [13] of the same, I state –

*“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.”*

[45] *Suzette* is an example of the Court digressing completely from like cases and imposing a sentence which was contemptibly beneath the minimum mandatory prison term as prescribed by the Legislature; in so doing, a child sexual assault offender was made to serve a lesser term of imprisonment than most offenders would be made to serve for far less grave offences. This Court is not bound by the ruling in *Suzette*, and declines to follow it. Instead, this Court considers the following cases to be more persuasive.

[46] In *Rene v R* SCCA 37 (14 December 2018), a sentence of 12 years for a similar offence on a 15-year-old was upheld. The Court of Appeal in the case of *Trevor Zialor v R* (Criminal Appeal SCA 10/2016) [2017] SCCA 42 (07 December 2017), 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. They stated as follows at paragraph [30] of their Judgment –

*“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.”*

[47] The Appellant in the present case indeed saved the Court precious judicial time by pleading guilty to the offence charged, and this was reflected in the reduction in sentence from the minimum mandatory sentence of fourteen years as prescribed by the legislature, to the term of imprisonment of ten years imposed by the trial Judge. The Court does not find, therefore, the sentence imposed by the trial Judge to be manifestly harsh or excessive, nor is there any indication that the sentence was wrong in principle.

[48] The Appellant further argues that the learned trial Judge failed to appreciate the Probation Report, whereby the family of the victim had forgiven the Appellant for the offence.

However, the family of the victim were not sexually assaulted by the Appellant; the victim was. Therefore, their forgiveness is not relevant for the purposes of sentencing.

**[49]** The trial Judge dedicated paragraphs [10] to [17] of his Judgment to a consideration of the Appellant’s Probation Report and the mitigating circumstances of his case, as raised by the Appellant. The learned Judge is not bound to accept each and every mitigating factor canvassed by the Appellant. The Court may, at its discretion, take into account the circumstances of the accused (*R v Aden* [2011] SLR 41).

**[50]** In the circumstances, all the appeal grounds against sentence lack merit and the appeal is dismissed in its entirety. The conviction and the sentence of ten years imprisonment are upheld.

M. Twomey (J.A)

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

F. MacGregor (PCA)

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

A. Fernando (J.A)

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