

SUPREME COURT OF SEYCHELLES

Reportable
[2020] SCSC ...
Cr S/63/2019

In the matter between

THE REPUBLIC

(rep. by David Esparon and Rongmei Lansinglu)

And

1. ML

(rep. by Nichol Gabriel)

2. EL

(rep. by Clifford André)

3. J-YN

(rep. by Alexia Amesbury)

Neutral Citation: *R v ML & Ors* Cr S 63/19 [2019] SCSC (17 April 2020)

Before: Twomey CJ and Burhan J

Summary: Sexual assault contrary to section 130(1) of the Penal Code read with section 130(2)(d) of the said Act and punishable under section 130(1) of the said Act – plea of guilty on numerous counts against five complainants - concurrent/consecutive sentences - powers of court when sentencing, totality principle factors to be taken into account.

Heard: 3 February 2020

Delivered: 17 April 2020

SENTENCE

1. First Convict on pleas of guilty on twenty-one counts is sentenced to a total of twenty-five years' imprisonment
 2. Second Convict on plea of guilty to one count is sentenced to a term of twelve years' imprisonment
 3. Third Convict on plea of guilty to one count sentenced to a term of a term of eight years' imprisonment.
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TWOMEY CJ and BURHAN J

- [1] The three convicts were charged together on twenty-six counts of, inter alia, sexual assault, extortion, possession of indecent photographs, possession of prohibited visual recordings, procuring or attempting to procure by way of threats or intimidation a girl to have unlawful carnal connection and recruiting, harbouring, transferring and receiving a child knowingly or recklessly disregarding that the person is a child for the purpose of exploitation. We sat exceptionally as two judges of the Supreme Court to hear this matter, given the unprecedented nature of the offences and their seriousness.
- [2] We pause to note that we found the facts in this case together with the evidence produced harrowing and disturbing.
- [3] This case also highlights the concerning role of social media platforms such as Facebook and how they create an enabling environment for sexual predators that seek to target children. This threat is not unique to Seychelles, it is a global problem which many countries are attempting to tackle, and Seychelles is not immune. As the United Nations Office for Drugs and Crime noted in its report, *Study on the Effects of New Information Technologies on the Abuse and Exploitation of Children* (2015), increased online platforms:

“facilitate opportunities for the misuse of ICTs to abuse and exploit children. Children can easily engage with strangers and exchange large data files, while the possibilities for parental supervision and monitoring are restricted. Children are also at particular risk as they often do not fully understand threats associated with the use of ICTs”

The anonymity, and associated access, that social networking platforms provide to users allows potential offenders to adopt fake identities in an attempt to target and groom young children, share, distribute and solicit sexually explicit material with relative ease, and exploit the vulnerability of children. In addition to the harm this causes, online sexual abuse and predation pose new challenges to law enforcement, legislators, parents, guardians, caregivers and social services. Policing the digital world needs specialised laws, specialised investigating units and targeted public outreach and awareness campaigns. This case is a depressing reminder that children, parents, caregivers and the

public at large need to be vigilant when engaging in the online space, and to report suspicious behaviour before it escalates to the commission of heinous crimes like those we have seen in this case.

Facts

- [4] In brief, the facts as outlined by the Prosecution to the court are that on the 22 July 2019, NF, a 17-year-old student made a complaint to the Central Police Station that a person with the Facebook profile of KB was threatening her with exposing indecent photographs of herself engaging in sexual activities unless she had sex with ‘him’. She reported that she had previously accepted a friend request on Facebook from the said KB who had posed as a female model from a modelling agency and who had asked her whether she wanted to be a model. She sent her photographs to KB who had then asked for more intimate photographs which she had also provided. The threats from KB had started thereafter. NF had been asked to engage in threesome sex and anal and vaginal intercourse and when she refused was told that her photographs would be published. In a frightened state she reported the incident to the police who traced the phone of the purported KB to the First Convict.
- [5] A sting meeting was arranged between the complainant NF, and the First Convict and he was apprehended at MCB Bank. His mobile phone was seized and examined and the analysis of texts and images thereon revealed that he had been in touch with numerous girls between the ages of 12 - 15 on social media under the name of KB and other Facebook profiles. A search warrant was executed at his residence and several electronic devices, namely external hard drives, pen drives, mobiles and laptops seized.
- [6] From the images and texts extracted the First Convict’s modus operandi emerged: he would falsely represent himself as a female model and get in touch with young girls – as young as 10 years of age and as many as 75 individuals – to invite them to be models and ask for photographs. He would offer them money for photographs, and then eventually ask them for sexual favours. When refused, he would threaten them with the publication of their nude photographs. The police seized a number of videos of the First Convict engaging in sex with the young girls dating from 2012 to 2019 and also of the other two

convicts, in two separate instances having group sex with the First Convict. Each time the First Convict would promise the complainants that if they engaged in sex with him or his friends their photos would be deleted. In the case of complainant NS, in respect of charges 15, 17, 18 and 19, she was only 13 years of age when she was accosted on the street by the First Convict. He groomed her and eventually got her to perform oral sex on him. On one occasion when she refused to perform oral sex on him and the Third Convict, he took her mobile phone and threatened not to return it unless she performed oral sex on them both. The oral sex is recorded on video and submitted in evidence.

[7] With respect to the charges relating to ML and EL, complainant AA who was only 14 years of age at the time was also accosted on the road. ML then asked her for her phone number and subsequently texted her. He started a sexual relationship with her and gave her a bottle of perfume and eventually got her to perform sex with both himself and the Second Convict.

[8] These facts are generally accepted by the convicts in respect to the charges with which they have been respectively charged. The First Convict only disputes the fact that he took NS's phone. With regard to complainant AA, he states that she told him that she was seventeen years of age and that after sex with her he gave her a bottle of perfume. He states that she consented to sex with him although it was pointed out to him that a fourteen-year-old cannot consent to sex.

[9] We proceed to sentence the Second and Third Convicts first as they have been charged with only two counts and their sentences are less problematic.

Sentence of the Second Convict

[10] The convict EL (the Second Convict in the case) has been convicted on Count 23 for sexual assault on his own plea of guilty as follows:

Count 23 - Sexual Assault contrary to Section 130 (1) of the Penal Code read with Section 130 (2) (d) of the said Act and punishable under Section 130 (1) the said Act.

The offence involves full penetration of the vagina and pursuant to section 130(4)(b) and pursuant to the proviso of section 130(1) of the Penal Code carries a sentence of not less than 14 years and not more than 20 years.

[11] The particulars of the offence indicate that the complainant AA was 14 years of age and that there was penetration as a result of sexual intercourse with the complainant by the convict. It also sets out the fact that the convict was a police officer at the time of the commission of the offence.

[12] At the request of learned Counsel for the convict, Mr. André, a probation report was called. The report states that the convict is thirty-three years of age and had a newly born baby at the time the report was made. The report further sets out the fact that the convict is a police officer attached to the Public Security Support Wing and had worked there for a period of five years.

[13] In the report, the Second Convict states that it was the First Convict who was acquainted with the complainant and had been instrumental in picking her up and bringing her to his house. He admits however accompanying the First Convict to pick her up. It is also the Second Convict's contention as borne out by the report that he had sex with the complainant on the invitation of the First Convict. He also refers to alcohol being consumed by him prior to the act of sexual intercourse with the complainant. He states that he is remorseful for his actions and apologises to the complainant and her family.

[14] It is apparent however, from the probation report that even though the complainant had agreed to be intimate with the First Convict with whom she believed she shared something special, she had not agreed to have sex with the Second Convict in this case but had finally given in, due to the pressure exerted on her by them and as she was at the time also afraid of being hurt by them.

[15] With regard to mitigation factors, learned Counsel, Mr. André submitted that the Second Convict had pleaded guilty at the very first opportunity and had not wasted the time of Court. By doing so, he had not put the complainant through the embarrassment of having to give evidence. He further submitted that the complainant had not complained of the

incident even after the incident and that as she had told the convict she had a boyfriend by the name of Phillip, the convict had presumed she was over fifteen years of age. Learned Counsel further submitted that there was only one count against the convict. He moved the court to consider a lenient sentence against the convict.

[16] Having thus carefully considered the plea in mitigation and the facts set out in the probation report, we give strong consideration to the fact that the convict pleaded guilty to the said offence at the very first opportunity provided to him, thereby saving the time of this Court, and that he has also expressed remorse and regret at what he has done. He has also in doing so, saved the complainant the trauma from once again re-living the experience she had undergone. There is also no indication that he had engaged with the First Convict in any of the other offences with which the latter is charged. We feel that these are strong mitigating circumstances and therefore will not proceed to impose the minimum mandatory term of fourteen years' imprisonment, prescribed by law for such an offence.

[17] However, this Court has to take into consideration the aggravating factors as well. There was penetration by an act of sexual intercourse with a minor. He went with the First Convict to pick up a child with the intention of having sex with her. The complainant was compelled to agree to have sex with him for fear of being harmed if she refused. This quite obviously was why she had not complained to the police even after the incident. The complainant was only fourteen years of age which indicates that even consent would have not been a defence for the convict in terms section 130(3)(b) of the Penal Code.

[18] Moreover, there are key components to be considered when imposing a sentence in cases of this nature. This issue was considered in *Njue v R* (2016) SCCA 12,(para 14) where it was pointed out that when sentencing, a Court must be guided by several principles including public interest; the nature of the offence and the circumstances it was committed; whether there is a possibility of the offender to be reformed; the gravity of the offence; the prevalence of the offence; the damage caused; any mitigating factors; the age and previous records of the accused; the period spent in custody; and the accused's cooperation with law enforcement agencies. These factors can be grouped into three

categories namely - looking at the crime committed, the offender and the interests of society. Thus, in the South African case of *S v Zinn* 1969 (2) SA 537 (A), the Court pointed out the following in regards to what must be considered when sentencing:

“It then becomes the task of this Court to impose the sentence which it thinks suitable in the circumstances. What has to be considered is the triad consisting of the crime, the offender and the interests of society...”

[19] The nature of the crime is described in detail above and we will revisit this issue, at the risk of being repetitive, when we consider the sentence of the First Convict. Suffice it to say at this stage and with regard to the crime committed by the Second Convict, it represents a new level of depravity.

[20] As we have stated, the convict was a police officer at the time of the offence and had a service record of five years. This in our view is a seriously aggravating circumstance as the said offence on an innocent child has been committed by the very official entrusted by the State to protect children from such reprehensible and degrading acts.

[21] The court must consider sending a clear message to police officers who may be tempted to break the law as opposed to upholding it. In *Jumeau v R* (Criminal Appeal SCA 22/2018) [2019] SCCA 30 (23 August 2019); the Court held that a factor it should take into account before assessing whether a sentence was manifestly excessive was the position of trust held by the offender (see also *Simon v R* [1980] SCAR 557).

[22] A number of South African judgments on sentencing police officers convicted of crimes are helpful in this case. In *S v Setholo* 2017 JDR 0488 (NCK) the police solicited a bribe from a person lured into a fake illicit diamond transaction. The court emphasised that the fact that the accused was a police officer, was in itself an aggravating factor and accordingly confirmed the sentence of 10 years. At Paragraph 20 the Court stated the following:

“The fact that the appellant was a policeman when he committed the offences is aggravating. He was supposed to be vigilant and protect the community he served

against the crime. There can be no doubt that the corrupt and fraudulent activities executed in this case were carefully planned...”

[23] In *S v Phillips* 2017 (1) SACR 373 (SCA) where a 35-year old police constable was convicted in a regional court for soliciting and accepting a bribe involving R900 in contravention of section 4(1)(a)(i)(aa) of the Prevention and Combating of Corrupt Activities Act 12 of 2014, the appeal court reduced the trial court sentence of 7 years’ imprisonment (of which two years were suspended) to four years’ imprisonment, but emphasised that such a sentence would nonetheless serve as deterrent to other police officers from committing such offences. In *S v Mogale* 2010 JDR 1510 (GNP), the police officers who received R2000 cash in a corruption case were subsequently convicted and sentenced to fifteen years’ imprisonment. Lastly, in *S v Mahlangu and Another* 2011 (2) SACR 164 (SCA), the accused who were police officers, were sentenced to six years’ imprisonment (of which two were conditionally suspended) for demanding a bribe of about R600.

[24] Although these sentences might appear severe, the fact that the convicts were law officers aggravated the punishment to be meted out by the courts. In the instant case, as the crime is also committed against a child, it doubly aggravates the sentence.

[25] The Supreme Court of Seychelles has in several cases emphasised the irreparable harm sexual offences inflict on minors. In addition, there seem to be an increase of offences of this nature, thus calling for severe sentences for offenders committing such crimes. Lamenting the nature of these crimes and their effect on minor children, in *R v Mémé* (2009) SLR 32, it was pointed out that:

“Children are a precious gift from God and represent the future generation. They must be jealously protected, properly nurtured and given all the required support and care by each and every adult person instead of taking advantage of them.”

[26] These sentiments demonstrate the level of seriousness of the crime that was committed. The Supreme Court has on numerous occasions cited *Crispin v R* (SCA CR 16/2013) [2015] SCCA 29 (28 August 2015) where it was held that:

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

[27] In *R v D.S.* (CR 50/2018) [2019] SCSC 55 (04 January 2019) and again in *R v J.E.* (CR 36/2019) [2020] SCSC 113 (14 February 2020), the Court stated that the revulsion, fear and disgust of the community in this regard cannot be underestimated. The degenerate conduct of rapists and paedophiles are a curse on our society and our children need to be protected from their acts. The specific provisions of the Penal Code relating to such offences need to be applied by the courts in the way it was intended.

[28] In *René v R* (SCA 12/2018) [2018] SCCA 37 (14 December 2018), a sentence of 12 years for a similar offence on a fifteen-year-old was upheld. In *G. K. v R* Criminal Appeal [2017] SCCA 3 (21 April 2017) Domah JA stated:

“We wish to make the following comment though. The irreparable harm done to vulnerable children and persons by paedophiles is today well documented. Public sensitization on the matter is well spread. Yet with three cases having come to the Court of Appeal in [the] course of this session, we wonder whether the campaign against such reprehensible and degenerate behaviour should be more robust. The legislature has provided for a sentence of 20 years in cases of sexual assault. We may not stay insensitive to the call of the day in this area of criminal law. Accused persons convicted of such offences shall not expect leniency from the Court of Appeal or any other Court for that matter.”

[29] Hence, the protection of vulnerable members of society and the welfare of children are factors which must guide the Court in sentencing sexual offenders (*R v Albert* SSC 30/1999, 17 November 1999), *R v L.J.* (CO 39/2017) [2018] SCSC 627 (22 June 2018)).

[30] Mr. André’s reference to the fact that the Second Convict believed the complainant to be older has no bearing in mitigating the sentence. Not only is this not the case (the Court

having viewed the recording to the incident and seen the slight and childlike frame of the complainant) but it matters not one jot as there was no consent capable of being given in this case as we have pointed out earlier.

[31] Having thus considered all the aforementioned circumstances, we have no hesitation in sentencing the convict EL, the Second Convict, in this case to **a term of twelve years' imprisonment.**

[32] Time spent in remand is to count towards sentence.

Sentence of the Third Convict

[33] The convict JYN (the Third Convict in the case) has been convicted on Count 16 for the offence of sexual assault contrary to section 130(1) of the Penal Code read with section 130(2) (a) of the said Act and punishable under section 130(1) of the said Act on his own plea of guilt.

[34] The particulars of the offence indicate that the complainant NS was thirteen years of age and had been indecently assaulted by the convict by the touching of her breasts and by having oral sex with her.

[35] The offence involves penetration of an orifice, the mouth, and pursuant to section 130(4) (b) and pursuant to the proviso of section 130(1) of the Penal Code carries a sentence of not less than 14 years and not more than 20 years.

[36] At the request of learned Counsel for the convict Mrs. Amesbury, a probation report was called. The report states that the convict is 26 years of age and is a self-employed building contractor and draughtsman.

[37] According to the report, the complainant in this case, NS, had been blackmailed by the First Convict to engage in sexual activity with the convict. It is clear that she had done so solely due to his threats. According to the charge sheet, the complainant NS had been thirteen years of age at the time of the said incident of sexual assault by the convict. It is also apparent from the report that the Third Convict was eighteen years of age at the time

and was a well-educated individual running a construction building enterprise. He appears remorseful of his acts and looks for leniency from this Court.

[38] In mitigation, Learned Counsel, Mrs. Amesbury submitted that the convict had pleaded guilty at the very first opportunity and had not wasted the time of court. By doing so, he had not put the complainant through the trauma of having to come to court and give evidence and relive her harrowing experience, especially in the light of the fact that the complainant herself had expressed in her statement to the police that despite the incident, she wanted to get on with her life, had excelled in her studies and was not comfortable talking about the incident and wanted it all to end.

[39] Learned Counsel also brought to the attention of the Court, the fact that the Third Convict was gainfully employed and the Social Services in the probation report had stated that they were willing to assist the convict if Court was minded to give him a non-custodial sentence (community-based rehabilitation) sentence. She also referred to the fact that just one mistake in the life of the convict should not destroy his entire life. She moved that the Court consider a lenient sentence on the convict.

[40] Having thus considered the plea in mitigation and the facts set out in the probation report, we do give strong consideration to the fact that he pleaded guilty to the said offence at the very first opportunity provided to him, thereby saving the time of this Court and in doing so has expressed remorse and regret at what he has done. He has also saved the complainant the trauma from once again re-living the experience she had undergone. We feel that these are strong mitigating circumstances. At the same time, however, equally strong aggravating factors do exist in this case. The complainant was only thirteen years of age at the time of the incident. Moreover, the fact that the complainant - admittedly on her own initiative - was able to overcome the psychological trauma she faced and do well in her studies, cannot be considered in favour of the convict.

[41] Further, there was penetration by an act of oral sex. The complainant was compelled to have sex with the convict as part of a group sex episode and did so due to being black mailed by the Third Convict's friend, the First Convict. Her fear and distress when confronted by the two men is evident on the video and will stay with the Court for some

time. Further, we observe that the convict was a well-educated individual who should have been fully aware of the serious moral, social and psychological consequences and implications of his act.

[42] We also point out that the whole incident was recorded - further causing much indignity and trauma to the complainant in this case.

[43] In the case of *R v Savy* SSC 51/1998 (5 February 1999) the Court recognised that a sentence of imprisonment for sexual assault will necessarily bring a premature end to one's career and affect a convict's married life; however, the interests of society take precedence over such considerations. The Court in *Savy* further held that an educated background may cast on an offender a higher degree of responsibility.

[44] We are also reminded of the words of the court in the case of *Ibrahim Gilbert Suleman v Republic* (Cr. App. No. 3 of 1995) that:

“Much as the court should be guided by a pattern of previous sentences in similar cases, it must be acknowledged that time and circumstances do often combine to make cases dissimilar for purposes of sentencing.”

[45] In the present case, the only reason we do not imprison the Third Convict to a sentence of at least fourteen years is the fact that he was only eighteen years of age at the time of the offence and it would appear impressionable and led on by the First Convict. We have also taken into consideration the other circumstances, especially the fact that the convict pleaded guilty. We therefore sentence the Third Convict, JYN, to **a term of eight years' imprisonment.**

[46] Time spent in remand is to count towards sentence.

Sentence of the First Convict

[47] The First Convict, ML, has been convicted on Counts 1, 2, 3, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 18, 19, 20, 21, 22, 24, 25 and 26 on his own plea of guilt. The offences for which he was convicted follows:

Count 1- Causing any person to receive any writing, demanding anything from one person without reasonable excuse or probable cause and containing threats of any injury or detriment of any kind if the demand is not complied with contrary to and punishable under section 284 of the Penal Code.

A convict is liable to be sentenced to a maximum term of 18 years' imprisonment for the said offence.

Count 2- Possession without reasonable excuse of indecent photographs or pictures of a child contrary to section 152 (1) (aa) of the Penal Code

A convict is liable to be sentenced to a maximum term of 5 years' imprisonment for the said offence.

Count 3- Procuring or attempting to procure by way of threats or intimidation any girl to have unlawful carnal connection, contrary to section 139 (a) of the Penal Code.

A convict is liable to be sentenced to a maximum of 3 years' imprisonment as the offence is considered a misdemeanour.

The aforementioned offences set out in Counts 1 to 3 were committed in the months of February to July 2019 on the complainant NF, aged 17 years.

Count 5- Recruiting or receiving another person for the purpose of sexual exploitation by means of coercion contrary to section 3 (1) (b) and punishable under section 3 (1) of the Prohibition of Trafficking in Persons Act (PTPA).

The said offence occurred on complainant JJ during the period 14th August 2018 and July 2019. A convict is liable to be sentenced to a term of 14 years of imprisonment and a fine of SCR 500,000 for the said offence.

Counts 6 to 12 are charges of Sexual Assault contrary to section 130(1) of the Penal Code read with section 130(2) (d) of the said Act and punishable under section 130(1) of the Penal Code. The complainant in Counts 6 to 12 is also JJ and concerns offences of repeated sexual assault including penetration, committed on 14th August 2018, during the

month of September 2018, 26th November 2018, 5th January 2019, 14th February 2019, and during the months of June 2019 and July 2019 on the complainant JJ.

Count 14- Possession of prohibited visual recording of another person having reason to believe it to be a prohibited visual recording without the person's consent contrary to and punishable under section 157 C of the Penal Code.

The offence was detected on the 25th of July 2019. The complainant was JJ aged 18 years. A convict is liable to be sentenced to a maximum term of 20 years' imprisonment for the said offence.

Counts 15 - Sexual Assault contrary to section 130(1) of the Penal Code read with section 130 (2) (d) of the said Act and punishable under section 130(1) of the Penal Code.

The said offence was committed during the month of April 2014.

Count 18- Possession of prohibited visual recording contrary to and punishable under section 157 C of the Penal Code.

The offence was detected on the 25th of July 2019.

Count 19- Intentionally benefitting from the exploitation of trafficking in a person contrary to and punishable under section 6 of the PTPA.

The date of offence was April 2014. A convict is liable to be sentenced to a maximum term of 25 years' imprisonment and a fine of SCR 800,000 for the said offence. The complainant in Counts 15, 18 and 19 was a minor, NS, aged 13 years.

Count 20- Recruiting, harbouring, transferring and receiving a child knowingly or recklessly disregarding that the person is a child for the purpose of exploiting, whether or not by the use of force or other forms of coercion contrary to section 4 (1) and further read with section 5 (1)(b) under the PTPA and punishable under section 4 (1) read with section 5 (2) of the same Act.

A convict is liable to be sentenced to a maximum term of 25 years' imprisonment and a fine of SCR 800,000 for the said offence.

Count 21- Prohibited visual recording of a private act contrary to section 157 A read with section 157 E and punishable under section 157 A of the Penal Code.

A convict is liable to be sentenced to a maximum term of twenty years' imprisonment. The offences in Counts 20 and 21 occurred in the year 2017 on the complainant KE, a minor aged 14 years old.

Count 22 - Sexual Assault contrary to section 130(1) of the Penal Code read with section 130 (2) (d) of the said Act and punishable under section 130(1) of the Penal Code.

The offence of sexual assault which included penetration, occurred in the year 2015.

Count 24- Committing an act of indecency towards a child contrary to section 135(1) of the Penal Code.

This offence of indecent act included penetration and occurred in the year 2015.

Count 25- Prohibited recording of a private act contrary to section 157 A read with section 157 E and punishable under section 157 A of the Penal Code.

Count 26- Possession of prohibited visual recording contrary to and punishable under section 157 C of the Penal Code on the 22nd of July 2019.

The complainant in Counts 22, 24, 25 and 26 was AA a minor aged 14 years.

[48] Both the offence of sexual assault that involves full penetration in terms of section 130(4) (b) of the Penal Code and pursuant to the proviso of section 130(1) of the Penal Code and the offence of indecent assault that involves penetration, under the proviso of section 135 (1) of the Penal Code, carries a sentence of not less than 14 years and not more than 20 years.

[49] At the request of learned Counsel for the convict Mr. Gabriel, a probation report was called in respect of the First Convict. The report states that the convict is 30 years of age, has no children and is not currently in a relationship. The probation report further sets out that the convict was employed by the Seychelles Fisheries Association (SFA) as an

employment officer and prior to being remanded was working freelance with the SFA as a fisheries observer.

[50] The First Convict has expressed remorse to the Probation Officer over his actions and states that his state of depression and low self-esteem added to his inability to have a girlfriend made him act in such a manner. He further stated that he had no intention of publishing the videos and pictures of sexual activities and that some of them were obtained by consent. He stated that one of the complainants had a relationship with him and that she had lied about her age to him. He stated that another complainant had engaged in sexual activity with him for a payment of SCR 1500. He further stated that another complainant had said she was 17 years of age and she too knew she was being recorded. The convict has further stated that he feels addicted to sex and that he requires psychological help to deal with the problem. He repeated that he had no intention of publishing any of the videos and photos. He further expressed the view that the sentence he deserves be imposed and apologised to all the complainants for what he had put them through. The probation report also notes that the convict's father had passed away last year and he was going through hard time dealing with it.

[51] With respect to the mitigation of the sentence to be imposed, Learned Counsel, Mr. Gabriel submitted that the convict had pleaded guilty at the very first opportunity he was provided with and not wasted the time of court and had expressed remorse and regret. He referred to several cases where sentences ranging from eight to ten years were imposed for acts of sexual assault. Learned Counsel also relies on the recommendation of the mother of the convict who stated that her son was a good person and that the death of his father was instrumental in affecting his conduct. Mr. Gabriel moved that the Court consider a lenient sentence against the convict considering the facts set out in the probation report.

[52] Having thus carefully considered the plea in mitigation and the facts set out in the probation report, we give strong consideration to the fact the convict pleaded guilty to the said offence at the very first opportunity provided to him, thereby saving the time of this Court and in doing so has also expressed remorse and regret at what he has done.

[53] However, all these facts in mitigation pale into insignificance when one considers the aggravating circumstances in this case. The convict we observe has committed these offences of sexual assault as far back as 2014, long before the death of his father. In assessing the nature of the crimes and their seriousness we find that that the First Convict committed serious crimes which are unprecedented in the history of our Courts in Seychelles. The crimes as we have explained committed by him varied from sexual assault, filming the victims, kidnapping and human trafficking. These crimes were committed on young girls. There was a clear modus operandi by the offender, involving befriending and manipulating children on social media to send him their pictures, and after a while threatening to expose their pictures, which were deceitfully obtained. In some instances, these pictures were obtained using false job promises for modelling. In addition, these crimes involved a great deal of planning. Having sexually assaulted them repeatedly under such threats he even shared the abuse of these children with his friends and close associates.

[54] There are five complainants in this case including four minors who have been subjected to being indecently photographed and video recorded while being subject to acts of sexual assault and thereafter threatened and blackmailed into further acts of sex not only with the convict but third parties as well. The convict has committed this cycle of activity repeatedly in an extremely systematic and well-organized manner. The fact that he was of the view that they consented is immaterial as several of the complainants were minors. In addition, consent obtained after threat, coercion and blackmail is not consent. The charges set out above are of the most serious nature as borne out by the sentences that could be imposed in respect of each charge.

[55] Having given due consideration to all the above factors, we are of the view that we are entitled under the prevailing law to sentence him to terms ranging from 2 to 25 years' imprisonment on the aforementioned counts and even order that such terms run consecutively as the offences are of different nature and committed on different dates and are in respect of different complainants. However, this would result in the convict serving a term exceeding 70 years and even a one third discount for his plea of guilty as suggested would have little effect on this sentence which in our view would be too high.

- [56] In this regard, we have given anxious scrutiny to our sentencing powers under the Constitution and the law.
- [57] Sentencing remains a discretionary power, exercisable by the court and involves the ‘deliberation of the appropriate sentence’ (*Marengo v R* (Criminal Appeal SCA 29/2018) [2019] SCCA 28, 45). Finding an ‘appropriate sentence’ or a ‘just punishment’ falls somewhere between striking a balance on key procedural ideals namely – rule making which ensures consistency and predictability. Secondly, sentencing requires the judge to exercise discretion, which promotes flexibility and efficiency in the administration of justice. A balance of these two ends promotes consistency in sentencing at the same time as ensuring that judges are flexible to adjust sentences when there is a need. In *Julie v The Republic* CN 33/2015 Appeal from the Magistrates Court Decision 524/2014) [2016] SCSC 552, para 6, the sentencing approach adopted rightly underscores the above perspective. In that case, the Supreme Court approved the sentencing approach of the lower court, which departed from the mandatory minimum sentences. The trial court had taken the circumstances of the convict into consideration and reduced the mandatory sentences to achieve an appropriate sentence. *Julie* rightly followed the seminal case of *Poonoo v Attorney-General* (SCA 38 of 2010) [2011] SCCA 30 (09 December 2011). Therefore, while the rule existed on mandatory sentencing, introducing flexibility enabled the Court to strike the right balance.
- [58] Approaching sentencing in cases where the offender is convicted on several charges requires a consideration of what has come to be known as the ‘totality principle’ in sentencing.
- [59] The core value of the principle of totality is to ensure that courts impose a ‘just and appropriate’ sentence. More developed and widely applied in Australia, United Kingdom and Canada, the totality principle is a common law principle that requires a judge sentencing an offender convicted on several offences to ensure that the ‘aggregation of the sentences appropriate for each offence is a just and appropriate measure of the total criminality involved’ (National Judicial College of Australia ‘Totality Principle’

<https://csd.njca.com.au/principles-practice/general-sentencing-principles/totality-principle3/>).

[60] In the UK, the totality principle is expressed as follows:

“A court which passes a number of consecutive sentences should review the aggregate for the sentences and consider whether the aggregate sentence is just and appropriate taking the offences as a whole...”

Where a court decides to adjust a series of sentences because the aggregate is too high, it is generally preferable to do so by ordering sentences to run concurrently rather than by passing a series of short consecutive sentences (see R v. Simpson, unreported, February 1, 1972), but where concurrent sentences are imposed for a series of offences of varying gravity, the individual sentences should not be out of proportion to the individual offences for which they are imposed (see R v. Smith, unreported, February 13, 1975)...”(Archbold- Criminal Pleading, Evidence and Practice 2013 5-592

[61] The principle encompasses two concepts namely that:

“[A]ll courts, when sentencing for more than a single offence, should pass a total sentence which reflects all the offending behaviour before it, is just and proportionate. This is so, whether the sentences are structured as concurrent or consecutive. Therefore, concurrent sentences will ordinarily be longer than a single sentence for a single offence. It is usually impossible to arrive at a just and proportionate sentence for multiple offences simply by adding together notional single sentences. It is necessary to address the offending behaviour, together with the factors personal to the offender as a whole.” (UK Sentencing Council ‘Offences taken into Consideration and Totality: Definitive Guideline’ (2012))

[62] The significance of the principle is to balance the existing rules on sentencing, with the discretionary powers of the judge in arriving at a just and equitable sentence outcome. This balancing exercise ensures that the final sentence imposed remains proportionate to the gravity of the offence committed (*R. c. Neeposh*, 2020 QCCQ 1235 (CanLII), para 50). Both the proportionality and the totality principle in sentencing are interlinked and aim to ensure that a just and equitable sentence is imposed on the offender. Some cases have, in addition to imposing fair or just sentences, placed emphasis on the role of

sentencing as a means to protect the general public from the activities of the offender and to contribute towards respect for the law and the maintenance of a just, peaceful and safe society. It is through a consideration of the total criminality involved in a crime that a decision on whether sentences must run concurrently or consecutively must be made. This applies more accurately in cases where the crimes committed are so shocking that a longer custodial sentence will be warranted to protect the general public.

[63] In terms of our own legal provisions, sections 8 and 9 of the Criminal Procedure Code deals with sentencing in cases of several offences at one trial. The provisions provide as follows:

Combination of sentences

“8. (1) Any court may pass any lawful sentence combining any of the sentences which it is authorised by law to pass.

(2) In determining the extent of the court’s jurisdiction under section 6 to pass a sentence of imprisonment the court shall be deemed to have jurisdiction to pass the full sentence of imprisonment provided in that section in addition to any term of imprisonment which may be awarded in default of payment of a fine, costs or compensation.

Sentences in case of conviction of several offences at one trial

9. (1) When a person is convicted at one trial of two or more distinct offences the court may sentence him, for such offences, to the several punishments prescribed therefore which such court is competent to impose, such punishments when consisting of imprisonment to commence the one after the expiration of the other in such order as the court may direct, unless the court directs that such punishments shall run concurrently...”

[64] These provisions thus allow for the imposition of consecutive sentences when it is necessary. Several comparable jurisdictions have addressed the principle of totality when sentencing accused persons who are convicted on two or more distinct offences, warranting a custodial sentence.

[65] Other jurisdictions have also had to address this issue. Kenya has a similar legal provision to Seychelles in this respect and in the case of *Peter Mbugua Kabui vs Republic* [2016] eKLR, the accused was charged in the alternate on three counts of indecent acts

with a child contrary to the Sexual Offences Act. After a full trial, he was convicted on two alternative charges relating to indecent assault involving a child and was sentenced to ten years' imprisonment on each count. The sentences were ordered to run consecutively. On appeal concerning the consecutive sentence, the Kenyan Court of Appeal stated the following regarding the choice of either a concurrent or consecutive sentence:

“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.”

[66] The Court, in dismissing the appeal on the sentence, emphasised that the offences in the case were not committed simultaneously or in the same transaction. They occurred on diverse dates, and the crimes were committed on different complainants. Once the court is satisfied that the sentence imposed can encompass the totality of the criminality of the offences created, a consecutive sentence can be imposed.

[67] Similarly, in the UK, in the case of *R v Clifford* [2014] EWCA Crim 2245 (para 35), where the offender was appealing against the sentence after a conviction on multiple sexual counts of indecent sexual assault, the Court made the following remarks regarding consecutive sentences:

“It must be recognised in any event that the judge was sentencing in relation to a multiplicity of incidents involving four different victims. Even with the limitations on the maximum sentence per count, the judge was entitled to structure his sentence by imposing consecutive sentences which would reflect the overall criminality involved according to modern standards and attitudes...”

[68] The Canadian Supreme Court expressed itself in *R v M* (C.A) 1996 CanLII 230 (SCC), [1996] 1 SCR 500, on how to deal with sentencing in cases where the accused is convicted on multiple charges in one trial. In that case, the accused had pleaded guilty to numerous counts of sexual assault, incest and assault with a weapon in addition to other charges that were emanating from an uncontested pattern of sexual, physical and

emotional abuse inflicted on his children over years. None of the charges carried a penalty of life sentence. Due to the severity of the offences, the trial judge sentenced the accused to a cumulative sentence of 25 years' imprisonment, with certain sentences running concurrently and consecutively. The Court of Appeal had reduced the sentence to 18 years and eight months, arguing primarily that, where life imprisonment is not available as a penalty, the totality principle requires trial judges to limit fixed-term cumulative sentences under the criminal code to a term of imprisonment of 20 years, in the absence of special circumstances.

[69] In upholding the trial court decision, and rejecting the Court of Appeal decision, the Supreme Court held that while the Code was silent on whether there is an upper sentence that can be imposed on fixed-term sentences, that in itself did not amount to life and did not follow that a judge was restrained from imposing a numerical sentence beyond 20 years. The reasons, as the Court stated, were primarily that sentencing, in addition to advancing certain utilitarian considerations relating to deterrence and rehabilitation aims to sanction the moral culpability of the offender. The Court added further that sentencing must reflect the retributive aspects (requiring the sentence to reflect the blameworthiness of the offender).

[70] In Australia, the totality principle was explained in *Mill v Mill*, (1998) 166 CLR 59 where it was held that the totality principle mandates a judge – after passing a series of sentences each properly calculated in relation to the offence, and when such sentences are made in accordance with principles governing consecutive sentences – to review the aggregate sentence and consider whether such a sentence is ‘just and appropriate’. The overall picture of the total sentences imposed must reflect the totality of the criminal behaviour.

[71] Similarly, in *Franklin v R*, 2013 NSWCCA 122 in an appeal against the sentence where the applicant was convicted on six offences of aggravated sexual intercourse and aggravated indecent assault on a 14-year-old girl, 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.”

[72] Other cases have cautioned that when applying the principle of totality, public confidence in the administration of justice must not be compromised (*R v Knight* (2005) 155 A Crim R 252, 112). Moreover, in this respect we must be reminded of what the Court of Appeal of England stated *R v James Henry Sargeant* 1974 60 Cr. App R.74:

"The Old Testament concept of an eye for an eye and tooth for tooth no longer plays any part in our criminal law. There is, however, another aspect of retribution which is frequently overlooked: it is that society, through the courts, must show its abhorrence of particular types of crimes, and the only way in which the courts can show this is by the sentence they pass. The courts do not have to reflect public opinion...Perhaps the main duty of the court is to lead public opinion. "

[73] With all these considerations and principles in mind, we proceed to sentence the First Convict as follows:

On Counts 1, 2 and 3 in respect of offences committed on complainant NF:

Count 1- a term of 10 years' imprisonment.

Count 2- a term of 3 years' imprisonment.

Count 3 to a term of 1year's imprisonment.

[74] We order that the terms of imprisonment in Counts 1 to 3 run concurrently, thereby making the convict serve a total term of 10 years' imprisonment for the three offences committed on complainant NF.

On Counts 5 to 12 and 14 in respect of offences committed on complainant JJ

Count 5 – a term of 10 years' imprisonment.

Count 6- a term of 10 years' imprisonment

Count 7- a term of 10 years' imprisonment.

Count 8 - a term of 10 years' imprisonment.

Count 9- a term of 10 years' imprisonment.

Count 10- a term of 10 years' imprisonment.

Count 11- a term of 10 years' imprisonment.

Count 12- a term of 10 years' imprisonment.

Count 14- to a term of 10 years' imprisonment

[75] We order that the terms of imprisonment imposed in the above-mentioned Counts 5 to 12 and Count 14 run concurrently, thereby making the convict serve a total term of 10 years' imprisonment for the 9 offences committed on complainant JJ.

On Counts 15, 18 and 19 in respect of offences committed on complainant NS:

Count 15- a term of 10 years' imprisonment.

Count 18- a term of 10 years' imprisonment.

Count 19- a term of 12 years' imprisonment.

[76] We order that the terms of imprisonment imposed in the abovementioned Counts 15, 18 and 19 run concurrently, thereby making the convict serve a total term of 12 years' imprisonment for the 3 offences committed on complainant NS.

On Counts 20 and 21 as follows in respect of offences committed on complainant KE as follows:

Count 20 - a term of 12 years' imprisonment.

Count 21- a term of 10 years' imprisonment.

[77] We order that the terms of imprisonment imposed in the above-mentioned Counts 20 and 21 run concurrently, thereby making the convict serve a total term of 12 years' imprisonment for the two offences committed on complainant KE.

On Counts 22, 24, 25 and 26 as follows in respect of offences committed on complainant AA as follows:

Count 22- a term of 10 years' imprisonment.

Count 24- a term of 8 years' imprisonment.

Count 25- a term of 10 years' imprisonment.

Count 26- a term of 10 years' imprisonment.

[78] We order that the terms of imprisonment imposed in the abovementioned Counts 22, 24, 25 and 26 run concurrently, thereby making the convict serve a total term of 10 years' imprisonment for the four offences committed on complainant AA.

[79] We further order that the total terms of imprisonment imposed upon the First Convict in respect of complainant NF i.e. 10 years; in respect of complainant JJ i.e. 10 years; in respect of complainant NS i.e. 12 years; in respect of complainant KE i.e. 12 years; and in respect of complainant AA i.e. 10 years – run **consecutively** thereby totalling a term of **44 years**.

[80] We also note that the convict in pleading guilty at the first instance saved the complainants the ordeal from once again re-living the trauma they had undergone at his hands. We consider this as a special circumstance and proceed to reduce the total sentence to **25 years' imprisonment**.

[81] Time spent in remand to count towards sentence.

[82] We further order that the First Convict be placed on the Sexual Offenders Register and all his interactions with children be closely monitored and that he is not allowed to engage on social media of any kind, whatsoever. We notice that the Facebooks account profiles used are still publicly available. We therefore also order that the Attorney General

formally report these crimes to Facebook through the complaint mechanism provided for on the Facebook platform and request that they are removed.

Signed, dated and delivered at Ile du Port on 17 April 2020.

Twomey CJ

Burhan J