

IN THE COURT OF APPEAL OF SEYCHELLES

Reportable

[2022] SCCA 70
(16 December 2022)
SCA CR 07/2022
(Appeal from CO 48/2020)
SCSC 16

S.E.

(rep. by Clifford André)

Appellant

and

THE REPUBLIC

(rep. by Luthina Monthy)

Respondent

Neutral Citation: *S.E. v R* (SCA 07/2022) [2022] SCCA 70 (16 December 2022)
(Arising in CO 48/2020) [2021] SCSC 16 (13 January 2021)

Before: Twomey-Woods, Robinson, Tibatemwa-Ekirikubinza, JJA

Summary: appeal of conviction and sentence- sexual assault of 13-year-old girl-
omission of formal conviction on record of transcript - alibi defence -
severity of 15-year sentence

Heard: 1 December 2022

Delivered: 16 December 2022

ORDER

The appeal is dismissed. Both the conviction and sentence are upheld.

JUDGMENT

DR. M. TWOMEY-WOODS JA

(Robinson and Tibatemwa-Ekirikubinza JA concurring)

Background

[1] The appellant, a thirty-four-year-old man, was charged with the sexual assault (rape) of A.N., a thirteen-year-old girl, in February 2019. The learned Chief Justice rejected the

appellant's alibi defence. On 13 January 2022, the court found the appellant guilty of the offence, and he was sentenced to fifteen years imprisonment.

Grounds of appeal

[2] It is from this conviction and sentence that he has appealed on the following eight grounds:

- (1) *The learned trial judge erred in law and on the facts, for having failed in the first instance to make a finding of facts, as to whether the prosecution has proven the offence beyond a reasonable doubt against the appellant.*
- (2) *The learned trial judge erred in law for having failed to convict the appellant for the alleged offence against him, on the basis of the evidence on records, prior to proceeding with the sentencing of the appellant, same failures which amount to a fatal irregularity in law.*
- (3) *The learned trial judge erred in law and on the facts for having found the appellant guilty of the alleged offence of sexual assault and more fully in having concluded that the evidence of the virtual complainant was cogent, credible, and consistent.*
- (4) *The learned trial judge erred in law and on the facts for having failed to appreciate that the prosecution's evidence clearly shows that the virtual complainant never related the alleged incident, voluntarily and without a prompt.*
- (5) *The learned trial judge erred in law and on the facts for having failed to sufficiently and/or fully appreciate and analyse the legal principles relating to the defence of alibi, as raised by the Appellant, prior to his considerations of the appellant's evidence relating to the same defence.*
- (6) *The learned trial judge erred in law and on the facts for having wrongly applied the principles of law relating to the defence of alibi as raised by the appellant, in his considerations of the defence's evidence raised before the trial court.*
- (7) *Further or alternatively to ground 6 above, the learned trial judge erred in law and on the facts in failing to consider sufficiently and/or fully, the totality of the appellant's evidence before the trial court, relating to his defence of alibi before the court and/or in drawing the wrong inferences from the appellant's evidence relating to the same defence.*

(8) The learned trial judge erred in law and on the facts in meting a sentence of fifteen years imprisonment on the charge, against the appellant in that the sentence is manifestly harsh and excessive and goes contrary to sentencing principles relating to the same offence charged.

[3] I propose to treat some of these grounds together as they are issue related.

Grounds 1 and 2 – material irregularities in the judgment

[4] It is submitted that the learned Chief Justice did not address his mind as to whether or not all the elements of the crime with which the accused was charged had been proved beyond reasonable doubt by the prosecution. It is further submitted that the learned trial judge also did not formally convict the accused of the offence after finding him guilty as charged.

[5] Learned counsel for the appellant, Mr. Camille, has submitted that although the learned trial judge stated that he found “the victim’s evidence to be cogent, credible and consistent” and subsequently asserted, “I will act on it totally”, he nevertheless did not satisfy himself as to whether the prosecution had indeed proven the case beyond reasonable doubt as there is no record of such a pronouncement in the judgment. In Counsel’s view, this is fatal to the case.

[6] On the other hand, learned counsel for the respondent, Mrs. Monthy, has contended that the learned trial judge did make a finding of fact that the prosecution had proved the offence beyond a reasonable doubt. She submits that he had first, appropriately, taken note in the second paragraph of his judgment that the prosecution bears the burden of proving that the accused committed the crime beyond a reasonable doubt, and after considering the facts and circumstances of the case as a whole, had noted in the last paragraph of his judgment that “I, therefore, find the accused guilty beyond a reasonable doubt as charged in this case.” This, she submits, shows an adequate consideration as to whether the prosecution had acquitted itself of its burden of proof.

[7] With regard to ground 2, Mr. Camille has submitted that the transcript of proceedings does not show that the learned trial judge proceeded to convict the appellant but merely stated: “I, therefore, find the accused guilty beyond a reasonable doubt as charged in this case.” In his submission, this is also fatal to the case.

- [8] Mrs. Monthy has submitted that failing to record a conviction is not fatal to the case. Both counsel have referred the court to section 143(2) of the Criminal Code of Procedure and several authorities on this issue. Mr. Camille has submitted that the case of *Marie v R*¹ established that the failure to convict an accused before imposing a sentence is a fatal irregularity. In contrast, Mrs. Monthy has relied on the authorities of *Larue & Anor v R*² and *Hoareau v R*³ to propose that such omission is not a fatal irregularity.
- [9] Before I examine the authorities on this issue, I am guided by the Criminal Procedure Code. First of all, the Code, in relation to the necessary contents of a judgment, provides as follows:

Section 143

(1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.

(2) In the case of a conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which the accused person is convicted, and the punishment to which he is sentenced. (Emphasis added)

- [10] Analysed against these provisions, can it be said that the learned Chief Justice's judgment falls short of these requirements? The learned Chief Justice states at the beginning of his judgment that “the prosecution bears the burden of proving that the accused committed the alleged crime beyond reasonable doubt”. He then summarises the prosecution's case, outlining the appellant's alibi defence. The next part of his judgment analyses and determines the issues raised in the case: whether corroboration of the complainant's evidence in sexual offences is necessary for Seychelles - he determines that it is not; whether he believes the prosecution evidence - he determines that the victim's evidence is cogent, credible and consistent and states that he will “therefore [...] act on it”. Next, he analyses the alibi evidence and determines whether he can act on it to rebut the evidence

¹ (1985) SLR 75

² (1998- 1993) SCAR 131 (SCA) 1 of 1998) [1989] SCCA 5 (25 October 1989).

³ (SCA 4 of 1989)[1989] SCCA 13 (25 October 1989).

of the prosecution – he states that the evidence fails as it is ambiguous, inconsistent, not cogent and unreliable.

[11] He concludes that “the alibi does not cast doubt on the victim’s account which is intelligible” and finds, “the accused guilty beyond reasonable doubt as charged in the case.”

[12] Given these statements in the judgment, which in my view, satisfy section 143 of the Code, I fully endorse Mrs. Monthy’s submissions on these points. At the heart of this appeal is the correct approach to evaluating evidence by the trial court. Appeal courts should not be concerned that a trial judge does not use the mantra “I find that the prosecution has proved its case beyond reasonable doubt” or words to that effect. What is essential are signs, indices, and proof that a trial judge has evaluated the evidence against the correct burden and standard of proof. The record of proceedings and decision in the present case, as borne out by the statements from the judgment cited above, clearly indicate that the court was alive to its duty in assessing the evidence and acquitted itself of the necessary burden and standard of proof as required.

[13] It must also be noted that there is no set template for recording one’s findings of fact in any particular case. There is no irregularity if the judgment meets the criteria in section 143 of the Code.

[14] With regard to the fact that the learned Chief Justice did not use the words: “I convict the accused”, similar submissions to the ones made in the present case have been made in the past.

[15] In *Confiance v R*⁴, the oldest case on this point in this jurisdiction, the Court of Appeal ruled that although there was a failure to comply with the provisions of section 149 of the Criminal Procedure Code,⁵ that is, strict compliance with the provisions of the Code, as long as the presiding officer has specified the offence of which, and the section of the Penal Code or other law under which the accused person was convicted, no failure of

⁴ (1956- 1962) SCAR 220.

⁵ Now section 344 of the Criminal Procedure Code.

justice is occasioned to merit setting aside the conviction. Similarly, in *Camille*,⁶ a magistrate did not record a formal conviction against an accused. On appeal, the Supreme Court found that the irregularity was curable under section 338 of the Criminal Procedure Code.⁷ This is again because the court found that no failure of justice had been occasioned.

[16] This line of jurisprudence was followed thereafter until the case of *Marie v R*.⁸ In this regard, it must be noted that *Marie* was a Magistrates' Court case in which established precedent had not been followed. It was clearly a case decided per incuriam and cannot be relied on.

[17] I am strengthened in this view by the subsequent Court of Appeal cases of *Larue & Anor v The Republic*⁹ and *Hoareau v R*¹⁰. The Court emphatically decided in those cases that the omission to record a formal conviction does not amount to an irregularity capable of having the conviction set aside.

[18] This is because of the proviso in section 344 of the Criminal Procedure Code, which provides in relevant part:

“Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account—

(a) of any error, omission or irregularity in the summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, ...

unless such error, omission, irregularity or misdirection has in fact occasioned a failure of justice:

Provided that in determining whether any error, omission, or irregularity has occasioned a failure of justice the court shall have been raised at an earlier stage in the proceedings.”

⁶ (1972) SLR 16.

⁷ Section 338 of the Criminal Procedure Code contained the same provision that is now now contained in section 344 of the Criminal Procedure Code.

⁸ Supra, fn 1

⁹ Supra, fn 2.

¹⁰ Supra fn 3

[19] I therefore consider this issue settled and find that there is no merit in those two grounds, which are therefore dismissed.

Grounds 3 and 4 – the cogency of the complainant's evidence

[20] Mr. Camille has submitted that the complainant's evidence should not have been relied on as it was prompted or elicited by questions of a leading and inducing or intimidating character. He relies on the case of *Rv Osborne*¹¹ for this proposition.

[21] I must first point out that the ratio in *Osborne* is to the effect that evidence of a similar complaint against an accused is admissible only to show that it is consistent with the complainant's evidence. The statement in that judgment relating to evidence "not elicited by questions of a leading and inducing or intimidating character" refers to a similar complaint. It is disingenuous, if not misleading, to refer the court to this authority. It has no relevance to the present case, where there was no attempt by the prosecution to adduce evidence of a similar complaint against the accused.

[22] Mr. Camille's reference to the 1998 publication of Archbold about how the evidence of "females alleged to have been wronged" ought to be treated is not only misogynistic and dated but has been firmly settled in this jurisdiction by the case of *Lucas v R*.¹² It is settled jurisprudence that the evidence of a female complainant does not attract the necessity of a corroboration warning. Corroboration is a matter for the judge's discretion based on the circumstances, the manner, and the content of the evidence, as in any other criminal case, regardless of the gender of the complainant.

[23] The present case is one where the learned trial judge attached great credibility to the complainant's evidence. He stated:

"In the present case, I found the victim's evidence to be cogent, credible, and consistent, and therefore I will act on it totally."

¹¹ [1905] 1 KB 551.

¹² (2011) SLR 313, (SCA 17 of 2009) [2011] SCCA 38 (02 September 2011).

[24] It is trite that a court of appeal does not lightly interfere with the credibility findings of a trial court. There is no compelling reason for making an exception in this case. These grounds of appeal are therefore also devoid of merit and are dismissed.

Grounds 5, 6 and 6 – the reliability of the alibi defence

[25] With regard to these grounds of appeal, Mr. Camille first submits that the learned trial judge did not enunciate the principles of law relating to the defence of alibi and therefore failed to direct himself on the law applicable in the present case. Secondly, he avers that the learned trial judge only considered the case of *R v Vidot*¹³ to the exclusion of leading cases relating to the onus on the prosecution to disprove an alibi defence beyond reasonable doubt. He further avers that the learned trial judge did not consider the law regarding alibis as contained in the case of *Sopha v R*.¹⁴

[26] Mr. Camille has also submitted that the alibi evidence was strong and never contradicted by the prosecution.

[27] Mrs. Monthy has contended that the learned trial judge in accordance with the principles laid down in the case of *Vidot*, did not find the evidence of the defence witnesses in the present case with regard to the alibi of the accused to be consistent, cogent and reliable. She submits that there were serious material inconsistencies between the accused's version and one of his witnesses. Ultimately the learned trial judge found that "the alibi [did] not cast doubt on the victim's account which [was] intelligible.

[28] *Vidot* was also a case concerning a charge of sexual assault in which the accused had tendered an alibi. The trial judge found that the accused and his witnesses did not give evidence that was consistent, cogent and reliable on the material particulars. He also noted that the prosecution bears the overall burden of proving the guilt of the accused even when he has raised the defence of alibi. The prosecution has to rebut the evidence and prove beyond reasonable doubt that the accused was there at the time and place of the alleged crime.

¹³ *Vidot v Republic* 3(7 of 1999) [2004] SCSC 11 (02 November 2004)

¹⁴ *Sopha & Anor v Republic* (1988 – 1993) SCAR 209 (SCA 2 of 1991) [1991] SCCA 10 (14 October 1991)

[29] *Sopha* preceded *Vidot* but the principles enunciated by this court in relation to the burden on the prosecution where the defence of the accused is an alibi were not different. This Court found that in cases where the accused tenders a defence of alibi, the prosecution still has to prove its case beyond reasonable doubt. The Court stated:

“The proper approach is to examine the alibi and decide whether or not it has been established. If it has been established then the accused must be acquitted. If it has not been established but it appears that it may be true, then the accused should also be acquitted since there would be doubt as to whether the accused is guilty or not. If the alibi is clearly rejected then the case for the prosecution must be examined to determine whether it establishes the guilt of the accused. The rejection of an alibi is not of itself a ground for basing guilt. A conviction must be based on the strength of the case for the prosecution, not the weakness of the defence.”

[30] This is the correct approach, and I endorse the principles as stated. However, I fail to see why *Sopha* has been relied on by Mr. Camille for the proposition that the trial judge in the present case did not satisfy himself that the prosecution had proved its case beyond reasonable doubt. The learned trial judge stated that he believed the complainant's evidence and that the prosecution had proved its case beyond reasonable doubt; he only added that the alibi did not cast doubt on the complainant's evidence.

[31] I accept that a misdirection as to the burden of proof can be fatal to a conviction. Where an alibi is raised, there is no burden on the accused – the burden is on the prosecution to negative the alibi beyond reasonable doubt. Generally, with or without an alibi, and notwithstanding any defence, the prosecution still has the burden to prove its case beyond reasonable doubt.¹⁵ The accused never has to prove his innocence.

[32] In the present case, it would have been better for the trial judge to have stated separately that he rejected the alibi evidence and that the prosecution had proved its case beyond reasonable doubt. What is essential, however, is that the judge did not shift the burden of proof onto the defence. Similarly to the case of *Sopha*, there was no miscarriage of justice, and the proviso in section 344 of the Criminal Procedure Code can be applied.

¹⁵ There are few exceptions - these are provided by statute – e.g. insanity as contained in section 13 of the Penal Code.

Notice of alibi defence

[33] There is another matter relating to the alibi defence that I wish to raise - if only to address the expediency of trials. This concerns notice of an alibi to the prosecution. When this trial occurred, Practice Directions No. 3 of 2017 were in force.¹⁶ These directions required the accused to provide a list of witnesses and indicate what elements of the offence would be disputed at trial – in other words, what his defence to the offence would be.

[34] The transcript of proceedings reveals that during a pleas and direction hearing held on 31 July 2020, Counsel for the accused indicated that only the accused would be testifying. Subsequently, at a pretrial review on 9 November 2020, Counsel for the accused revealed that he would have two witnesses. Details of the defence disclosed were that “all the elements of the offence would be disputed.” An alibi was not indicated. It was only when the defendant testified that it became clear that his defence was essentially an alibi.

[35] In the circumstances, the prosecution had no opportunity to verify the alibi. In this regard, section 5 of the Evidence Act provides in relevant part:

“Whenever the Republic or any other party to a trial is required by any law or rule of court in force in Seychelles to file a list of witnesses or give a notice of facts, if at the trial witnesses be tendered whose names have not been included in such list, or who have not been sufficiently described therein, or if evidence be tendered of a fact omitted from or not sufficiently set out in such notice of facts, or if such lists or notice shall not have been filed or given within the time fixed by law, it shall not be lawful for the court to reject the proof of such facts or refuse the witnesses offered merely on the ground that such notice of facts, list or description of witnesses has not been served in time, provided the court is satisfied that there has been no mala fides, but the court shall be at liberty to postpone the trial with such terms as to costs, if any, as to the court may seem just...” (emphasis added)

[36] Whereas section 5 does not permit the court to reject an alibi as a defence when no notice of the same has been given by the accused (except in cases of bad faith), it could have adjourned the matter for the prosecution to verify the alibi. Several cameras in Victoria would have recorded the accused’s vehicle being towed on 10 February 2019. The prosecution failed to apply for such an adjournment to do this simple check.

¹⁶ These directions were repealed by the Chief Justice in 2021.

[37] The logic of giving notice of witnesses generally in a trial is clear. It prevents a trial by ambush. In cases where there is an alibi, it provides the prosecution with an opportunity to investigate the validity of the alibi and either prepare to undermine its credibility or, if proven true, to drop the charges against the defendant.

[38] The Practice Directions, now repealed, put those rules in place and should have been observed by the court and parties in this case. The Directions reinforced the constitutional fair trial requirement to prevent surprise twists in trials and to meet the discovery standards demanded of a modern and democratic society.

[39] Our source of criminal law is the common law, in which it has long been recognised that an alibi is a defence requiring special rules. In tracing the history of alibis in the common law, David Epstein¹⁷ notes that:

“At common law, all defences except autrefois acquit, autrefois convict, and former pardon were admissible under a plea of not guilty. As a result, a problem faced the prosecutor, who could not be prepared to meet any and all defences. In 1887 Scotland tried to rectify this situation and required that the defendant give notice when his defence would be alibi, insanity at the time of the act, commission of the act by another named and designated, self-defence, sleep or temporary mental disassociation, or hysterical amnesia.”

[40] In *R v Brown*,¹⁸ Lord Hope explained that before rules of disclosure had been codified, they existed in common law as a duty developed because of the elementary right of every defendant to a fair trial. He referred to *R v Keane*¹⁹ in which Lord Taylor of Gosforth C.J. had also referred to “the great principle [...] of open justice.”²⁰

[41] In any case, common law rules of disclosure emerged slowly and painstakingly in the nineteenth and twentieth centuries as preliminary hearings replaced the grand juries

¹⁷ David M. Epstein, *Advance Notice of Alibi*, 55 J. Crim. L. Criminology & Police Sci. 29 (1964).

¹⁸ [1997] UKHL 33; [1998] AC 367; [1997] 3 All ER 769; [1997] 3 WLR 447; [1998] 1 Cr App Rep 66 (24th July, 1997)

¹⁹ [1994] 1 W.L.R. 746.

²⁰ *Ibid*, page 370.

charged with determining whether there was good cause to commit an accused to trial. However, the preliminary hearing served primarily as:

*“a discovery device for the benefit of the defence, afford[ing] it a safeguard against ill-founded prosecutions as well as substantive protection against surprise at the trial.”*²¹

[42] These common law rules were eventually codified in the Criminal Justice Act 1967, together with the added duty of the accused to notify the prosecution about an alibi defence. Inevitably, this has pitched the State against an accused’s constitutional right to remain silent. Nevertheless, John Burchill²² in expounding on the unavoidable tension between the right to remain silent and the fact that notice should be required for an alibi defence, states that:

“Given the ease with which an alibi could be fabricated, this rule protects against a last-minute defence that may be impossible for the Crown to verify.”

[43] In this regard, Alec Samuels²³ adds that:

*“The criminal trial should be a fairly conducted inquiry into the truth, not a forensic game.”*²⁴

[44] It must also be noted that in many common law jurisdictions where advance notice of an alibi is not given and then raised during a trial, an adverse inference from the late disclosure can be drawn, although the court cannot prevent the evidence from being called. Moreover, where there is evidence that an alibi has been fabricated, this may be used as circumstantial evidence to draw an inference or “consciousness” of guilt.²⁵

²¹ Roger J. Traynor, Ground Lost and Found in Criminal Discovery in England, 39 N.Y.U. L. REV. 749 (1964), 754.

²² John W Burchill, Alibi Evidence: Responsibility for Disclosure and Investigation, 2018 41-3 *Manitoba Law Journal* 99, 2018

²³ A. Samuels, The Criminal Justice Act, 31 (1) *The Modern Law review*, 16 (1968).

²⁴ *Ibid*, at 22.

²⁵ See the Canadian Supreme Court case of *R v Hibbert* 2002 2 SCR 445 at 62.

[45] In the case of *Noble*,²⁶ the Canadian Supreme Court, reiterated that the requirement to disclose an alibi defence before trial is a necessary exception to an accused's right to silence. This rule may be traced back to the case of *R v Jenkins*²⁷.

[46] What of our jurisdiction in Seychelles, then? As I have pointed out, there is an enshrined constitutional right to remain silent when charged.²⁸ Additionally, an accused person has a constitutional right to remain silent at the trial²⁹ and not to have an adverse inference drawn from his exercise of that right.³⁰ These are absolute rights and are not subject to limitations, unlike other rights, which are subject to qualification by law when necessary in a democratic society.³¹ It is clear, therefore, that requiring an accused person to provide notice of alibi would be in breach of the Charter of Fundamental and Human Rights and Freedoms in the Constitution. A court cannot, therefore, require an accused person to disclose particulars of an alibi if he wishes to rely on the same at trial. The trial can only be delayed if an adjournment is sought by the prosecution to inquire into the alibi details.

[47] As I have said this was not an issue at the trial, and the grounds raised regarding the alibi have no substance and are dismissed in their entirety.

A manifestly harsh and excessive sentence contrary to sentencing principles – Ground 8

[48] The final ground of appeal as submitted by Mr. Camille for the appellant, is that the learned trial judge erred in law and on the facts in meting a sentence of fifteen years imprisonment on the charge, against the appellant in that the sentence is manifestly harsh and excessive and goes contrary to sentencing principles relating to the same offence

²⁶ *R v Noble* [1997] 1 SCR 874 146 DLR (4th) 385 [Noble].

²⁷ (1908), 14 C.C.C. 221 at p. 230, 14 B.C.R 61 (C.A.)

²⁸ Article 18 (3) of the Constitution provides: "A person who is arrested or detained has a right to...remain silent"

²⁹ Article 19 (2) (g) of the Constitution provides:" Every person who is charged with an offence – shall not be compelled to testify at the trial or confess guilt..."

³⁰ Article 19 (2) (h).

³¹ Article 10 provides: Anything contained in or done under the authority of any law necessary in a democratic society shall not be held to be inconsistent with or in contravention of—

(a) clause (1), (2)(e) or (8), to the extent that the law in question makes necessary provision relating to the grounds of privilege or public policy on which evidence shall not be disclosed or witnesses are not competent or cannot be compelled to give evidence in any proceedings; (b) clause (2)(a), to the extent that the law in question imposes upon any person charged with an offence the burden of proving particular facts or declares that the proof of certain facts shall be *prima facie* proof of the offence or of any element thereof; (c) clause (2)(e), to the extent that the law in question imposes conditions that must be satisfied if witnesses called to testify on behalf of an accused person are to be paid their expenses out of public funds..." Therefore, the right to silence is not included in those rights capable of being circumscribed.

charged. He has relied on the case of *R v Suzette*³², in which this Court reduced a sentence of nine years upheld by the Supreme Court for the sexual assault by a teacher of a pupil of thirteen years from the same school in which he taught.

[49] Mrs. Monthy has submitted that the offence with which the appellant was charged with carries a maximum penalty of twenty years.³³ She has also proposed that on the authority of *Marengo v R*,³⁴ and *Cedras v R*³⁵ the sentencing power is discretionary, exercisable by the court and that unless the sentence imposed goes beyond recent trends the court will not interfere with it.

[50] Sentencing principles generally were expounded by the Supreme Court in the case of *R v MI and ors*.³⁶ Those relevant to the present appeal bear repeating: aggravating factors, including penetration by an act of sexual intercourse with a minor, the young age of the complainant, the position of trust held by the appellant with regard to the complainant; the interests of society – the protection of vulnerable members of society and the welfare of children from the degenerate conduct of rapists and paedophiles.³⁷

[51] If anything, previous sentences in similar cases do not reflect the increase in such cases clearly demonstrated by the incidence of such issues before the courts. It is extremely concerning that the court found the rape of a thirteen-year-old schoolgirl by a teacher meriting a sentence of only four and half years on the grounds that:

“There [was]no evidence that [she] was tricked, coerced, misled or in any way forced into having sexual intercourse with the appellant. There is no evidence that this was the first time that she ever had sexual intercourse.”

[52] A child does not and cannot consent to intercourse. It is even worse when it is a person in a relationship of trust that commits the offence. Whether a complainant has had sexual intercourse before is not a consideration to be taken into account in cases of sexual

³² *R v Suzette* (CP 5 of 2014) [2017] SCSC 916 (09 October 2017).

³³ See section 130 (1) Penal Code.

³⁴ (SCA 29 of 2018) [2019] SCCA 28 (22 August 2019).

³⁵ (SCA 38 of 2014) [2017] SCCA 3 (20 April 2017).

³⁶ *R v MI & Ors* (CR 38 of 2019) [2020] SCSC 256 (16 April 2020)

³⁷ *Simon v R* [1980] SCAR 557

assault. This court in *Jumeau v R*³⁸ has already distanced itself from the decision in *Suzette*, remarking that it was given per incuriam. I reiterate that the case of *Suzette* is an aberration and must not be relied on by any court.

[53] In the present case, the appellant was the family taxi driver and the despair and trauma of the complainant after pleading with him to take her home and not to touch her are all too evident from the proceedings. She will remain traumatised for the rest of her life. She has borne the consequences of this crime, a child she has carried to term. Two young lives have been scarred.

[54] I am aware that a sentence of fifteen years was severe and at the higher end of the scale. It was, however, neither wrong in law nor in principle. It was not manifestly harsh or excessive, given the offence, the maximum penalty imposable, the particular circumstances of this case and the considerations of public interest I have already outlined. In the circumstances, I see no reason to interfere with it. This ground of appeal is also devoid of merit.

[55] For all these reasons, this appeal fails in its entirety.

³⁸ (SCA 22 of 2018) [2019] SCCA 30 (22 August 2019).

Order

[56] The appeal is dismissed. The conviction and the sentence are upheld.

Dr. M. Twomey-Woods, JA.

I concur

Dr. L. Tibatemwa-Ekirikubinza, JA

F. ROBINSON JA

[57] I agree with the conclusion and order made by Justice Twomey-Woods in this case that the appeal be dismissed.

[58] For the avoidance of doubt, I reserve my opinion with respect to her finding as to whether or not “[46] [...] *requiring an accused person to provide notice of alibi would be in breach of the Charter of Fundamental and Human Rights and Freedoms in the Constitution.*” The finding goes on to state that “[46] [...] [a] *court cannot, therefore, require an accused person to disclose particulars of an alibi if he wishes to rely on the same at trial.*”

F. Robinson JA

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