

**IN THE COURT OF APPEAL OF SEYCHELLES**

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**Reportable**

[2021] SCCA 72  
SCA CR 10/2020  
(Arising from CR 79/2015)

In the matter between

Jean-Luc Louise  
(rep. by Mr Joel Camille)

**Appellant**

and

The Republic  
(rep. by Mrs Lansinglu Rongmei and Ms. C. Rose)

**Respondent**

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**Neutral Citation:** *Louise v R* (SCA CR 10/2020) [2021] (Arising in CR 79/2015) SCCA 72

17 December 2021

**Before:** Fernando P, Robinson JA, Adeline JA

**Summary:** Appeal from a conviction of sexual assault

**Heard:** 1 December 2021

**Delivered:** 17 December 2021

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**ORDER**

Appeal dismissed.

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**JUDGMENT**

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**FERNANDO, PRESIDENT**

1. This is an appeal by the Appellant against his conviction and sentence for committing two acts of indecency towards a girl below the age of 15 years contrary to and punishable under section 135(1) of the Penal Code. In count 1, he had been charged for inserting his penis in the vagina of RL for sexual purposes and in count 2 for inserting his penis in the anus of RL. Both offences are alleged

to have been committed in 2012. The Appellant had been sentenced to periods of 14 years in respect of each count but ordered that both sentences are to run concurrently.

2. The Appellant has raised the following grounds of appeal:

- i. “The learned trial judge erred in law and on the facts in failing to appreciate and assess sufficiently that the sexual complaint against the Appellant was made over an inordinate period of more than two years, after the alleged incident, which period of time did not amount to a recent complaint by the complainant, as accepted in law.
- ii. The learned trial judge erred in law and on the facts in failing to appreciate and assess sufficiently that a lurking doubt exists as to whether the Appellant did actually sexually assault the complainant, especially given the fact that the prosecution’s own evidence, through the testimony of Annabelle Valentin remained ‘shaky’ before the Court and hence casts doubt on the complainant’s own evidence as being credible.
- iii. The learned trial judge erred in law and on the facts by drawing the wrong inference from the defence’s evidence particularly, to the fact that the Appellant had since the date of the allegations, move out from Port Glad and had never visited the house where the complainant was at the material times living and hence Appellant could not have committed the offences as alleged by the complainant.
- iv. The sentences of 14 years on both counts, are manifestly harsh and excessive in that the trial judge failed to take into considerations the factors the Appellant presented in his mitigation.” (verbatim)

By way of relief the Appellant had sought “an order reversing the learned Judge’s decision by quashing the Appellant’s conviction and to acquit the Appellant of the charges against him.” (verbatim)

3. At the hearing of the appeal Counsel for the Appellant by way of a Notice of Motion requested this Court to admit “new and/or further evidence disclosed and /or revealed after the determination of the trial before the Supreme court, namely a letter of the virtual complainant RL dated 31 May 2020 addressed to the Registrar of the Supreme Court and to the attention of the Trial Judge, exonerating therein, the Appellant of the offences charged against him” The application was made under rule 31(1) of the Seychelles Court of Appeal Rules 2005. This is a discretionary power that may be exercised by the Court in an appropriate case. It is to be noted when this case was mentioned for purposes of case management earlier, Counsel for the Appellant withdrew his earlier application to adduce new evidence. It is the same application he sought to renew at the hearing of the appeal. This shows that both the Appellant and his counsel are not serious about the applications they make to Court, and this should be discouraged. The ‘new and/or or further evidence’ sought to be led is an ‘alleged letter’ from the victim, RL. It is not an affidavit sworn before a Notary. There is nothing to indicate that the said letter was even written by the victim RL, is in her handwriting and if by her, voluntarily. Further the record of proceedings of the 12<sup>th</sup> June 2020 in this case shows, as stated in the Notice of Motion, that Counsel appearing for the Appellant at the trial, had not stated anything about a letter of the virtual complainant RL dated 31 May 2020 addressed to the Registrar and to the attention of the Trial Judge, when he mitigated, but had only stated that “the mother of the victim has spoken of something which totally exonerate the accused person”, which the learned Trial Judge had rightly refused to accept by stating “Too late. The mother testified in Court so whatever she says after the conviction it is completely irrelevant.” This Court would say the same thing, namely RL has testified in

Court, so whatever she says after the conviction is completely irrelevant. I therefor had no hesitation in rejecting the application to adduce 'new and/or or further evidence'.

4. The Appellant who is an older brother of the virtual complainant, RL, had been indicted as the 1<sup>st</sup> accused before the Supreme Court, along with his father, who is also the father of RL, as the 2<sup>nd</sup> accused. The father too had been charged under two counts for committing two acts of indecency on RL in 2012 but had been acquitted on both counts. It is to be noted and as set out in the judgment: "It is emphasized from the start that there is no evidence of there being any collective acts or common knowledge by the 1<sup>st</sup> and 2<sup>nd</sup> accused in relation to the charges levelled against them." The offences although committed in 2012 had been on different dates and committed by either one of the accused on the respective occasions. It is not the function of this Court to question the correctness of the decision of the learned Trial Judge to acquit the 2<sup>nd</sup> accused. Even had the learned Trial Judge erred in acquitting the 2<sup>nd</sup> accused, that alone cannot be a basis for this Court to acquit the Appellant.
  
5. The virtual complainant is RL, who was 12 years at the time she gave evidence before the Trial Court in July 2017. She had testified about an incident that had taken place about 5 years ago, namely on an unknown date in 2012. She had been about 8 years old at that time and had been attending primary class in school. Although staying at Foyer de la Solitude at La Misere at the time she testified and for the past 3 years, she had stated that she had been living at Port Glaud with her mother, father, the Appellant her elder brother and her other brother Joshua and little sister SL at the time of the incidents in 2012. It had been her evidence that one evening on a date she cannot recall in 2012 she had been watching a movie in the living room seated on a sofa, when her elder brother had come and changed the movie that she was watching and put on a movie that was named 'Fuck the

Teacher'. The other people in the house had been sleeping at that time. RL had then woken up and gone to sleep in another sofa. After some time, she was awoken when the Appellant had pulled her feet down on the ground while her head remained on the sofa. At this time, she had been sleeping face down. The Appellant had then held her from the waist from behind and removed her panty and put his private part in her buttocks and made a few movements forward and backwards for a few minutes. RL had been wearing a long shirt and a panty before the incident took place. She had felt pain when the Appellant did sexually assault her. RL had said that she had pressed her legs together to prevent the Appellant from doing it. The following morning when the rest of her family members were away in the garden the Appellant who had taken a shower had called her to his room. When RL went to the Appellant's room he had removed her under pant and placed her on his bed underneath the bed sheet. The Appellant had also gone under the bed sheet, made her to turn her face down and put his private part in her buttocks and made forward and backward movements for some time. RL had said that she was in pain when the Appellant did this. After sometime the Appellant had made her turn on her back and put his private part in her vagina and made forward and backward movements. RL had said that she was in pain since this was the first time that someone had put his private part in her vagina. The Appellant had stopped what he was doing when he heard their father and mother coming from the garden and asked RL to put her clothes on and watch TV. RL had gone on to testify to other acts of sexual assault committed on her, during the year 2012 by the Appellant. I do not intend to go into them as they are not the subject matter of the charge and had been narrated for the first time in Court. RL had said that she had told her mother about these incidents only in 2013. When asked why she had not spoken about these incidents earlier, RL had said that it was through fear of the Appellant who was in the habit of beating her regularly. RL had said that she recalls been taken to the Social Services in the year 2014, where she had

reported these incidents. RL had stated that she had made statements to the police about these incidents.

6. Under cross-examination it has been suggested to RL that the Appellant had been staying at Les Mamelles with his uncle since he was 18 years. RL had been questioned about the statements she had made on two different dates. RL had admitted that it was at the request of someone, who she cannot remember that she had made the statements. She had been questioned as to why it took her so long to make those statements and why she had delayed in telling the mother or anyone else about the incidents. It has been the defence suggestion that such incidents did not happen, which RL had vehemently denied. It is interesting to note that although RL throughout her examination-in chief had made reference to the buttocks and not the anus, Counsel in cross examination had clarified it by questioning her on the basis of penetration of the anus. Had this not been done there was a doubt as to whether there was anal penetration. RL had been questioned about one Joan and it had been suggested that he was her boyfriend, but nothing beyond that. RL had admitted that Joan was a friend of hers. RL had been challenged that the incident that took place after the Appellant had switched on the pornographic movie could not have happened as there were others in the house, which RL had denied and said they were all sleeping. RL had been questioned on matters, to which she could not provide answers, like why her mother did not check why the TV was on, or how these incidents went unnoticed by others in the house. RL had said that after she reported the incidents to her mother in 2013, her mother had asked the Appellant to stop doing what he did. It was not possible for RL to answer the defence question that the mere warning by the mother was not sufficient as it was indeed a question that should have been put to the mother when she testified. RL had stated that the Appellant was in the habit of coming to Port Glaud despite living at Le Mamelles. RL had been questioned about how she came to be at Foyer de la Solitude, without any indication of

relevance to this case. It had been the defence suggestion that she was taken to Foyer de la Solitude, because her mother was not taking care of her. RL had also stated that her parents fought frequently. RL had said in answer to a question put to her in cross examination that her mother rarely came to visit her at the Foyer de la Solitude. All this confirms the pathetic circumstances in which RL grew up and lived. It had not been suggested to RL that she had fabricated the case against the Appellant nor any motive had been attributed for RL to testify against the Appellant.

7. AV, the mother of RL testifying in Court had stated that she used to live in Port Glaud in 2012 with her family including her daughter RL, who was 8 years old at that time. In 2014 she had reported to the Social worker about the sexual abuse of RL by the Appellant. She had confirmed that the Appellant along with his younger brother was in the habit of beating RL and her younger sister SL. RL had confided in her that the Appellant had put his private part in her anus in 2012. On being questioned as to why she had to wait till 2014 to alert the Social services about these incidents, her answer had been that she was threatened and she was one who had been discarded by her family and had no place to go. She had confirmed that RL had made statements to the police about the incidents in her presence. She had also stated that RL had been examined at the hospital and the doctor had confirmed that RL's hymen was broken.

8. Dr. Olga Ferdova testifying before the Court had stated that she examined RL, aged 10 years, on the 2<sup>nd</sup> of December 2014 at the Victoria hospital and found that her hymen was not intact. According to her this could be as a result of penetration by sexual intercourse by penis or by finger, but was unable to give a time period as to when it could have happened. According to the doctor it is possible that the hymen can rupture without any bleeding. She had not done an examination of the anus.

9. The Appellant testifying before the Court had stated that he is the brother of RL and the son of AV. He had been 18 years in 2012. According to the Appellant he had been living with his paternal uncle at Le Mamelles, since 2010. The Appellant had repeatedly denied the allegations made against him by RL on the basis that he never went to his mother's house in Port Glaud in 2012. The Appellant had said that he did not have access to the house in which his mother and other siblings lived in Port Glaud during the year 2012. A rather strange statement. Why he had singled out the year 2012 is questionable. When questioned about the second act of sexual intercourse in 2012 that RL had complained about, the Appellant had asked the question: "When was that?" He had stated that he had been living at Les Mamelles with his paternal uncle Joanece Louise since 2010 and "couldn't go to Port Glaud often to the house or anything because there was so much violence there." The Appellant had not alleged any motive for RL to accuse him falsely.

10. Joanece Louise, the paternal uncle of the Appellant testifying for the Appellant had said that the Appellant had lived with him at Le Mamelles since 2010 and did not commit the offences he is accused of. His evidence is of little value as he worked on a boat and for almost 6 months of the year, he was at sea. The evidence of Joshua Louise, the brother of the Appellant had also been of no value to the defence as all that he did say was that the Appellant did not live at Port Glaud in the year 2012 and was living with his uncle Joanece Louise at Le Mamelles. According to him the Appellant has been falsely implicated by RL at the instigation of their mother.

11. The defence put up in this case is that the Appellant did not live at Port Glaud in the house with his mother and other siblings in the year 2012, the year when the offences were committed. As against this version there is the version of RL whose evidence the learned Trial Judge had believed. No valid reason has been



attributed as to why RL the younger sister of the Appellant should falsely testify against the Appellant and give a detailed description of what the Appellant did to her or why the mother of both the Appellant and RL would instigate RL to fabricate a case against her own son. It is a tall story to believe that for one whole year the Appellant did not visit his parents' house at Port Glaud, simply because he had disagreements with his own mother.

12. The 1st ground of appeal that refers to an inordinate delay in making the complaint against the Appellant, namely more than two years, needs to be viewed, taking into consideration the circumstances of this case. It is not in all cases that a recent complaint is a must and there is no law of prescription or time limit in registering a criminal complaint against sexual abuse in Seychelles. The matter of recent complaint only goes to the issue of credibility and consistency of the complaint. In the case of **Raj V The State 92014) FJSC 12: CAV 3 of 2014, 20 August 2014** the Supreme Court of Fiji said citing, **Basant Singh & Others V The Crim App 12 of 1989; Jones V The Queen (1977) 191 CLR 439** and **Vasu V The State (2006) FJCA 69, AAU 11U of 2006, 24 November 2006**: *“Recent complaint is relevant to the question of consistency, or inconsistency, in the complainants conduct, and as such was a matter that went to her credibility and reliability as a witness.”* Delay is a typical response of sexually abused children, as a result of confusion, denial, self-blame, embarrassment, powerlessness and overt and covert threats by offenders. This was a case where the victim RL was only 8 years at the time of the alleged incidents and therefore may not have been in a position to comprehend the gravity of what happened to her; came from a broken family where the family dynamics were unhealthy, namely where the father and the mother fought often; and the girls didn't feel loved and safe; and where the Appellant had been in the habit of beating up the victim and therefore, RL was in fear of him. The fact remains that RL had complained to her mother in the year 2013. The mother too was in a desperate situation as she was dependent

on her husband for the provisions he provided. The delay in making the complaint does not in my view cast any doubt on RL's evidence. In **PC V DPP [1999] 2 IR 25** it was said: *"It appears that rational consideration of abusive events is frequently suppressed for complex personal, family and social reasons."*

13. It is not the Appellant's complaint that delay in prosecuting him, has caused him irreparable prejudice in making his defence, for example irretrievable loss of evidence due to unavailability of witnesses who could testify to prove his innocence, destruction or loss of crucial documents or exhibits that were relevant. His position before this Court and before the trial court is one of a total denial on the sole basis that he did not go to the house where RL lived in the year 2012 and that RL should not have been believed by the Trial Judge in view of her delay in complaining against him. Had the Appellant's position been that he was unable to prepare a proper defence in view of the delay as stated earlier, that may have been a matter for the consideration of the court as stated in United States case of **Barker v Wingo, [1972] USSC 144; 407 U.S. 514** .

14. The judgment in **Sanderson v Attorney-General, Eastern Cape [1997] ZACC 18**; points out that in determining delay it is not only the interests of the accused that must be borne in mind. In making a value judgment, courts must be constantly mindful of the profound social interest in bringing a person charged with a criminal offence to trial, and resolving the liability of the accused. In **Zanner v Director of Public Prosecutions, Johannesburg, [2006] ZASCA 56; 2006 (2) SACR 45 (SCA)** it was held *"The right of an accused to a fair trial requires fairness not only to him, but fairness to the public as represented by the State as well. It must also instil public confidence in the criminal justice system, including those close to the accused, as well as those distressed by the horror of the crime."* The Supreme Court of Ireland in the case of **B V DPP [1977] 3 IR 140** held that

the defendant's right to a trial with reasonable expedition was to be balanced against the right of the community to have offences prosecuted.

15. In the case of **Bothma V Els & Others (CCT 21/09) [2009] ZACC 27** it was held that the specific nature of the offence should be considered in considering whether the lapse of time (37 years) was unreasonable. Sexual abuse is one of the most humiliating and embarrassing complaints to make by any victim. The Court in **Bothma** stated: *“Society demands a degree of repose for its members. People should be able to get on with their lives, with the ability to redeem the misconduct of their early years. To prosecute someone for shop-lifting more than a decade after the event could be unfair in itself, even if an impeccable eyewitness suddenly came forward, or evidence proved the theft beyond a reasonable doubt. Everything will depend upon the circumstances. All the relevant factors would have to be weighed on a case-by-case basis. And of central significance will always be the nature of the offence. The less grave the breach of the law, the less fair will it be to require the accused to bear the consequences of the delay. The more serious the offence, the greater the need for fairness to the public and the complainant by ensuring that the matter goes to trial. As the popular saying tells us “Molato ga o bole” (Setswana) or “ical’aliboli” (isiZulu) – there are some crimes that do not go away.”*

16. The Court in **Bothma** went on to say: *“Complainants should be encouraged rather than deterred when, breaking through feelings of fear and shame, they seek to bring to light past abuses against them. A notable feature of recent decades has been the manner in which adult women have through newly discovered insight found themselves suddenly empowered to come to grips with and denounce sexual abuse they had suffered as children.”*

17. In **Van Zijl v Hoogenhout, 2005 (2) SA 93 (SCA)** the victim, at the age of forty-eight, sued her uncle for sexual abuse during eight years of her childhood and court held that delay was not a bar to the prosecution of the abuser. The Supreme Court of Appeal accepted that rape had the inherent effect of rendering child victims unable to report the crime, sometimes for several decades, and that the policy was not to penalise them for the consequences of their abuse by blaming them for the delay. In **S v Cornick and Another 2007 (2) SACR 115** the rapes for which the appellants had been convicted occurred in 1983, some nineteen years before the complainant laid charges against them. The complainant was then a child of fourteen and the appellants some four years older. The complainant testified that she did not realise until her mid-twenties that she had been raped. She attempted to bury the ordeal in the back of her mind, though she said that she had become even more withdrawn a child than she had been before. She said that she had “lived a lie”.

18. In **R v L (W.K.) [1991] 1 R.C.S. at 1091 the Supreme Court of Canada** held that a stay of prosecution should not have been issued by the trial court in a matter where a man was charged with having sexually assaulted his step-daughter and daughters over a period that had started thirty years before. A unanimous Court held:

*“It is well documented that non-reporting, incomplete reporting, and delay in reporting are common in cases of sexual abuse. The 1984 Report of the Committee on Sexual Offences Against Children and Youths (the Badgley Report), vol. 1, explained at p. 187 that:*

*‘Most of these incidents were not reported by victims because they felt that these matters were too personal or sensitive to divulge to others, and because many of them were too ashamed of what had happened. . . . For three in four female*

*victims and about nine in 10 male victims, these incidents had been kept as closely guarded personal secrets.'*

*For victims of sexual abuse to complain would take courage and emotional strength in revealing those personal secrets, in opening old wounds. If proceedings were to be stayed based solely on the passage of time between the abuse and the charge, victims would be required to report incidents before they were psychologically prepared for the consequences of that reporting”*

19. In New Zealand the Court of Appeal in **W v Attorney-General [1999] 2 NZLR 709** observed:

*“Approaching the question whether she made the connection between her sexual abuse and adult behaviour, or ought to have discovered that connection, as if it were an exercise akin to that of discovering cracks in a house foundation, does not demonstrate any great understanding of the subject or sensitivity to the psychological and emotional problems suffered by a woman in Ms W’s position. . . Some women never complain. Others delay complaining for many years, if not decades. The reasons why women refrain from or delay in making a complaint may be subtle and difficult to comprehend, forming part of the rape trauma syndrome suffered by many women in the aftermath of rape or sexual assault... While there may be a public interest in granting certain classes of defendant statutory immunity from being sued after a defined time, there cannot be any public interest in protecting the perpetrators of sexual abuse from the consequences of their actions ...the patent inequity of allowing these individuals to go on with life without liability, while the victim continues to suffer the consequences, clearly militates against any guarantee of repose.”*

20. In **R v Smolinski, [2004] EWCA Crim. 1270** the Court of Appeal in England upheld an appeal on the facts against the conviction of a man who at the age of

sixteen (twenty years earlier), had allegedly indecently touched two sisters aged six and seven when acting as their babysitter. Lord Chief Justice Woolf concluded:

*“We hope we have made clear two things in the course of hearing this appeal. One is that we discourage applications [for stay of prosecution] based on abuse of process] in cases of this sort. Secondly, where evidence is given after so many years, the court should exercise very careful scrutiny at the end of the evidence to see whether or not the case is safe to be left to jury. If there is an appeal, then this court will scrutinise the situation with care. We are certainly not indicating that it is not right to bring prosecutions in the appropriate circumstances merely because of the period that has elapsed. As this Court appreciates, it is sometimes very difficult for young children to speak about these matters and therefore it is only many years later that they come to light. Justice must be done of course to a defendant, but the court must also be mindful of the position of the alleged victims.”*

21. Several Irish cases have held that that there was no specific prejudice caused by delay. In **SF V DPP [1999] 3 IR 235**, it was held that there was no specific prejudice caused by the delay of almost 8 years, where a Roman Catholic curate charged with 66 counts of indecent assault or gross indecency against eight boys aged 11 or 12 years. In **RC V DPP [2005] IEHC 97** the court refused to grant an order on prohibition of prosecution where the charges pertaining to the incident dated back 21-23 years. In the Irish cases of **PJC V DPP [2005] IEHC 98**, **JO’C V DPP [2000] 3 IR 478** and **SA V DPP [2005] IEHC 262**, the court held that delay in making the complaint of sexual abuse was not a bar to the prosecution of the accused.

22. As regards the second ground of appeal, what is of importance in this case is the evidence of the virtual complainant, namely RL and not that of her mother A. V.

She merely corroborates some of the facts RL had stated. It is to be noted that she is torn between two difficult situations, namely protecting the interests of her daughter and testifying against her own son. This is borne out by her evidence: “Anything I want to do is to protect my children that’s all.” As stated earlier the learned Trial Judge had believed RL and acted on her singular evidence to convict the Appellant. He had the advantage of seeing RL, which we do not have. There is no basis for us to disturb his finding on facts. He states: “I found the virtual complainant to be cogent and clear in recounting the incidents between her and the Appellant and which I believe in its entirety.” It has been held by this Court in the case of **Raymond Lucas V R (SCA 17/09)** that corroboration of the evidence of the prosecutrix is not a legal requirement for judicial reliance on the testimony of the prosecutrix but a guidance of prudence under given circumstances.

23. I have examined the 3<sup>rd</sup> ground of appeal carefully and find that there is nothing to indicate that the learned Trial Judge had drawn the wrong inferences from the defence evidence particularized in that ground. As stated earlier it is a tall story to believe that for one whole year the Appellant did not visit his parents’ house at Port Glad, simply because he had disagreements with his own mother. The Appellant’s own evidence that he “couldn’t go to Port Glad often to the house” militates against the defence raised by him. The evidence of Joanece Louise and Joshua Louise, referred to at paragraph 10 above, does not help the Appellant in anyway. None of them could exclude the possibility of the Appellant committing the offences on two consecutive dates in the year 2012 as narrated by RL.

24. Counsel for the Appellant at the hearing of the appeal raised a new ground of appeal, namely that the learned Trial Judge erred in law in not having assessed the evidence of the complainant on a preliminary enquiry, in accordance with section 11A of the Evidence Act, thereby challenging the competence of RL to testify. **Section 11A of the Evidence Act**, which deals with evidence of a child is as

follows: “*At any trial the evidence of a child shall be received unless it appears to the court that the child is incapable of giving intelligible evidence.*” There is nothing in the law which makes reference to a preliminary enquiry, save that it has been a practice that has been followed by the court. It is incorrect for the Appellant to submit that “the learned trial Judge never satisfied himself that the complainant could give intelligible evidence in this trial.” In fact, the learned Trial Judge had stated “I found the virtual complainant to be cogent and clear in recounting the incidents between her and the Appellant and which I believe in its entirety.” I have perused carefully from the record of proceedings the evidence given by RL in her examination-in-chief, cross-examination and re-examination and find that the observation the learned Trial Judge has made is correct. The Trial Judge had the additional benefit of observing the demeanour of the child. It is my view that on a preliminary inquiry before taking the evidence of a child witness, it is difficult by asking a few questions, for a trier of fact, to come to a determination whether the child is capable of giving intelligible evidence. It is only by observing the manner in which the child answers the questions put to him/her during his entire testimony that a trier of fact can determine whether the child is capable of giving intelligible evidence. In **Jacobs V Layborn (1843)** 11 M & W 685 it was said that the incompetency of a witness may become apparent only after he has commenced to give evidence. ‘Intelligible’ in my view in the context of section 11A of the Evidence Act, simply means the child is able to understand the questions put to him/her and give answers which can be understood by the listener and nothing more. Credibility of a witness is a determination to be made by the trier of fact based on the evidence, a witness gives and should not be confused with intelligibility. Many an adult witness who takes the oath to speak the truth does not always speak the truth. In **Blackstone’s Criminal Practice 2010 at F4.18** under the heading child witnesses it is stated: “*that questions of credibility and reliability are not relevant to competence but go to the weight of the evidence...*” In **MacPherson; Powell (2006) 1 Cr App R 468** it was said that a court cannot



properly conclude that a child is incapable of satisfying the test of competency on the basis of the child's age alone. In **Blackstone's Criminal Practice 2010 at F4.18** under the heading child witnesses it is stated: "*There has been a change of attitude by Parliament, reflecting in its turn a change of attitude by the public in general to the acceptability of the evidence of young children and an increasing belief that their testimony, when all precautions have been taken, may be just as reliable as that of their elders.*" At **paragraph 8-59 of Archbold 2012** it is stated: "*A child's chronological age will, however, help to inform the decision as to competence, but the age of a witness is not determinative of his ability to give truthful and accurate evidence, and if found competent, it is open to a jury to convict on the evidence of a single child witness, whatever his age: R V B (2011) Crim L. R. 233, CA (observing that none of the special measures which apply to the evidence of children carry with them the implicit stigma that children should be deemed in advance to be somehow less reliable than adults.)*"

25. I do not agree that the failure of the learned Trial Judge to conduct a preliminary inquiry to assess the evidence of RL, even if it is a requirement as argued by Counsel for the Appellant was fatal to the conviction of the Appellant. At its worst this would be an appropriate case to apply the proviso to **rule 31(5) of the Seychelles Court of Appeal Rules 2005** which states: "*Provided that the Court may, notwithstanding that it is of opinion that the point or points raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.*" Reliance is also placed on **section 344 of the Criminal Procedure Code** which states that no finding passed by a court of competent jurisdiction shall be reversed or altered on appeal on account of any omission in the proceedings during the trial under this Code unless such omission has in fact occasioned a failure of justice and "provided that in determining whether any omission has occasioned a failure of

*justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”*

26. I am therefore of the view that a counsel having had the opportunity to caution the judge, if he so believed in the importance of the preliminary enquiry to assess the evidence of RL before she testified, cannot be heard to complain on appeal in relation to such omission, as stated in the proviso to section 344 of the Criminal Procedure Code. In **Bimlesh Prakash Dayal V The State AAU 0109 of 2014** citing **Raj V The State, CA V 0003 Of 2014; 20 August 2014 FJSC 12**, the Court of Appeal of Fiji stated: *“The raising of direction in this way is a useful trial function and in following it, counsel assist in achieving a fair trial. In doing so they act in their client’s interest. The appellate courts will not look favourably on cases where counsel have held their seats, hoping for an appeal point, when issues in directions should have been raised with the judge...”* In the Fiji Supreme Court case of **Varsiko Tuwai V The State CA V 0003 of 2014, 20 August 2014**, it was said that counsel should not employ a deliberate tactic to find an appeal point by waiting for Trial Judges to make mistakes to find a point of appeal.

27. As regards sentence, the learned Trial Judge had taken into consideration the probation report called on behalf of the Appellant and the plea in mitigation of the Appellant’s counsel where reference has been made in the Sentencing Order that the Appellant is a young man of 26 years and a father of 3 minor children of 4 years, 2 ½ years and 1 year. The Trial Judge had stated in the Sentencing Order: *“The Probation Services showed that the convict maintains his innocence despite the conviction and has shown no remorse at any stage. He is more concerned with the effect of the sentence on his personal life and that of his immediate family. The Probation Services recommended a sentence that would be appropriate and serve as a deterrent from further criminal behavior.”* The learned Trial Judge has set out

both the mitigating and aggravating facts in detail and I find that the learned Trial Judge cannot be faulted in anyway. None of the well-known grounds where an appellate court interferes with the sentence passed by the trial court are existent in this case. This was essentially a case where deterrence, denunciation and community protection especially of young children had to be considered. The sentence imposed by the learned Trial Judge in my view has not breached, and is in line with the well-known principles of sentencing, namely parsimony, proportionality, parity and totality. The authorities cited by the learned Counsel for the Appellant have no relevance to the facts of this case or the manner adopted by the learned Trial Judge in determining the sentence imposed on the Appellant.

28. I was mindful of increasing the sentence in accordance with the powers of the Court of Appeal as laid down in rule 31(5) of the Seychelles Court of Appeal Rules 2005, but refrained from doing so, only taking into consideration that the Appellant probably had just turned 18 years when he committed these offences and his background. The sentence for Sexual interference with a child was increased by the amending Act 5 of 2012 with effect from 6 August 2012 for a very specific reason: to show the seriousness, public revulsion and societal abhorrence for this kind of offence. The amendment provided that a person who commits an act of indecency towards a person under the age of fifteen years is on conviction liable to imprisonment for 20 years and where the accused is of or above the age of 18 years and the act of indecency is the non-accidental touching of another with one's sexual organ, or the penetration of a body orifice of another for a sexual purpose, the person shall be liable to imprisonment for a term not less than 14 years and not more than 20 years. One cannot have any sympathy on the Appellant who took advantage of the age, innocence and immaturity of his own sister to sexually abuse her at a time when no one would notice. The incestuous acts committed by the Appellant is reprehensible and certainly will have an effect on RL. It is a violent act of contempt, not an expression of affection or sexuality.

Abuse is never contained to a present moment; it lingers across a person's lifetime and has pervasive long-term ramifications. Society must be protected from such persons and a strong message should go out.

29. For the reasons stated above I have no hesitation in dismissing the appeal both against conviction and sentence.

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Fernando, President

I concur:

\_\_\_\_\_  
F. Robinson, JA

I concur:

\_\_\_\_\_  
B. Adeline

Signed, dated and delivered at Ile du Port on 17 December 2021.