IN THE SEYCHELLES COURT OF APPEAL

[Coram: A. Fernando (J.A.), M. Twomey (J.A.), B. Renaud (J.A.)**]**

Criminal Appeal SCA 13/2017

(Appeal from Supreme Court Decision CN 49/2015)

Graham Ravel Julian Pothin Appellant

Versus

The Republic Respondent

Heard: 20 August 2018

Counsel: Mr. Charles Lucas for the Appellant

Ms. Brigitte Confait, Senior State Council, for the Respondent

Delivered: 31 August 2018

JUDGMENT

M. Twomey (J.A.)

[1] I have not had the opportunity to read my learned brother's decision in this appeal. He has however indicated his views to me, which views I respectfully dissent with for the reasons I have expressed herein.

[2] Seldom has a case so plainly displayed the difficulties that victims of sexual assaults suffer when trying to bring their assaulters to face the consequences of their actions. The child did not have any obvious and egregious physical injuries, only the injuries she

suffered as a result of the betrayal that she faced and the lifelong injury to her relationships with men.

[3] Some of the line of questioning during both the Supreme Court and the Court of Appeal hearings involved what in my view was insensitive and disrespectful comportment. I have in the case of *Julie v R* Criminal Appeal SCA 21/2017 stated my views in relation to the need for a moral and professional shift on the part of the legal profession in Seychelles on the appreciation of the difficulties faced by sexual assault victims and the necessity to orientate ourselves away from the demeaning of witnesses and the need to be respectful at all times no matter the offence.

[4] I am especially concerned in the present case about the subjecting of a child complainant to traumatic and disrespectful cross-examination. While the purpose of cross-examination is to test the credibility of a witness and the reliability of her evidence and while it is acknowledged that hindering the accused from putting his case may amount to a breach of his constitutional fair trial rights, conversely; extensive and aggressive questioning of an 8 year old child and her unbridled bullying whilst stripped of her support structures (such as her mother and the social services case worker) amounts to a breach of her constitutional right to dignity and to her special rights of protection given her immaturity and vulnerability under Articles 16 and 31 of the Constitution respectively.

[5] In essence, as has been pointed out by Anne Cossins[1] "the rights of an accused under the fair trial principle are not absolute and are to be balanced against 'the interests of the Republic] acting on behalf of the community'.[2] Indeed, the concept of fairness is not fixed and immutable and 'may vary with changing social standards and circumstances'[3] - it is inextricably 'bound up with prevailing social values.'[4] The concept of fairness can take into account the interests of the victim,[5] including the desirable goal of minimising the re-traumatisation experienced by sexual assault complainants during the trial process.

[1] Ann Crossins, 'Cross-Examination in Child Sexual Assault Trials: Evidentiary Safeguard Or An Opportunity To Confuse?' (2009) Vol 33 Melbourne University Law Review 68, 72.
[2] *Dietrich* (1992) 177 CLR 292, 335 (Deane J), quoting *Barton v The Queen* (1980) 147 CLR 75, 101 (Gibbs ACJ and Mason J).
[3] Ibid. see also See also *McKinney v The* Queen (1991) 171 CLR 468, 478.
[4] Ibid.
[5] Ibid.

Being informed by the public interest, it can and should be applied in a way that encourages victims to report sexual offences to the police."[6]

[6] Procedures in trials of sexual assaults involving children in Seychelles need to be addressed seriously and immediately.

[7] In any case, some of the questioning in this case is unacceptable. It demeans the lifelong injury suffered by victims of these crimes. It shows a perceived normalisation of sexuality in children, and a blame game with the default being that the child victim was making up the allegation of abuse because she was "naughty".

[8] As has been pointed out in the cross-examination of child witness 'the contest between a child and a defence advocate [will be] far from equal', with the child's vulnerability and the adversarial nature of cross-examination combining to produce a relationship of power easily exploited by defence counsel. [7]

[9] As a society we need to protect our children. We need to protect vulnerable victims and witnesses. We need to review our child protection measures, so that we sensitise our lawyers and judges to protect children from any further victimisation in our courtrooms, and we need to treat these cases with the seriousness that they deserve.

[10] In my view much was made of the language of the child in this case. I have had the opportunity to hear the audio recording of this case. Our court procedures are not perfect. The language of the courts by virtue of our laws is English. Witnesses generally testify in Creole and an English translation is provided for our court records and for the non-Creole speaking Judge. Judges not accustomed to some of our customs and specific language in aspects of our Creole (sometimes untranslatable) do not appreciate the discrepancies and subtle meanings lost in translation. The child throughout the case talked about *deryer* (not *trou fes* or *lanis* (anus)) which is normal for a child of her age. The fact that these discrepancies are now raised underline the necessity for such matters to be

[6] Cossins (supra) n1, 72.
[7] Reid Howie Associates, Scottish Executive Central Research Unit, Vulnerable and Intimidated Witnesses: Review of Provisions in Other Jurisdictions (2002) 16.

addressed. The Judiciary needs, together with other stakeholders, to spearhead rules and procedures to be adopted in cases involving child witnesses.

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[11] According to a 2014 UNICEF report, around 120 million girls worldwide (slightly more than 1 in 10) have experienced forced intercourse or other forced sexual acts at some point in their lives.[8] By far the most common perpetrators of sexual violence against girls are persons known to the girls in positions of trust, such as husbands and boyfriends. The report states further that:

> *"Over the last decade, recognition of the pervasive nature and impact of violence against children has grown. Still, the phenomenon remains largely undocumented and underreported. This can be attributed to a variety of reasons, including the fact that some forms of violence against children are socially accepted, tacitly condoned or not perceived as being abusive. Many victims are too young or too vulnerable to disclose their experience or to protect themselves. And all too often when victims do denounce an abuse, the legal system fails to respond".*[9]

This is exactly what I fear has happened in this case.

Background

[12] The Appellant was found guilty on two counts of committing acts of indecency on a person below the age of 15 years, contrary to and punishable under section 135(1) of the Penal Code. The charge sheet specified that the first count consisted of penetrating the anus of the child, and the second count of licking her vagina. The Judge found that all of the elements of the offence required for Count 1, other than the act of penetration, and all the elements of the offence contained in Count 2 were proven beyond reasonable doubt and convicted the Appellant. The Appellant was sentenced to six years imprisonment.[10]

Trial Court

[13] The complainant, a girl aged 8 at the time of the incident, is the daughter of the Appellant and gave evidence that the Appellant had committed the acts against her when she and

[8] UNICEF (2014). Hidden in Plain Sight: A Statistical Analysis of Violence against Children, p. 167.
[9] Ibid.
[10] *R v Pothin* CO 49/2015 [2016] SCSC 422.

her younger brother had been staying overnight with the Appellant on 27 July 2015. She specifically testified that the Appellant had touched her vagina on the inside of her panties with his finger, that he had kissed her chest, stomach and vagina and had inserted his penis into her anus but had stopped when she cried out in pain.

[14] She had reported the incident to her mother at the first occasion the following day and proceeded directly to the police station to report the incident where her statement had been recorded. Two medical reports were produced; neither indicated that there was tearing or bruising around the anus. However, the experts testified that penetration, or partial penetration would have been possible without resulting in tearing or bruising.

[15] In an unsworn dock statement, the Appellant admitted to having a friend come over to the house, and leaving the children in the house to go and buy beers, he admitted to drinking a few beers that night but denied the exact sequence of events given by the child and denied that he had committed the acts against the complainant. The remaining defence witnesses were not present on the night of the incident but saw the child the following day, and testified that the child did not appear hurt or injured.

[16] The complainant testified on 2nd October 2015 via videolink, she was accompanied in the video link room by an interpreter and a social services worker. Her examination in chief ran for close to three hours. The cross examination of the child began with a whole day on 20 October 2015, and continued almost two months later on 11th December 2015. During the continuation of cross examination of the victim, the child's evidence suddenly changed. She stated that her father had done nothing to her, he had never kissed her on the mouth, stomach or her private parts. Counsel for the Appellant also said to her "this is a very important question because your father is in court for that reason he risks spending 14 years in prison" and thereafter the child proceeded to completely recant her evidence. The Judge held that "the change [was] very abrupt and sudden and no doubt aggravated by the question" asked by counsel for the defence.

[17] The Judge convicted the Appellant on the basis of the testimony of the complainant having found that prior to her recantation, she had given "a vivid and detailed account of the indecent acts committed on her" which evidence withstood two sessions of intense cross examination.

[18] In considering the recantation, the Judge found that the child had begun "to recant and change her evidence on 11 December 2015 due to the sympathy she felt towards her father who[m] she loved and the fear her evidence would result in him being sent to prison for a period of 14 years and the need to escape the social pressure of being held responsible for it." [11]

[19] The Judge took into account the fact that the witness testifying was a child victim of only 8 years at the time of the incident, she was a vulnerable witness, giving evidence in respect of very sensitive matters relating to indecent acts. The Judge considered that the acts were perpetrated by a close family member of the witness.

[20] The Judge rejected an allegation from the Defence that the child's mother had told the child to make the allegations and coached her. He held that the child had immediately reported the incident to her mother when she met her at the bus stand, and the mother had gone straight to the police to report the incident and that "there was no time for the mother to coach the victim".[12]

[21] Moreover, the Trial Judge found that there was no proof at all that the social service worker who was assisting the child during the trial had influenced her testimony.

[22] Having observed the child complainant giving her evidence, her demeanour and answers, even after over three hours of cross examination, the Judge was convinced that she was telling the truth about the acts committed against her.

[23] The Judge found that the some of the details given by the complainant were "intricate details, which she could not be coached to say". He stated that "the cogency of the chain of events of the assault adds to its believability." He stated that he was "firmly of the view that the victim spoke the truth when she described in detail the indecent acts committed on her." He said he could see no reason why this child would attempt to falsely implicate her father especially when "she states that she loved her father and at

[11] Ibid at [41].
[12] Ibid at [36]

no stage of the trial [did] it appear to the Court that the child was vindictive or had anything against her father."[13]

Appeal

[24] The Appellant now appeals the conviction. The grounds of appeal are lengthy and I paraphrase them to make them clearer.

1. The first ground is that the Judge erred in law by convicting the Appellant for various reasons:
    a. By failing to warn himself of the dangers of convicting on the basis of the uncorroborated evidence of the child;
    b. Because the child's character and truthfulness had been discredited by her admissions of being coached by Social Services and that she liked to lie;
    c. Because the child's evidence in chief had been discredited in cross examination and therefore the Judge ought to have sought corroboration;
    d. Because there was no medical evidence of harm to the child, and defence witnesses presented circumstantial evidence to infer that the child was not injured or different in behaviour following the incident;
2. That the Judge erred in his assessment of the weight of the evidence as a whole.
3. The third ground is related to 1 (c), that the Judge's reliance on the child's evidence excluding the recantation was wrong, biased and prejudicial to the Appellant.
4. The conviction on the first Count was incorrect as the Judge had made a finding that there had been no penetration of any body orifice.
5. That the conviction on the second ground lacked corroboration and the child's evidence had been retracted.
6. That the evidence of the Defence was "overwhelming", "true, cogent and fully corroborated" and therefore should have led to an acquittal.
7. The Judge was incorrect to draw the conclusion that she had been influenced to change the version of her testimony.

[25] I propose to address grounds 1c, 3, 5 and 7 first and foremost as they all deal with the effect of the child's recantation on the credibility of the child's testimony. Grounds 1a, b, d and 6 can be easily dealt with, and will be considered next. Thereafter, I will consider

[13] Ibid at [36]

Ground 4 whether 'penetration' as specified in the particulars of the offence was a requirement for a conviction in terms of section 135. Finally, I shall consider 2, which is whether the Judge took a correct view of the evidence as a whole.

The role of the Court of Appeal

[26] Before I begin to deal with the grounds individually, I remind myself of the role of the Court of Appeal when considering the balancing of evidence by a Trial Judge. It is trite that an Appellate Court will not readily overturn the factual findings of a Trial Judge, specifically because the Appellate Court "is disadvantaged in that that it has to weigh these matters with only the record of proceedings before it and cannot observe the witnesses at first hand to gauge their truthfulness" *Beeharry v R* SCA 28/2009 [2012] SCCA 1 (per Twomey JA) [at para 15].

[27] In *Akbar v R* [1998] SCCA 37 this court stated "An appellate court does not rehear the case on record. It accepts findings of facts that are supported by the evidence believed by the trial court unless the trial's Judge's findings of credibility are perverse."

[28] This approach is consistent with the roles of appellate courts in other common law jurisdictions. A helpful discussion of this tension between the trier of fact and the appellate court is found in South African jurisprudence, in the dissenting judgment of Daffue J in the case of *Thobela v S* (A48/2014) [2016] ZAFSHC 221 (20 October 2016),

> *Therefore if there are no misdirections on fact a court of appeal assumes that the court a quo's findings are correct and will accept these findings unless it is convinced that these are wrong. Therefore in order to interfere with the court a quo's judgment it has to be established that there were misdirections of fact, either where reasons on their face are unsatisfactory or where the record shows them to such. … it is only in exceptional cases that it would be entitled to interfere with the trial court's evaluation of oral evidence. [at [11]. References omitted].*

[29] In *Styles v Attorney General* 2006 JLR 210 it was noted that "it is not part of the powers of the Court of Appeal to review the totality of the evidence, sift through points of alleged weakness and attempt to make its own evaluation of that evidence. [at 32-34].

Furthermore, any evaluation of the facts or law which have not been raised in the appeal are ultra petita, and the Court of Appeal has no role in raising these itself and determining matters which were not properly before the court.

Grounds of appeal 1c, 3, 5 and 7

[30] The real crux of this case at hand is whether the Judge was correct to accept that the complainant's evidence prior to recantation was credible and true, and whether the recantation undermined the credibility of the witness as a whole, or merely led to the disqualification of the evidence following the recantation.

[31] In evaluating the child's evidence the Trial Judge found that the sudden change in the child on the final day of her cross examination indicated an unreliability of her evidence which followed, but he was not of the opinion that this recantation was sufficient to undermine the veracity of the child's previous evidence about the incident.

[32] The stark difference in the child on the morning in question is noticeable from the first page of the proceedings that day, when the otherwise measured and consistent child began to contradict herself.

> *"Q: [E] before coming here on Wednesday this week, were you taken anywhere for you to see any social services officer?*
>
> *A: No.*
>
> *Q: You did not go to Unity House to see a Social Services Officer?*
>
> *A: No*
>
> *Q: But you were seen there?*
>
> *A: Yes*
>
> *Q: So you went?*
>
> *A: Yes."*

[33] The child continued to answer evasively throughout that session. When cross examined about the incident specifically, she stated that nothing had happened. Yet in

reexamination, she confirmed the timing and activities of the afternoon, as well as the incident itself, however, she again then stated that the incident itself had not happened. It is worth reproducing the relevant part of the proceedings in full.

Q: *Do you know why you are here and for what purpose?*

A: *Yes.*

Q: *Tell me why.*

A: *Because of the incident that happened to me.*

Q: *[E], since July 27th have you seen your father?*

A: *No.*

Q: *Were you told where you father was?*

A: *No.*

Q: *Did anybody suggest to you that your father had gone fishing?*

A: *No.*

Q: *Did you not ask where your father was?*

A: *No.*

Q: *You did not look for your father?*

A: *No.*

Q: *You did not ask any questions about the whereabouts of your father?*

A: *No.*

Q: *Did you see your father in court?*

A: *Yes.*

Q: *Has your father done any harm to you ever?*

A: *No.*

Q: *Did your father ever kiss you on your mouth?*

A: *No.*

Q: *Did your father ever kiss you on your stomach?*

A: *No.*

Q: *Did your father ever kiss you on your private part in front of you?*

A: *No.*

Q: *The other day you were saying that your father did something very nasty to you with his penis, did this ever happen? [E], this is a very important question because your father is in court because for that reason he risks spending 14 years in prison.*

Court: All that is not necessary, let her answer the first question first.

Q: [E] tell us seriously has your father every used his penis to put into any part of your body?

A: No.

…

Q: Now I go back, would you like to see your father again?

A: Yes.

Q: Do you miss him?

A: Yes.

Q: If you had the opportunity to spend part of your holidays with him would you like to do that?

A: Yes.

Q: Are you scared of your father?

A: No.

Q: Do you love him?

A: Yes.

[34] In this string of questioning, Counsel for the Appellant clearly ideologically linked the reason that they were in court (because of the incident that happened to the complainant) to the reason why her father had gone away for six months and now risked fourteen years in prison. Moreover, it played on her familial feelings for her father.

[35] In re-examination, the complainant was consistent in reiterating the sequence of events on the 27th July 2015 leading up to the incident. In answer to questions about whether she could remember what happened that day when it was time for bed, she stated that she could.

Q: Now earlier today you mentioned in cross examination that you knew why you were before the court and you were before the court because of an incident which happened to you?

A: Yes.

Q: Which incident was that?

A: No answer.

…

Q: *What incident are you telling the court that happened to you?*

A: *When my daddy removed my panty and then I put my clothes back on me and then I went to bed and then he pulled me and I almost hit my head and then he came to my bed and he again removed my panty and he kissed me on my mouth, on my neck and on my stomach.*

Q: *Yes go on.*

A: *Then he kissed me on my vagina and then he turned me upside down and he placed his penis inside my anus.*

Q: *And this incident that you have explained to the court is it true?*

Mr. C. Lucas: My lord, note her time to answer.

A: *No.*

[36] The change in the child from the first session of cross examination in October 2015 to the second on 11 December 2015 is marked. It is clear that something or someone had managed to affect the child. The Trial Judge perceived that the child had begun to change her evidence when she felt sympathy toward her father. This is a perfectly reasonable reason to attribute to an 8 year old. The Judge did not err in accepting that this was the reason for her change, and therefore was correct to reject that the recantation was a genuine recantation, but rather the attempt of a child to consider amending her evidence to "make things right".

[37] The Appellant has attempted to state that the reason for the recantation was not because of sympathy for her father, but rather as a result of the removal of the social services official from the videolink room. The Appellant attempted to state that the social services official had been coaching the child's evidence, however there was no proof to support this allegation and it therefore must fail. Ground 7 is therefore dismissed.

[38] It is sadly not uncommon for younger children to recant their evidence. The younger the child, the more likely the 'recantation'.[14] Studies show that most children who recant are telling the truth when they originally disclose.[15] The relationship the child has with the

[14] Lindsay C Molloy & Allison P Mungo, "Children's Recantation of Adult Wrongdoing: An Experimental Investigation'' 145 Journal of Experimental Child Psychology (2016) 11-21

[15] Sanford Health, North Dakota
Accessed at < https://bismarck.sanfordhealth.org/dcac/families/overview.asp> on 30 July 2018

perpetrator of the abuse and other caregivers (who may have close relationships with the perpetrator) can create feelings of loyalty and dependence which lead the child to delay disclosure of wrongdoing out of a wish to protect the known and trusted adult from the expected consequences.[16] Therefore, alleged victims will expect situations such as family disruption, negative emotions, punishment etc when they have close relationships with the perpetrators.[17] Furthermore children in these circumstances are both less willing to disclose sexual abuse promptly and more likely to recant allegations.[18]

[39] Recantation is largely a result of familial adult influences rather than a result of false allegations.[19] It was found that 48.3% of the children who recanted their statements of sexual abuse eventually reaffirmed at least some part of those statements.[20]

[40] Recantation is often considered by the court to be indicative of the untruthfulness of a witness and courts will sometimes look for other "significant indicia of reliability" such as a consistent series of accusations naming the accused as the perpetrator. [*US v Renville,* 779 F.2d 430, 432 (8th Cir. S.D. 1985).

[41] I am in agreement with the Trial Judge that the tested evidence of the child prior to the recantation was consistent and believable, and that the evidence given on the morning of

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[16] Lindsay C Molloy & Allison P Mungo, "Children's Recantation of Adult Wrongdoing: An Experimental Investigation'' 145 Journal of Experimental Child Psychology (2016) 11-21

[17] Farrell, 'Factors That Affect a Victims Self-Disclosure in Father-Daughter Incest', 67 Child Welfare (1998) 462-468

Goodman-Browne *et al*, 'Why Children Tell: A Model of Childrens Disclosure of Sexual Abuse', 27 Child Abuse & Neglect (2003) 525-540

Hershkowitz *et al* , 'Exploring the Disclosure of Child Sexual Abuse with Alleged Victims and Their Parents', 29 Child Abuse & Neglect (2007)

Lawson & Chaffin, 'False Negatives in Sexual Abuse Disclosure Interviews: Incidence and Influence of Caretaker's Belief in Abuse in Cases of Accidental Abuse Discover by Diagnosis of STD', 7 Journal of Interpersonal Violence (1992) 532-542

Mian, Wehrspann, Klajner-Diamond, Lebaron & Winder, 'Review of 125 Children 6 years of Age and Under Who Were Sexually Abused', 10 Child Abuse & Neglect (1986) 223-229

Sauzier, 'Disclosure of Child Sexual Abuse: For Better or For Worse', 12 Psychiatric Clinics of North America (1989) 455-469

[18] Goodman-Browne *et al* , 'Why Children Tell: A Model of Childrens Disclosure of Sexual Abuse', 27 Child Abuse & Neglect (2003) 525-540

Hershkowitz *et al*, 'Exploring the Disclosure of Child Sexual Abuse with Alleged Victims and Their Parents', 29 Child Abuse & Neglect (2007)

Malloy *et al,* 'Filial Dependency and Recantation of Child Sexual Abuse Allegations', Journal of the American Academy of Child & Adolescent Psychiatry (2007) 162-170

[19] Lindsay C Molloy & Allison P Mungo, "Children's Recantation of Adult Wrongdoing: An Experimental Investigation'' 145 Journal of Experimental Child Psychology (2016) 11-21

[20] *Ibid*

11 December 2015 could be discarded because it is clear that there has been some influence on the child which has affected her further evidence. The in-court recantation is different from recantation of statements provided prior to the trial, or recantations after the conclusion of the trial. In this case, the evidence of the child regarding the incident was on the record and consistent with her previous statements to her mother and the police officer. The evidence on that day is the only departure from her statement of the incident.

[42] The Defence pointed out that there were several inconsistencies in the version of events as portrayed by the Complainant and that portrayed by the Defence witnesses. These particularly related to minor details, such as whether her brother had dinner, the reason given for staying home from school, whether or not she had been caught watching a pornographic movie by her grandmother and trouble she had gotten into at school. *In Zialor v R [2017] SCCA 42* this court held that when dealing with inconsistencies in a child witnesses' evidence "[w]e have to determine, therefore, whether or not the inconsistencies were material ones that could affect the Complainant's evidence on the essential issue that she had been sexually assaulted by the Appellant" (at [20]). In *Zialor* the court cited with approval *Vilakazi v The State* (636/2015) [2015] ZASCA 103 (10 June 2016)—

> *"In Woji v Sanlam Insurance Co. Ltd 1981 (1) SA 1020 9A) Diemont JA provided a helpful guide to approaching the evidence of young children. The guide highlights, as the focal point, the trustworthiness of the evidence. At 1028A-E of the judgment the learned Judge said:*
>
> > *"The question which the trial Court must ask itself is whether the young witness' evidence is trustworthy. Trustworthiness, as is pointed out by Wigmore in his Code of Evidence para 568 at 128, depends on factors such as the child's power of observation, his power of recollection, and his power of narration on the specific matter to be testified. In each instance the capacity of the particular child is to be investigated. His capacity of observation will depend on whether he appears "intelligent enough to observe". Whether he has the capacity of recollection will depend again on whether he has sufficient years of discretion "to remember what occurs" while the capacity of narration or communication raises the question whether the child has "the capacity to understand the questions put, and to frame and express intelligent answers" (Wigmore on*

Evidence vol II para 506 at 596). There are other factors as well which the Court will take into account in assessing the child's trustworthiness in the witness-box. Does he appear to be honest – is there a consciousness of the duty to speak the truth? Then also "the nature of the evidence given by the child may be of a simple kind and may relate to a subject-matter clearly within the field of its understanding and interest and the circumstances may be such as practically to exclude the risks arising from suggestibility" (per Schreiner JA in R v Manda [1951] (3) SA 158 (A)]). At the same time the danger of believing a child where evidence stands alone must not be underrated."….

"Inconsistencies must, therefore, be measured by the yardstick of seriousness and materiality which must be linked with the overall issue of truthfulness. Not every inconsistency is serious and material, and inconsistencies need not affect per se the appreciation by a trial court that a particular witness's testimony is true." [21-22]

[43] In the present case, the inconsistencies pointed out by the defence are not material, and therefore do not affect the overall assessment of credibility by the Trial Judge who held that these minor inconsistencies were non-consequential. I have no reason to disagree with the finding of the Trial Judge in this matter.

Grounds 1a, b, d and 6

Ground 1a: The Judge erred in law by failing to warn himself of the dangers of convicting on the basis of the uncorroborated evidence of the child;

[44] The Defence relies on the dicta in *R v Albert* (2008) SLR 348 at 359 in which Perera ACJ, as he was then, held that:

"[C]orroboration is required in sexual offence cases, especially when young children are victims, due to the danger that allegations can be easily fabricated, and it becomes extremely difficult for the accused to refute. However, as a matter of law, such corroboration is not required to be corroborated where the Trial Judge is satisfied, after warning himself of the danger of convicting on uncorroborated evidence, that the victim is truthful."

[45] At paragraph 33 of the Judgment of this case, the Judge clearly warns himself of the dangers of convicting on the basis of the evidence of a child. The Judge is seen to take into account the factors affecting the child's testimony, including, her tender age, her vulnerable status in giving evidence in respect of sensitive matters relating to indecent acts which were committed against her. He considered the closeness of relation between the child and her father, a person who she admitted that she loved. The Judge found that the evidence of the child, up until her recantation was cogent and truthful.

[46] Having come to that conclusion that the child was telling the truth, the necessity to look for corroboration falls away (*Lucas v R* (2011) SLR 313). I therefore cannot fault the findings of the Judge in this circumstance. Ground 1a is therefore dismissed.

Ground 1b That the Judge erred in law because the child's character and truthfulness had been discredited by her admissions of being coached by Social Services and that she liked to lie;

[47] There was no proof of any inappropriate involvement by the Social Services officer. The complainant admitted that she had met with the Social Services officer, but consistently stated that she had been told to tell the court the truth. There was no evidence of any coaching on the facts of the case or how to answer questions. Moreover, the Trial Judge correctly found that the Social Services officer was only assigned to the case after the initial complaint was made, and there is no reason on record as to why the Social Services officer would have a motive to frame the Appellant.

[48] I cannot fault the Trial Judge's finding that the complainant was not coached by the Social Services officer.

[49] With regard to the allegation that the complainant had stated that she like to lie, there is no evidence of this in the record. Again I uphold the Judge's finding that there was no truth to the allegation of the Defence that the complainant liked to lie. The Trial Judge came to an opinion that the Complainant was telling the truth and that the attacks to her character were unimpressive. I agree with this finding, and Ground 1b is therefore dismissed.

Ground 1d That the Judge erred in law because there was no medical evidence of harm to the child, and defence witnesses presented circumstantial evidence to infer that the child was not injured or different in behaviour following the incident

And

Ground 6. That the evidence of the Defence was "overwhelming", "true, cogent and fully corroborated" and therefore should have led to an acquittal.

[50] The evidence of the Defence consisted of an unsworn dock statement and the testimony of three persons who were not present on the night of the incident and merely observed the complainant the day after the incident.

[51] It should be remembered that "the unsworn evidence of the Appellant from the dock by the Appellant which was subject to the infirmities of not being under oath and not tested by cross-examination … holds much less weight and value than the testimony of the [complainant] which had no such infirmities and had no material inconsistencies or contradictions." [*Hoareau v R* CN01/2015 delivered 19 February 2016 at [11]].

[52] The dock statement of the Appellant further proves the credibility of the Complainant's version of the events on the evening of 27 July 2015 leading up to the incident. However, the bare denial of the incident by the Appellant cannot serve to dispel the cogent testimony produced by the complainant regarding to the incident.

[53] The Trial Judge was correct in his weighing of the evidence of the Defence in the judgment from paragraphs [45-49], and the Appellant has given no reason to replace the Trial Judge's assessment of the facts with any other. Ground 1(d) and 6 therefore are to be dismissed

Ground 4 - The conviction on the first Count was incorrect as the Judge had made a finding that there had been no penetration of any body orifice.

[54] The Appellant was found guilty of offences in terms of section 135(1) of the Penal Code. Section 135(1) provides: "A person who commits an act of indecency towards another person who is under the age of fifteen years is guilty of an offence and liable to imprisonment for 20 years".

[55] An act of indecency in terms of section 135 is a broader category of sexual offence than those specified in section 130. The section is titled "Sexual interference with a child". In *R v Albert* (2008) SLR 348 at 351-352Perera ACJ (as he was then) held that the "essence of this section is the act of indecency" and in citing *R v Court* [1988] 2 All ER 221 defined indecency as being "manifested in conduct, at least to the extent that 'right-minded persons' would consider, without reference to any uncommunicated motive of the defendant, that the conduct in question might involve indecency", and "overtly sexual in nature".

[56] The acts particularised on the charge sheet, namely the penetrating of the anus of the victim, and the licking of the vagina of the victim, are both (undoubtedly) objectively indecent to be performed on a child under the age of 15 and overtly sexual in nature.

[57] With regard to the accuracy of a charge sheet, the Criminal Procedure Code (CPC) at section 111 states that "[e]very charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."

[58] To this end it must specify the offence and then provide reasonable information as to the nature of the offence. Furthermore, at section 114 (f) the CPC states that "Subject to any other provisions of this section it shall be sufficient to describe any place, time, thing, matter, act or omission whatsoever to which it is necessary to refer in any charge or information in ordinary language, in such a manner as to indicate with reasonable clearness the place, time, thing, matter, act or omission referred to." Both provisions anticipate some inaccuracy in the language of the charge sheet, and cater to this with the qualifier "reasonable".

[59] In *Amelie Builders vs Republic* [2013] SLR 511 the Seychelles Court of Appeal cited with approval the case of *R v Ayres* [1984] AC 447 at 461 that:

> *" if the statement and particulars of the offence can be seen fairly to relate to and to be intended to charge a known and subsisting criminal offence but plead it in terms*

which are inaccurate, incomplete or otherwise imperfect, then the question whether conviction on that indictment can properly be affirmed under the proviso must depend on whether, in all circumstances it can be said with confidence that the particular error in the pleading cannot in any way have prejudiced or embarrassed the defendant"

[60] This was cited with approval in *Leon v R* [2015] SCSC 221 at [10]. It was also stated that it is significant whether the accused "had been misled by the particulars of the charge and had not been given the opportunity to adduce evidence" (*Wright v Nicholson* [1970] 1 All ER 12).

[61] In the present case, the Judge held that the act of penetration had not been proven, however continued to enter a conviction on both charges. The complainant had been clear that there had been interference with her *deryer*, however, it was in dispute as to whether there was partial or full penetration, as the victim testified that the Appellant stopped as soon as she cried out in pain.

[62] Penetration is not essential as the interference with the child's anus would be sufficiently covered by the charge. When the amendment to section 135(1) was introduced in 1996 the legislature in explaining the reasons in Bill no 9 of 1996 stated that:

"Instead of having an offence for each variant circumstance, this draft has sought to group together under one offence as many sexual offences with the same basic constituent elements. The additional specificity of each offence becomes relevant only for the purpose of determining the penalty which the court can impose on the offender." [R v Khan CS 37/1998].

Therefore the specificity of anal penetration is relevant only with regard to the penalty.

[63] Moreover, section 344 of the Criminal Procedure Code provides that

"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."

[64] Therefore, ground 4 must be dismissed as the Appellant has not satisfied me that the Judge erred in convicting the Appellant in terms of Section 135.

Ground 2 - That the Judge erred in his assessment of the weight of the evidence as a whole

[65] On appeal, it is for the Appellant to show reasons why the conviction should be overturned. *(Naiken v The Republic* [1981] SLR 19). This has not been discharged. The Defence's witnesses did not introduce any doubt as to the version of events that the complainant put forward. Counsel for the Defence attempted to attack the character of the young girl (saying she's a liar, a trouble maker and watched blue movies), the motives of the mother and the social worker, but did not introduce any reason why the prosecution case ought not be believed.

[66] During the hearing it was suggested that the Trial Judge erred by suggesting that State Counsel approach the Attorney General after the complainant's recantation to seek further instructions. It was inferred by the Appellant that the Trial Judge did not believe the evidence himself and acted wrongly in making such a suggestion. It is, however, common for Trial Judges to enable state counsel to adjourn to contact the AG regarding going further with the case, specifically as the AG bears the responsibility for all prosecutions in the country. Absolutely no negative connotations can be drawn from this action.

[67] For all the aforementioned reasons, I see no merit in the Appellant's grounds of appeal against conviction and dismiss them. The appeal is dismissed accordingly.

M. Twomey (JA)

Signed, dated and delivered at Palais de Justice, Ile du Port on 31 August 2018.