

**IN THE COURT OF APPEAL OF SEYCHELLES**

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**Reportable**

[2022] SCCA 64 (16 December 2022)  
SCA CR 01/2022  
(Appeal from CO 08/2021)

In the matter between

**C L**

*(rep. by Mr. Olivier Chang-Leng)*

**Appellant**

and

**The Republic**

*(rep. by Ms. Corrine Rose)*

**Respondent**

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**Neutral Citation:** *Laurencine v R* (SCA CR 01/2022) [2022] SCCA 64 (Arising in CO 08/2021) (16 December 2022)

**Before:** Fernando President, Robinson JA, Tibatemwa-Ekirikubinza JA

**Summary:** Appeal against conviction for sexual assault and the sentence imposed.

**Heard:** 1 December 2022

**Delivered:** 16 December 2022

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**ORDER**

Appeal against conviction dismissed. Appeal against sentence varied and the sentences in respect of the two charges should run partially concurrently and the Appellant should serve a period of 17 years.

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**JUDGMENT**

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## **FERNANDO, PRESIDENT**

1. The Appellant had appealed against his conviction for sexual assault contrary to section 130(1) read with 130(2)(d) and sexual assault contrary to section 130(1) read with 130(2)(a) and the sentences of 15 years' imprisonment imposed on him in respect of each count which are to be served consecutively, thereby totalling to a period of 30 years' imprisonment.
2. The first count as particularized in the indictment was for inserting his finger in the vagina of 9-year-old AR for a sexual purpose and the second count as particularized was for licking the vagina of AR and touching it with his finger and making AR lick his penis.
3. The Appellant has raised the following grounds of appeal against conviction:
  - i. "The Learned Trial Judge erred in fact when he stated that the evidence of the virtual complainant was corroborated by the evidence of Damien Isaac.
  - ii. The Learned Trial Judge erred in fact when he incorrectly combined and narrated the version of events as described by the two material witnesses, being the virtual complainant and Damien Isaac.
  - iii. The Learned Trial Judge erred in law and on the facts when he stated that the discrepancies between the evidence of the virtual complainant and Damien Isaac are a result of their being young children, failing to consider that their evidence differed significantly and materially.
  - iv. The Learned Trial Judge erred in fact and law when he considered and based his decision on testimony that the Appellant made the virtual complainant touch his penis when this was not one of the offences with which the Appellant was charged.
  - v. The Learned Trial Judge erred in fact when he stated that the Appellant did not deny that he was in the house with the virtual complainant at around the time of the commission of the offence.
  - vi. The Learned Trial Judge erred in fact and law when he stated that Dr. Michel, the expert witness, could not rule out sexual assault failing to consider that the same witness accepted that he saw no evidence of sexual assault on the virtual complainant.
  - vii. The Learned Trial Judge erred in law when he failed to engage with the inconsistencies and deficiencies in the evidence against the Appellant." (verbatim)

As against sentence the Appellant has argued that it is harsh and excessive having regard to the circumstances and past jurisprudence.

By way of relief the Appellant has sought for “an order quashing the judgment and the acquittal of the Appellant, or, in the alternative, a reduction in his sentence proportionate to the circumstances of the case” (verbatim). Counsel should have taken care in reading what is written before placing his signature on a Notice of Appeal.

4. All grounds of appeal in my view are in relation to factual matters which are generally the domain of the Trial Judge who has had the opportunity to see and hear the witnesses testifying and thus view their demeanour, the yardstick to determine the truth of what the witnesses said. It is to be noted that appeals to this Court shall be by way of re-hearing and this Court has all the powers of the Supreme Court when hearing an appeal and in that respect may draw inferences of fact, and give any judgment which the Supreme Court ought to have given. In hearing an appeal, the duty of this Court is to ascertain whether sufficient evidence had been placed before the Trial Court to sustain the conviction. It is to be remembered that what is on appeal is the conviction of the appellant and not the judgment or the manner the judgment had been written. Thus, whatever misconceptions there may be in the judgment, as set out in paragraphs 16-18 of the Skeleton Arguments and any wrong inferences the Trial Judge may have drawn will not necessarily vitiate a conviction, provided this Court is satisfied that there is sufficient evidence to sustain the conviction. However, this Court will always bear in mind that it is the Trial Judge who is best suited to make a determination as to the truthfulness of witnesses having had the opportunity to watch their demeanour and it would only be in exceptional situations that this Court would interfere with a finding of fact by the Trial Court.
5. The evidence of A.R. being a child had been taken by closed circuit television, without objection. Prior to leading AR’s evidence, she had been questioned and the Court had been satisfied that she knew the sanctity of an oath and the difference between the truth and a lie. The learned Trial Judge as per the judgment had been satisfied that A.R. was capable of giving intelligible evidence, thus satisfying the requirement of section 11A of the Evidence Act. A.R. had said that at the time of the incident she had been living with her family, namely Manuela Tirant, her mother; E.L. her stepfather; V.P. her brother and sisters Ella and A; at Coco Rouz, in Praslin. On being asked why she was in Court A.R. had replied because Christopher raped her. Christopher is the Appellant in this case. She had said that Christopher works at Octopus and lives at Coco Rouz with Ms. Elna. He

has his separate bedroom. She had said that she knows both the Appellant and Ms. Elna because they live opposite their house. On that eventful day in November 2020 A.R. had gone to sleep in Ms. Elna's house. She had been in the bedroom with Ashira (A) and Adriano watching cartoons. Later Rene Richard and Damien had come to that bedroom. Thereafter, the Appellant had called her to his bedroom. It was a big room and there was a big bed in it. At that time Ashira, Adriano and R.R. were asleep apart from Damien. When she entered the Appellant's bedroom she saw on television a man and a woman naked. There was a door to the Appellant's bedroom but the door did not close properly. The Appellant placed a gas cylinder behind the door to close it. At this time, only the Appellant and A.R. were in the bedroom. Appellant had then removed A.R.'s short jeans and small panty and rubbed his finger inside her vagina. A.R. had not liked what the Appellant was doing and had asked him to stop it because it was painful but the Appellant had continued doing it. Thereafter he had rubbed his tongue inside her vagina. The appellant had also removed his shorts and asked A.R. to lick his penis. She had done so once and put on her shorts and left the Appellant's bedroom. When she came out of the Appellant's room Damien had told her that he knows what had happened. A.R. had told him that he was lying as she thought that he had not seen anything. A R. had said that she did not shout or call out to anyone nor had not told what the Appellant had done to her, because she was scared. A.R. had said that when the incident happened Ms. Elna and her baby had been in Elna's bed room asleep. Later the Appellant had given her and her sister SCR 100 each. A.R. said that she felt scared when she saw the Appellant thereafter.

6. In cross examination it had been confirmed that the Appellant lived in Ms. Elna's house and had his own bedroom, which had a big bed. A.R. had said she had gone to Ms. Elna's house to sleep on several earlier occasions and was in the habit of sleeping in the same bedroom. Counsel for the defence had got A.R. to confirm that the Appellant had come to A.R.'s bedroom and asked her to come to his bedroom. A.R. had said that when she went to the bedroom the TV was on, but the Appellant had switched it off. A.R. had said that there was light in the room. Thereafter Counsel for the defence had virtually got A.R. to confirm what she had said in her examination-in-chief about what the Appellant did. By this line of cross-examination Counsel had not challenged the identity or presence of the Appellant at the scene of crime, despite the Prosecutor failing to ask A.R. to identify the Appellant, who was in the dock, when she testified. A.R. had also said that when she came out of the room of the Appellant Damien was awake and watching cartoons in another bedroom and the door of that room was open. Damien had told her that he saw what happened. She had told Counsel for the

defence when questioned by him, that she was sure that she was telling the truth, that she knew the importance of telling the truth, that no one had asked her to tell lies. When questioned: “I put it to you that Christopher never did any of these things to you” A.R.’s answer had been “It is true. He did it.” Cross-examination revealed that A.R. had made the statement to the Police about 2-3 months after the incident. What the defence had attempted to show as contradictions of A.R.’s evidence from the statement she gave to the Police, was that in her statement she had said that there was a small mattress on the floor, which she did not state in her evidence and that she had not seen when the Appellant removed his shorts, although she said that in her evidence in court. A.R. had not been asked to describe all that was in the room of the Appellant when she was examined in chief and in my view both these matters are not material contradictions as to have an impact on the truthfulness of A.R.’s evidence.

7. The learned Trial Judge had said: “I have carefully scrutinized the evidence of A.R. as a whole, which I find it to be cogent, consistent and credible. I have also carefully considered the complainant’s demeanour and the words, phrases and expressions that she used in her testimony.” The learned Trial Judge had thereafter at paragraph 27 of the judgment repeated the testimony of A.R. which he believed. An appellate court will interfere with the factual findings of the Trial Judge only when there are grave errors as stated earlier.
8. 15-year-old, Damien Issac testifying before the Court on oath, had stated that at the time of the incident, he had been living in Praslin with his mother, stepfather, two sisters and brother. They were neighbours of the Appellant who he named as Christopher Laurencine, Elna Paul and Manuella Tirant. When asked why he had come to Court, Damien had said, that he had come to tell the truth of what happened to the little girl called A.R who was also their neighbour. He remembered the night of the incident when he slept over at the house of Elna Paul. Damien was uncertain whether the incident happened in November or December 2020. On that day A.R. the victim, and three others (R.R., Ashira and Jelissa) were staying over at Elna’s house, including the Appellant, who Damien identified in Court. According to Damien he had slept at the house of Elna on multiple occasions and slept in two of the rooms interchangeably. That night too, he was first sleeping in the Appellant’s room. At a certain stage he saw A.R. who was also in the Appellant’s room with her hand on the private part of the Appellant. Both the Appellant and A.R. were clothed at this time. The Appellant was wearing a pair of shorts. At that time a sex movie was playing and the Appellant had asked Damien to take the external drive and go out of the room and watch TV in another room. He had then left the Appellant’s room leaving A.R. in the Appellant’s room.

He had not gone to watch TV in the other room soon thereafter as he wanted to find out what the Appellant and A.R. were doing and remained in the living room adjacent to the other bedroom. It is clear from Damien's testimony that he was not a witness to the entire incident as narrated by A.R. since he was asked by the Appellant to move out of the room. But certainly his curiosity would have been aroused as a teenager of 15 years, after seeing A.R.'s hand on the Appellant's private part. It would have been for that reason that he wanted to find out what the Appellant and A.R. were doing. After some time, he had seen A.R. coming out of the Appellant's room with a small amount of blood on her pair of shorts near her private part. When questioned A.R. had said it was from a cut. The next morning, he had informed A.R.'s sister about the incident and in January A.R.'s family about it.

9. In cross-examination it had been suggested to Damien that his version was different to that of A.R; having drawn his attention to the various discrepancies between A.R.'s and his evidence and therefore told that either he or A.R. was lying, to which Damien had replied that he had stated what he had seen. It had been the defence position: "I put it to you Damien that both your statement and your evidence today in Court is a complete lie", which amounts to a total rejection of Damien's evidence as one, that could not in any way rely upon. If that be the defence position it is strange why the defence now seek reliance on Damien's testimony to discredit A.R. It is to be noted the court can come to a finding if it believes the testimony of A.R, without further evidence. It is strange to find that Counsel for the Defence had put to Damien a part of his statement to the Police, which corroborates his testimony in Court, namely: "and now Christopher (*Appellant*) saw me, and he asked me to go the other bedroom, where the other children are and then I went to the bedroom where the other children have already fallen asleep. So, I went back and stood there near Christopher's bedroom." Damien had repeated under cross-examination that the Appellant gave him an external and told him to go and watch movies and that he had seen blood on the shorts of A.R. When challenged that both he and A.R. had concocted a story against the Appellant which is untrue, Damien had denied it and said "It is true". What the defence have failed to show in this case, is why A.R. a nine year old girl and fifteen-year-old Damien should have concocted a story about the Appellant against whom they or their parents had no motive or any form of grievance.
10. Undoubtedly there are inconsistencies between the evidence of A.R. and Damien; but bearing in mind that A.R. is only nine years and Damien 15 years, and the very confusing manner the questions had been asked both by the Counsel for the prosecution and defence; I do not attach any weight to the inconsistencies in the

evidence of A.R. and Damien and in my mind they are not material so as to discredit the testimony of A.R. There has been no consistency in the manner both Counsel have examined the witnesses in getting at what they wanted the witnesses to testify to Court. The issues about who slept where, and at what time they moved in and out of the two rooms, in the testimony of Damien do not come out clearly as a contradiction of the evidence of A.R. so as to discredit the testimony of A.R. That part of the statement of Damien to the police, which the Counsel for the defence had highlighted has placed the Appellant at the scene, namely: “and now Christopher saw me, and he asked me to go the other bedroom, where the other children are and then I went to the bedroom where the other children have already fallen asleep.” The learned Trial Judge had been quite alive to this when he said: “The defence denies the offence by relying on what it considered contradictions in the prosecution evidence, especially between the evidence of Damien and that of the virtual Complainant. I have carefully considered this defence and I find that indeed there are discrepancies...” and have gone on to itemize some of the inconsistencies in the evidence of A.R. and Damien at paragraph 32 of his judgment. Having considered them the learned Trial Judge had said: “I have noticed these and some other discrepancies however, to my mind these do not come to the level of reasonable doubts. They amount to doubts that would be present in the evidence of young children, testifying about a traumatic incident, in public, months after the incident happened.” Having scrutinized the evidence of both A.R. and Damien in this case, I am of the same view as the learned Trial. Even if there are discrepancies in the evidence of A.R. and Damien, I am of the view that no substantial miscarriage of justice has occurred in this case and therefore apply the proviso in **rule 31(5) of the Seychelles Court of Appeal Rules 2005**. I therefore dismiss ground (iii) of appeal. Since ground (vii) is on the same lines as ground (iii) I also dismiss ground (vii).

11. Counsel for the Appellant in his Skeleton Arguments had stated that A.R. and Damien differ with regards to who was there that evening, where they were, what occurred and what conversations was had between them. Only the name of Jelissa had not been mentioned when A.R. testified. But there is no discrepancy in regards to the presence of the Appellant, A.R. and Damien in the house of Elna that evening in the testimonies of A.R. and Damien. The evidence bears out that the children were moving in and out of the two rooms that evening. It is also clear that Damien was not a witness to all that happened between the Appellant and A.R., as he had been asked to move out of the Appellant’s room by the Appellant with the external drive. The fact that A.R. had not narrated to Damien all that happened to her while she was in the room of the Appellant, soon after the incident and when

Damien spoke to her, is understandable taking into consideration that she was only 9 years of age and would have been afraid or embarrassed to talk about it.

12. The medical evidence in this case does not corroborate or contradict the evidence of A.R., save it may lend some support to the evidence of Damien, indirectly. Dr. R. Michel, a very experienced Obstetrician and Gynaecologist and one who had testified before the Courts in many sexual abuse cases had, producing his Medical Report stated that he had examined A.R. on 12 February 2021, i.e. about 3 months after the incident. According to the said report there had been no external visible bruises. The vaginal examination had revealed that the hymen was intact and there was no vaginal discharge. In his Report he had stated: "Sexual abuse cannot be ruled out". The doctor in explaining this to Court had said that this is because sexual abuse happens without leaving any physical evidence. He then had made reference to fingering and kissing. The doctor had said that even if there had been penetration there are instances where there will be no signs. He had stated that his examination had been days after the incident and thus too late to find any evidence of sexual abuse. The doctor had also said if there had been blood coming from the victim's private part, it could be from a scratch, without a tear of the hymen. When asked in cross examination if it had been a scratch would it leave a scar afterwards, the doctor had said "No it will heal According to the learned Trial Judge, Damien's evidence in relation to seeing blood on the shorts of A.R. had been corroborated by the doctor who said it could have been from a scratch. It is also to be noted that A.R. in her evidence had stated that when the Appellant rubbed his finger inside her vagina it was painful and she had asked him to stop it. Counsel for the defence had then asked the doctor: "You said that sexual abuse cannot be ruled out in your statement but you'll agree with me that sexual abuse cannot also be confirmed by physical examination" to which the doctor had answered in the affirmative. The learned Trial Judge by making reference to this in his judgment did not in any way err in fact and law as stated at ground (vi) of appeal. I therefore dismiss the said ground of appeal.
13. Manuella Tirant (M.T.), the mother of A.R. testifying before the Court had stated that she learnt about the incident on 4<sup>th</sup> February 2021, when she received a call from A.R.'s father of an incident regarding his daughter A.R. Following that she had confronted A.R. on the matter. At first A.R. had refused to talk saying that M.T. would beat her up. After comforting and assuring A.R. that she would not beat her, A.R. had cried and said that the Appellant had touched her vagina. Thereafter, she had gone to fetch Elna Paul, the lady in whose house the incident had occurred and A.R. had repeated her complaint in the presence of Elna. It was thereafter, the matter was reported to the police. M.T. had stated that she noticed



changes in A.R.'s behaviour as of December 2020 when her grades in school started to drop and that the incident had affected A.R. a lot. M.T. had said that she had also noticed that the Appellant had started to shout at A.R. after November 2020 and she had found fault with him. The fact that A.R. had not given all the details of what happened as narrated in Court, when first questioned by her mother cannot be taken to discredit the testimony of A.R.

14. Elna Paul (E.P.) testifying before the Court had stated that the Appellant lived in her house in one of rooms and they shared the house rent between them. His bedroom door did not close properly and he was in the habit of closing it by placing a diver gas bottle or a rock to prevent the door from opening. A.R. was a neighbour and often came to her house with other children in the neighbourhood, namely Rene Richard, Adriano and Damien, to play and watch cartoon. The boys used to sleep in the Appellant's room and sometimes A.R. also slept at her place, but not in the Appellant's room. Elna had a son who was 1 ½ years old. The children had access to the Appellant's room. She had come to know of the incident between the Appellant and A.R. when A. R's mother M.T. reported it to her in the presence of A.R. A.R. had been crying at that time and looked fearful. According to her the Appellant was a kind person and a good friend of hers. He worked as a diver at Octopus Diving Centre. Elna was shocked to hear about the complaint of Elna as she did not expect that type of conduct from the Appellant. She had asked A.R. why she had not called her or screamed, and A.R. had said that she did not want to wake her up and her little son as they were sleeping. Elna had admitted that often she slept while the children watched cartoons. She had also said that the Appellant would be in the house with the children while she was asleep.
15. The evidence of M.T. and E.P. referred to in paragraphs 13 and 14 above makes it clear that A.R.'s complaint has not been at the instigation of any one of them. Their evidence shows that they too were taken by surprise to hear what the Appellant had done to A.R. who had no motive to fabricate a case against the Appellant. A.R. was an innocent child who through shame and fear had kept the incident a secret and her story would not have come out if not for Damien. It goes without saying sometimes unexpected behaviour is reported from persons one may not imagine.
16. The Appellant's intentions become clear and A.R.'s testimony finds corroboration from the following facts. Damien's evidence that he saw A.R.'s hand on the private part of the Appellant; the fact the Appellant was playing a sex movie before the incident; the Appellant sending Damien out of the room by giving him the external drive and asking him to watch TV in another room; the fact that

Damien had seen A.R. coming out of the Appellant's room with a small amount of blood on her pair of shorts near her private part, which the doctor had said could have been from a scratch in the vaginal area, the Appellant shouting at A.R. after December 2020, and A.R.'s behaviour when she was first questioned by M.T and subsequent to that as testified by M.T. I therefore see no merit in ground (1) and dismiss it.

17. I find no merit in ground (ii) as I do not find that the learned Trial Judge had 'incorrectly combined' and narrated the version of events as described by A.R. and Damien. He had only placed together the pieces of evidence of A.R. and Damien to make out the narrative. I therefore dismiss ground (ii).
18. Ground (v) is based on what the learned Trial Judge had stated at paragraph 27 of the judgment, namely, "The undisputed evidence puts the virtual complainant and the accused in the same house at around the time that the offences took place. The accused does not deny this." The learned Trial Judge had said the Appellant only disputed having committed the offences of sexual offences he had been charged with. In making this statement the learned Trial Judge had not erred in fact as stated in ground (v). This was in fact the defence put forward on behalf of the Appellant on the basis of the cross-examination at the trial and what was borne out from the undisputed evidence. The defence had not in any way challenged the evidence of A.R. or Damien on the basis that the Appellant was not in the house at the time of the incident or brought evidence of an alibi. It is to be noted what is not challenged is taken to be accepted.
19. In regard to ground (iv), I state having examined the judgment, the learned Trial Judge certainly had not "based his decision on testimony that the Appellant made the virtual complainant touch his penis" as stated therein. Counsel for the Appellant had gone on to state in that ground that "this was not one of the offences with which the Appellant was charged", indicating the Appellant was charged for making A.R. lick his penis. It is to be noted that 'lick' is a synonym or hyponym of 'touch'. I see no merit in ground (iv) and dismiss it.
20. For the reasons stated above I have no hesitation in dismissing the appeal against conviction and upholding the conviction.
21. As regards the ground of appeal on sentence I find that the offences with which the Appellant was charged are serious and I am in agreement with what the learned Trial Judge had said at paragraph 7 of his Sentencing Order. I find however that the learned trial Judge had failed to consider that all the sexual

assaults that the Appellant stood charged with had been committed at the same time and place and within a short proximity of time.

22. It is my view that a court is mandated, to act in accordance with the provisions section 36 of the Penal Code and give consecutive sentences, in cases where convictions have taken place under different indictments and not where the convictions for different offences take place simultaneously in respect of offences committed at the same time and in the course of the same transaction under one indictment as in this case.

23. Section 36 of the Penal Code reads as follows:

“Where a person after conviction for an offence is convicted of another offence, either before sentence is passed upon him under the first conviction or before the expiration of that sentence, any sentence, which is passed upon him under the subsequent conviction, shall be executed after the expiration of the former sentence, unless the court directs that it shall be executed concurrently with the former sentence or of any part thereof:

Provided that it shall not be lawful for a court to direct that a sentence under Chapter XXVI, Chapter XXVIII or Chapter XXIX be executed or made to run concurrently with one another or that a sentence of imprisonment in default of a fine be executed concurrently with the former sentence under section 28(c)(i) of this Code, or any part thereof.”

The words “after conviction”, “before sentence is passed upon him under the first conviction” or “before the expiration of that sentence” in section 36, is suggestive of this. In the instant case both convictions had been at the same time, in the same judgment, delivered on the same date and both sentences had also been delivered at the same time, in the same Order, delivered on the same date. There is however no bar for a court to order that sentences passed in respect of different offences committed in the course of the same transaction charged under one indictment be served consecutively. In my view consecutive sentences would be appropriate where the gravamen of the offences committed during the same transaction are different, and where there are clearly identifiable differences between the offences committed, for instance robbery and sexual assault.

24. The court also has the discretion under section 36 to order that any sentence, which is passed shall be executed concurrently with the former sentence or of any part thereof. The latter part of the earlier sentence which is underlined simply

means, for instance in this case the court could have passed a sentence of 15 years in respect of count 1 and ordered that the sentence of 15 years in respect of the second count be executed concurrently one or more years after the commencement of the sentence in respect of count 1, thereby imposing a total sentence of imprisonment of 16 years or more, namely up to 28 years. This manner of sentencing by making the sentences partially cumulative has been adopted in **Mill V The Queen [1988] 166 CLR 59**. In the case of **Dickens V The Queen [2004] WASCA 179**, the Court of Criminal Appeal of Western Australia following Mill, ordered for cumulative service of the terms imposed by the trial court to one of partial cumulacy.

25. In this case, inserting the finger in the vagina of AR by the Appellant as particularized in the first count and licking the vagina of AR and touching it with his finger and making AR lick his penis as particularized in the second count have all taken place simultaneously, in the course of the same transaction and within a short period of time. This has been described as the “one transaction” or “continuing episode rule”. See Australian case of **Ruane V R [1979] 1 A Crim 284**. It is to be noted that despite the fact that the said acts fall under 130 (2) (d) and 130 (2) (a), they are generally interrelated sexual acts committed while having sex, although unlawfully, and can be viewed as a single act of sex. If one is to separate the various sexual acts committed, a person can be charged and punished for removing the clothes of the victim, getting her to be naked and thereafter the acts of inserting the finger in the vagina, the acts of cunnilingus and fellatio, all of which will fall under the sub paragraphs (a) to (d) of 130 (2). I am however not unmindful of the fact, that certain sexual acts like cunnilingus, analingus and felatio should be viewed as different and grievous in nature to other sexual acts, especially when committed on persons of tender years.

26. The Court of Appeal for Eastern Africa defined the phrase ‘*same transaction rule*’ in the case of **Republic –vs- Saidi Nsabuga S/O Juma & Another [1941] EACA** and revisited it again in **Nathan –vs- Republic [1965] EA 777** where the court stated as follows: -

*“If a series of acts are so connected together by proximity of time, criminality or criminal intent, continuity of action and purpose, or by relation of cause and effect as to constitute one transaction, then the offences constituted by these series of acts are committed in the course of the same transaction.”*

27. In **Royer V Western Australia [2009] Owen J** described the ‘single transaction rule’ as follows: *“At its heart, the one transaction principle recognises that, where there is an interrelationship between the legal and factual elements of two or more offences with which an offender has been charged, care needs to be taken so that the offender is not punished twice (or more often) for what is essentially the same criminality. The interrelationship may be legal, in the sense that it arises from the elements of the crimes. It may also be factual, because of a temporal or geographical link or the presence of other circumstances compelling the conclusion that the crimes arise out of substantially the same act, omission or occurrences.”*

28. In **Peter Mbugua Kabui –vs- Republic [2016] KLR the Court of Appeal of Kenya** stated as follows:

*“As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act/transaction a concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment.*

29. In the South African case of **S v Mokela 2012 (1) SACR 431 (SCA)**, the Court expressed the view that sentences are to run concurrently where *“the evidence shows that the relevant offences are inextricably linked in terms of locality, time, protagonists and, importantly, the fact that they were committed with one common intent.”*

30. It is stated at **paragraph 5-588 of Archbold 2012** that: *“As a general principle, consecutive terms should not be imposed for offences which arise out of the same transaction or incident, whether or not they arise out of precisely the same facts...”*

31. In the case of **K. M. Samatha Piyalal, CA/HCC/23/18**, the Court of Appeal of Sri Lanka, quashed the sentence of 12 years on each of the two counts to run consecutively in a case where the accused was charged with the offences of sexual abuse, namely, cunnilingus and rubbing his genitals on a girl of sixteen years. Instead the Court of Appeal ordered that the said sentences of 12 years be executed concurrently. The basis for varying the sentence being that they were two offences committed under the same transaction.

32. The imposition of consecutive sentences on the Appellant which amounted to 30 years in prison, created the anomalous situation, in that he faced a penalty more severe than the maximum that could have been imposed under section 130 of the Penal Code, namely a sentence between 14 to 20 years, for an offence of a much more serious nature.
33. In sentencing in a case where multiple offences are charged, a Judge should take into consideration the principle of ‘Proportionality’ and the principle known as ‘Crushing Sentence’, which have been identified as being two limbs of the ‘Totality Principle’. Under the proportionality principle as stated in the Australian case of **Woods V The Queen [1994] 14 WAR 341** the total effective sentence must bear a proper relationship to the overall criminality involved in all the offences, viewed in their entirety and having regard to the circumstances of the case including those referable to the offender personally. See also **Adams V Western Australia [2014] WASCA 191** and **Roffey V Western Australia (2007) WASCA 246**. According to the ‘totality principle’ the accumulation of sentences, in other words the total sentence should not be disproportionate to the total criminal conduct. Under the crushing sentence principle, a court should bear in mind as stated in **Martino V Western Australia [2006] WASCA 78**, that the sentence should not induce a feeling of helplessness in the offender and destroy any reasonable expectation of a useful life after release. Also see [**Sayed v The Queen [2012] WASCA 17**, (Buss JA, Martin CJ and Hall J agreeing); **Azzopardi v The Queen [2011] VSCA 372**, (Redlich JA, Coghlan and Macaulay AJJA agreeing); **R v MAK [2006] NSWCCA 381**, (Spigelman CJ, Whealy and Howie JJ); and **R v Baker [2011] QCA 104**, (Atkinson J, McMurdo P and Lyons J agreeing)]
34. It should also be noted that the fact that a sentence will be crushing is not of itself a reason for mitigation. As Doyle J stated in the Australian case of **R v E, AD [2005] SASC 332** at: *“Care must be taken in using the concept of a crushing sentence. Not uncommonly, for particularly serious crimes, a sentence that is crushing in its effect must be imposed. The use of that term does not imply that when a very heavy sentence is called for, it is appropriate for the court to reduce it simply because to the offender the sentence may be crushing. At the end of the day if that is what is called for, that is the sentence that must be imposed”* In the federal sentencing decision of **Hay v The Queen [2009] NSWCCA 228**, the Court cited Sully J’s comments in **R v Wheeler [2000] NSWCCA 34**: *“It needs to be clearly understood by all concerned that a person who commits a deliberate series of discrete offences ... must not be left with the idea that by intoning references to the principle of totality as though it were some magic mantra, he can escape effective punishment ...”* Courts have also noted that public confidence in

the administration of justice requires courts to avoid any suggestion that what is being offered ‘is some kind of discount for multiple offending’.

35. It is stated at **paragraph 5-592 of Archbold 2012** that under the ‘totality principle’, “A court, which passes a number of consecutive sentences should review the aggregate of the sentences, and consider whether the aggregate sentence is just and appropriate taking the offences as a whole.”
36. In the Australian case of **Postiglione v The Queen [1997] HCA 26, Kirby J** extracted a passage from **Clayton Ruby, Sentencing (4th ed, 1994) 44-45** that identifies both limbs: “A cumulative sentence may offend the totality principle if the aggregate sentence is substantially above the normal level of a sentence for the most serious of the individual offences involved, or if its effect is to impose on the offender ‘a crushing sentence’ not in keeping with his record and prospects” In the same case, McHugh J referred to a statement of King CJ in R v Rossi, that described the totality principle as enabling a court: “To mitigate what strict justice would otherwise indicate, where the total effect of the sentence merited by the individual crimes becomes so crushing as to call for the merciful intervention of the court by way of reducing the total effect”
37. In **S v Moswathupa 2012 (1) SACR 259 (SCA)** the South African High Court said: “Where multiple offences need to be punished, the court has to seek an appropriate sentence for all offences taken together. When dealing with multiple offences a court must not lose sight of the fact that the aggregate penalty must not be unduly severe.”
38. In **R v MMK [2006] NSWCCA 272, Street CJ** said at 260:
- “The principle of totality is a convenient phrase, descriptive of the significant practical consideration confronting a sentencing judge when sentencing for two or more offences. Not infrequently a straightforward arithmetical addition of sentences appropriate for each individual offence considered separately will arrive at an ultimate aggregate that exceeds what is called for in the whole of the circumstances. In such a situation the sentencing judge will evaluate, in a broad sense, the overall criminality involved in all of the offences and, having done so, will determine what, if any, downward adjustment is necessary, whether by telescoping or otherwise, in the aggregate sentences in order to achieve an appropriate relativity between the totality of the criminality and the totality of the sentences.”*
- In **Franklin v R [2013] NSWCCA 122**, the Court observed that:

*“A judge sentencing an offender for more than one offence must fix an appropriate sentence for each offence and then consider questions of accumulation and concurrence as well, of course, as questions of totality. In accordance with the approach in Pearce, sentences considered appropriate for each offence are to be determined and the overall objective criminality is then to be taken into account when considering whether they should be served concurrently or cumulatively upon one another, either in part or totally.”*

39. It has been held that sentencing is about achieving the right balance between the crime, the offender and the interests of the community (**S v Zinn 1969 (2) SA 537 (A) at 540G-H**). A court should, when determining sentence, strive to accomplish and arrive at a judicious counterbalance between these elements in order to ensure that one element is not unduly accentuated at the expense of and to the exclusion of the others (see **S v Banda 1991 (2) SA 352 (BG) at 355A**).
40. The question is essentially whether, on a consideration of the particular facts of the case, the sentence imposed is proportionate to the offence, with reference to the nature of the offence, the interests of society and the circumstances of the offender. See **Yose and Another v S (04/2021; A230/2021; RCA 199/2008**).
41. I am of the view that the 30 years’ imprisonment passed on the Appellant is excessive and offends the totality principle when taking into consideration that the Appellant is 30 years old, a first offender and the fact that no force had been used in committing the sexual assaults. I am however of the view that the acts of cunnilingus and felatio, although committed during the same transaction, have to be viewed as different and grievous in nature and morally debasing, when taking into consideration that the victim was only 9 years of age. A strong message should go out to society that one must not corrupt persons of tender years.
42. While maintaining therefore, the sentence of 15 years’ imprisonment in respect of counts 1 and 2, I am of the view that the sentence of 15-year imprisonment in respect of count 2 should be executed concurrently, two years after the commencement of the sentence in respect of count 1, thereby imposing a total sentence of imprisonment of 17 years.
43. As stated earlier I dismiss the Appellant’s appeal against conviction and uphold the conviction, but quash the order that the Appellant serve a total period of 30 years’ imprisonment in respect of counts 1 and 2. I order that the Appellant shall serve a total period of 17 years’ imprisonment, in respect of both counts 1 and 2, as explained at paragraphs 24 and 42 above.



Fernando President

I concur:

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

I concur:

\_\_\_\_\_  
L. Tibatemwa-Ekirikubinza JA

Signed, dated and delivered at Ile du Port on 16 December 2022.