

**Michel v Republic
(1999) SLR 139**

John RENAUD for the appellant
Lucy POOL for the respondent

Judgment delivered on 14 May 1999 by:

ALLEEAR CJ: The appellant was charged with the offence of indecent assault on a female contrary to section 135(1) of the Penal Code. The particulars of offence were that Irene Michel of Anse Louis, Mahe on 2 November 1995, at Anse Aux Pins, unlawfully and indecently assaulted A, a girl of three years of age.

The appellant had pleaded not guilty to the count. The evidence disclosed that the appellant aged 65 years had inserted his penis into the mouth of a young girl and had sucked her vagina. The senior magistrate convicted the appellant and sentenced him to undergo a prison term of 7 years.

This is an appeal against sentence on the ground that the appellant was "remorseful in that he had not cross-examined the complainant aged three years. He had saved her further embarrassment and trauma."

Mr Renaud also highlighted the fact that the appellant was impotent and he respectfully urged the Court to reduce the sentence passed.

Counsel representing the State, Ms Pool, argued that the appellant had pleaded not guilty. He was sentenced to only 7 years out of the maximum of 14 years' imprisonment which the senior magistrate could have imposed. The victim, she said, was only three years old. She said the fact that the appellant was impotent had nothing to do with the sexual assault, as the evidence showed that the appellant was seen sucking the vagina of the young victim and putting his penis in her mouth.

Ms Pool disagreed with the appellant's counsel that the sentence passed was harsh and excessive in all the circumstances of the case. She cited the case of *Republic v Moncherry* in which Perera J referred to the following cases:-

1. *R. v Agrippine* (unreported) Cr 35/1998 - sexual assault on a 15 year old girl (8 years imprisonment)
2. *R v Parameswaran* (unreported) Cr 27/1998 - sexual assault on a boy (8 years imprisonment)
3. *R v Willy Brioche* (unreported) Cr 12/1997 - acts of indecency on a child (5 years imprisonment)

4. *R v Allain Leon* – (unreported) Cr 17/1998 - sexual assault on a 14 year old boy (8 years imprisonment)
5. *R v Cliff Rachel* (unreported) Cr 23/1998 - non-accidental touching the sexual organ of a girl under 15 years of age. In this case the Probation Officer remarked that it was "a blatant abuse of a young helpless girl by an irresponsible male adult." The accused was sentenced to 5 years imprisonment.

Ms Pool stated that the young victim in the present case had been traumatised by the incident. She was still suffering from nightmares and was being counselled. Ms Pool therefore urged the Court to dismiss the appeal.

An appellate court will normally interfere with the sentence passed by the lower Court in the following circumstances:

- (i) if the sentence is not justified by law, in which case it will be interfered with not as a matter of discretion but of law;
- (ii) where the sentence has been passed on a wrong factual basis;
- (iii) where some matter had been improperly taken into account;
- (iv) where the sentence was wrong in principle or manifestly harsh and excessive or inadequate.

Vide the case of *Cupidon v Republic* (1990) SLR 67, *Confiance v Republic* (1992) SLR 75, *Agnes v Republic* 1990 (SLR) 92.

At the time the offence was committed the maximum sentence in respect thereof was 14 years' imprisonment. It has now been enhanced to 20 years.

It is borne in mind that any court while passing sentence must look at all the circumstances of the case and also the maximum sentence provided for by law at the time of the commission of the offence and not at the time of sentencing. Therefore the enhancement of the sentence of imprisonment to 20 years in respect of the present offence at the time of sentencing has been correctly ignored by the sentencing court.

In the present case I do not find any justification for interfering with the sentence passed on the appellant. None of the circumstances referred to above is applicable. Hence the appeal is dismissed.

Record: Court of Appeal (Criminal No 7 of 1997)