

**IN THE SEYCHELLES COURT OF APPEAL**

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

**CriminalAppeal SCA 13/2017**

**(Appeal from Supreme Court Decision CO 49/2015)**

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Graham Ravel Julian Pothin

Appellant

Versus

The Republic

Respondent

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Heard: 20 August 2018

Counsel: Mr. C. Lucas for the Appellant

Mr. H. Kumar for the Respondent

Delivered: 31 August 2018

**JUDGMENT**

**A.** Fernando (J.A)

1. The Appellant has appealed against his conviction for the offences of committing acts of indecency of a girl under the age of 15 years by penetrating her anus and licking her vagina.
2. The learned Trial Judge in convicting the Appellant had stated: “I am satisfied beyond reasonable doubt that the accused committed acts of indecency on the victim and hold that the prosecution has proved all the elements contained in Counts 1, other than the act of penetration and all the elements of the charge contained in Count 2 beyond reasonable doubt.” In saying this, the learned Trial Judge had accepted that ‘penetration’ was an element of count 1 in view of its particularisation in count 1 as set out below. Therefore this also amounts to him saying that the particulars as set out in count 2 was part of the elements that had to be proved in respect of count 2.

3. The two charges, with names of the accused and victim being withheld, read as follows:

Count 1

*Statement of offence*

Committing an Act of Indecency on a person below the age of 15 years Contrary to and Punishable under Section 135 (1) of the Penal Code Cap 158.

*Particulars of offence*

X (name withheld), of Anse Boileau, Mahe on the 27<sup>th</sup> July 2015, at Anse Boileau, Mahe committed an act of indecency towards Y(name withheld), a girl under the age of 15 years by penetrating the body orifice, namely, the anus of said Y with his penis.

Count 2

*Statement of offence*

Committing an Act of Indecency on a person below the age of 15 years Contrary to and Punishable under Section 135 (1) of the Penal Code Cap 158.

*Particulars of offence*

X (name withheld), of Anse Boileau, Mahe on the 27<sup>th</sup> July 2015, at Anse Boileau, Mahe committed an act of indecency towards Y(name withheld), a girl under the age of 15 years by licking the vagina of the said Y.

4. **Section 135 (1) of the Penal Code** deals with sexual interference with a child. The section states:

“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:

Provided that where the person accused is of or above the age of 18 years and the act of indecency is of a kind described in subsection 2(c) or (d) of section 130(2) the person shall be liable to imprisonment for a term not less than 14 years and not more than 20 years.....”

5. **Subsection 2 (c) or (d) of section 130(2) of the Penal Code** deals with:

“(c) the non-accidental touching of another with one’s sexual organ, or  
(d) the penetration of a body orifice of another for a sexual purpose.”

6. 'Act of indecency' has not been defined in the Penal Code. For an act to be considered 'indecent' there needs to be a sexual connotation present. It can generally be defined as any act that a right minded person would find contrary to acceptable standards of decency. Different terminology has been used in the Penal Code in respect of sexual offences, and this can often lead to confusion. For example 'sexual assault', 'indecent assault', 'act of indecency', 'sexual interference' and 'carnal knowledge, which of course means sexual intercourse'. There is no doubt however that 'anal penetration' and 'licking of the vagina' are acts of indecency. At **paragraph 1-190 of Archbold 2012** it is stated: "*Where an offence charged depends on allegations which could be put on several different footings it is incumbent on the prosecution to particularise the facts on which it relies in support of the allegations*" and cites the case of **R VS Litanzios [1999] Crim.L.R. 667** in which it was said: "*that a count for cheating the public revenue should be drafted with sufficient detail to inform the court and the defence as to the exact nature of the factual allegation, and so as to eliminate the possibility of a conviction on either of two alternative bases.*" The same could be said of the offence of committing an act of indecency.
7. Therefore it is important that when filing charges against an accused it is necessary to inform the accused "*as far as is practicable...and in detail of the nature of the offence*". This is a guaranteed right of an accused in the Charter of Fundamental Rights which is enshrined and entrenched under **article 19(2)(b) of the Constitution**. It is for this reason that our **Criminal Procedure Code at section 111** requires that in addition to stating the specific offence with which the accused person is charged, the charge must contain "*such particulars as may be necessary for giving reasonable information as to the nature of the offence charged*", so that an accused would be "*adequately facilitated in preparing a defence to the charge*". This too is a fundamental right of an accused person under **article 19(2)(c) of the Constitution**, and a necessary element of the right to a fair hearing under **article 19(1) of the Constitution**. In the South African case of **S V Langa 2010(2) SACR 289 (KZP)** the majority of the Court recognized the principle that "*a fair trial demands that an accused has the requisite knowledge in sufficient time to make critical decisions which will bear on the outcome of the case as a whole. It is for this reason that a charge sheet ought to inform an accused with sufficient detail of the charge he or she should face. It should set forth the relevant elements of the crime that has been committed and the manner in which the offence was committed*". In the Australian case of **Johnson V Miller [1937] 59 CLR 467 Dixon J** said: "*A defendant is entitled to be apprised not only of the legal nature of the offence with which he is charged; but also of the particular act, matter or thing alleged as the foundation of the charge.*"
8. In this case both charges had set out in specific detail the nature of the act of indecency committed and therefore the prosecution cannot be faulted in regard to

the drafting of the two charges. I shall however deal with the issue as to whether there was evidence in this case to prove the commission of the acts of indecency as particularised, namely, penetrating the body orifice, the anus of Y with his penis by the Appellant and licking her vagina. Once the prosecution states with specific particularity the nature of the offence, it becomes an element of the offence that needs to be proved as against the accused by the prosecution beyond a reasonable doubt. The learned Trial Judge had accepted that 'penetration' was an element of count 1 in view of its particularisation in count 1 as stated at paragraph 2 above. It is to be noted that an accused defends him on the basis of the charge levelled against him.

9. The **Supreme Court of Canada in H. M the Queen VS N. H. Rooke and R. C. De Vries, indexed as R. V. Saunders [1990] 1 SCR 1020. 1990 CanLII 1131 (SCC)** stated: *"It is a fundamental principle of criminal law that the offence, as particularized in the charge, must be proved. In Morozuk V The Queen, 1986 CanLII 72 (SCC), [1986] 1 S.C.R. 31, at p. 37, this Court decided that once the Crown has particularized the narcotic in a charge, the accused cannot be convicted if a narcotic other than the one specified is proved. The Crown chose to particularize the offence in this case as a conspiracy to import heroin. Having done so, it was obliged to prove the offence thus particularized. To permit the Crown to prove some other offence characterized by different particulars would be to undermine the purpose of providing particulars, which is to permit "the accused to be reasonably informed of the transaction alleged against him, thus giving him the possibility of a full defence and a fair trial": R V Cote, 1977 CanLII (SCC), [1978] 1 S.C.R. 8, at p.13."*In the case of **R V Dalton (R.C.), 1999 CanLII 19775 (NL SC) the Supreme Court of Newfoundland and Labrador** stated: *"Each element of the indictment, including the "particulars" must be proved beyond a reasonable doubt.*

#### 10. Evidence in Brief:-

The mother and father of the victim, the Appellant, were separated but were on talking terms and the children used to visit their father and he had access to them. The victim and her 4 year old brother lived with their mother and their maternal grandmother at Baie Lazare, while the father lived at Anse Boileau. It was the mother of the victim who had told the Appellant to keep the victim and her younger brother at his house on the 27th of July 2015, namely the day of the alleged incident, and send them to school on the 28th as she was unable to take care of them that day, as she was working. The Appellant had therefore taken them from school to his house.

The victim, who was 8 years old, had given a detailed description of what the victim, her brother and the Appellant did from the moment she came to her father's,(the Appellant), house up to the time the alleged incident took place. She had also said how her paternal grandmother helped her with her homework. She had then gone on to describe the alleged incident in detail. In her examination-in-chief, the victim had said that when she had gone to sleep in her bunk bed the Appellant had asked her to come to his bed and sleep next to him. He was naked at that time. When she went to his bed he had touched her vagina putting his fingers underneath the boxer she was wearing. Her brother was also sleeping on the same bed. She had then got frightened as this was the first time that the Appellant had done it, and had therefore gone back to the bunk bed. The Appellant had then grabbed her from his arms and come up to the bunk bed. The Appellant had then started to kiss her underneath her neck, going down to her belly. She had alleged that he had kissed her twice in her mouth and then kissed her vagina. Thereafter he had turned her face down and had inserted his penis into her buttocks. It had been painful and she had started to cry. He had then stopped and asked her to apply vaseline. After the alleged incident, she had gone to sleep. When she woke up the next day her buttocks had been painful and therefore had not gone to school. In the afternoon she had gone back to her mother's house at Baie Lazare. She had not reported the matter to her maternal grandmother but reported it to her mother when she returned from work.

The victim had admitted under cross examination that her class teacher was not kind to her as she was naughty, did not listen in class, did not do her homework and quarrelled with other children and bit them. She had also admitted that she watched a blue film but later retracted that evidence. Having earlier denied that her grandmother assisted her with her homework, the victim later had come round to admit it.

The mother of the victim had said on the 28th of July 2015 around 5.00 pm when she disembarked from the bus on returning from work, the victim had met her and told her that she had something to tell her and if she did, she would either fight with the father or go to the police. It is after she had pressured her to tell that the victim had related to her what the Appellant had done to her on the night of the 27th. She had then taken the victim straight to the Baie Lazare Police station to lodge a complaint against the Appellant. What the victim told the mother of the victim does not amount to corroboration of the victim's evidence but may only

show her consistency. Under our law previous statements made to the police or any other person by a witness are not admissible.

The Appellant had made an unsworn statement from the dock. He had said that the mother of the victim had called him and had requested of him to take his two children to his house on the 27th of July. While hanging up the phone she had asked him if they could get back as they had been separated for a while. When he turned down her request she had told him that he “will see much more”. He had then hung up but as requested taken his children home. The Appellant had then gone on to describe what happened after he brought his children home, what they did, them having dinner, and going to sleep. His son had not been feeling well and when he contacted the mother of the victim she had asked him not to send the children to school the next day. The following morning the Appellant had gone to his mother’s place where the victim and her brother had played, climbed trees, and the victim had swum in the sea. Returning back to his house the Appellant had requested the victim and her brother to get back to their mother as he had to go to Silhouette. After a while he had received a call from the victim’s mother accusing him and informing him that she will be reporting him to the police. He had then gone to the Anse Boileau Police Station with his mother, the grandmother of the victim. At the police station he had been arrested. The Appellant had vehemently denied that he sexually abused the victim, his daughter, or did any of the things the victim had alleged he did. According to the Appellant “These stories had been fabricated because of her (*mother of victim*) feeling angry me not getting back to her...” (verbatim).

The paternal grandmother, who had been a teacher for 33 years, testifying on behalf of the defence had stated that she used to help the victim with her home work and spend time with her. According to her, the victim was stubborn and naughty at times and would not admit to a wrong she did. She had once caught the victim watching a blue movie with her younger brother and playing with his penis by putting her hand inside his trousers. She had not reported it to the victim’s mother as they were not in good terms. She had confirmed that the Appellant had come to her house on the 28th, namely the day after the incident, with his two children. The victim had been running about playing, climbing trees and feeding the animals. The victim had later swum in the sea. The victim’s brother had not been feeling too well, but the victim was acting normal. She said that she accompanied the Appellant, her son to the police station, where he was arrested.

11. The Counsel for the Appellant has filed seven grounds of appeal but in our view missed out on the most salient points, namely the total lack of evidence to sustain the two charges as a result of the victim and the sole witness to the incidents, retracting her evidence given in examination-in-chief, during her cross-examination and re-examination; which we, as the final appellate court cannot ignore and even if the evidence given in examination-in-chief by the witness is to be relied upon as credible, the essential elements of the offences as particularised in the charges had not been proved by the prosecution beyond a reasonable doubt.
12. The victim having given evidence to sustain the two charges during her examination-in-chief had retracted her evidence whilst under cross-examination. We record below the victim's evidence in cross-examination as per the proceedings:

“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? Y 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 1<sup>st</sup> question first.

Q: Y tell us seriously has your father ever used his penis to put into any part of your body?

A: No.

Q: Are you scared of your father?

A: No.

Q: Do you love him?

A: Yes”

13. The victim having repeated just once in re-examination, what she had said in her examination-in-chief, had thereafter in answer to the learned Prosecuting

Counsel's very next question "And this incident you have explained to the court is it true" had affirmatively said: "No".

14. We **record** below the victim's evidence in re-examination thereafter:

"Q: Are you saying you are lying to the court when you said these things happened to you?

A: Yes.

Q: So on the 27<sup>th</sup> of July 2015 these things that today this morning now you just said your father did to you that he kissed you on the mouth, on the neck, on your belly and then on your private part, and then he turned you over and put his penis these are not true; is that what you are saying to the court?

A: Yes.

Q: So tell me **Y** when you said to the court that on the 27<sup>th</sup> of July 2015 that your father put his penis in your bum and that it hurts this also is a lie?

A: Yes.

Q: So you are telling the court that these things never happened and you said you lied when you said these things happened?

A: Yes."

And finally after much objection and argument from the Counsel for the Appellant, and after much pleading by the learned Prosecutor, the learned Trial Judge had allowed the question from the learned Prosecutor, which had previously been asked over and over again by the Prosecuting Counsel, but which she said would be her last question, namely:

"Y on the 27<sup>th</sup> of July 2015 when you said that your bum bum was hurting because your father put his penis in your bum bum is that true or is it not true?, the victim's answer had been: "It is not true". (emphasis added)

15. The learned Trial Judge at paragraph 40 of his judgment had said:

"In sexual assault cases, vulnerable witnesses recanting their evidence are not unusual. There could be instances when a vulnerable witness recants her version at the very beginning of her evidence or refuses to speak. In such instances, there is nothing a court could do. There are instances when vulnerable witnesses recant their evidence after conviction and letters are sent to court after the conviction has been entered. It is the duty of the Court to analyse the evidence before it and be mindful of the fact that it is dealing with the evidence of a child witness and decide whether the child is lying about the incident of sexual assault or has decided to recant or change the truth of the incident of sexual assault due to



external factors such as pressure, threat, duress, sympathy, etc.” (verbatim and emphasis added)

16. The learned Trial Judge in deciding to convict the Appellant and placing reliance on the victim’s evidence, had taken into consideration that the victim, was only 8 years old at the time of the incident, is considered in law as a vulnerable witness, was testifying in relation to very sensitive sexually oriented acts committed on her by her own father whom she admitted she loved and still loves, had in her evidence in chief given a very detailed account of the indecent acts committed on her, and that she maintained her evidence unchanged for a period of two sessions of intense cross examination. In cross-examination, initially or subsequently, the victim did not maintain her version given in her examination-in chief. Thus the learned Trial Judge had erred in stating at paragraph 41 of his judgment that the victim had maintained her version given in her examination-in chief and in her initial cross examination.
  
17. We are conscious of the fact that the cross-examination of the victim on the 20<sup>th</sup> October 2015 had commenced 18 days after her examination-in-chief, namely on the 2<sup>nd</sup> October 2015 and continued on the 11<sup>th</sup> of December 2015 after a further adjournment of 51 days from the earlier cross-examination. It was only on the second date of cross-examination, that Counsel for the Appellant had started questioning the victim about the incident per se and it was then the victim recanted her evidence given in examination-in chief. The cross-examination of the witness is recorded in 60 A4 pages, while the examination-in-chief in 41 pages and the re-examination in 17 pages amidst objections and interruptions. That part of the cross-examination pertaining to the incident per se is recorded in 4 pages. We do note that Counsel for the Appellant had wasted much time of the court in cross-examining the victim on matters which had no real bearing on the case, especially as to what happened in the Appellant’s house since she returned from school and up to the time of the alleged incident. The victim had also been cross-examined on matters such as, that she had been coached by her mother and the lady from the Social Services under the mother’s influence and some questions that would have a bearing on her behaviour and credibility. This questioning however was in our view not with the intention of causing annoyance to the witness. We are however of the view that continuation of the examination of the victim continuously on two days, and without breaking it up into slots of one hour or less, is a very unsatisfactory state of affairs and shows poor management of the case by the learned Trial Judge, but this cannot be held against the Appellant. We should however bear in mind that deprivation of the opportunity to cross examine and test and probe the evidence so that there could be a proper assessment as to the witness’ credibility may breach an accused’s rights enshrined in articles 19(1) and 19(2) (e) of the Constitution. **Article 19 (1)** guarantees the right to a fair hearing and **article 19(2)(e)** the right to cross examination. In the case of **PM and the**

**Queen [2008] EWCA Crim 2787 Lord Justice Moses** said: *“We comment that whilst, of course, a judge must take into account the strain on witnesses, particularly in relation to cases where sexual offences are alleged, and the impact of delay on those witnesses and on the criminal justice system, such considerations can never trump the requirement to ensure a fair trial.”*

18. The learned Trial Judge had stated: “However, quite suddenly, on the 11<sup>th</sup> of December 2015, after an earlier adjournment of the hearing on the 13<sup>th</sup> of November, her evidence changed. The abrupt change is clearly borne out in the proceedings dated 11<sup>th</sup> December 2015, aggravated further by the following question being put by learned counsel for the defence.” The question from the defence counsel is the one stated before the comment from court set out at paragraph 12 above, namely, “Court: All that is not necessary, let her answer the 1<sup>st</sup> question first.” The second part of the question, namely, “Y this is a very important question because your father is in court because for that reason he risks spending 14 years in prison”, which was in the form of a suggestion had not been put to the witness on an order of the learned Trial Judge. The learned Trial Judge had further stated: “The change is very abrupt and sudden and no doubt aggravated by the question referred to above. It is to be observed that in cross examination, the witness had expressed the love she felt towards her father.” It is to be noted that the second part of the question was never put to the witness on the order made by the Judge and was “blocked by court”, that the witness was giving evidence via video link and from a place outside the court room, and all questions that were put to her in English, by both counsel had been translated to her in Creole and there was no way that that the second part of the disallowed suggestion was heard by the witness to have resulted in her “very abrupt and sudden change” as stated by the learned Trial Judge. We have listened to the tape recording of the proceedings of that part of the evidence and find that the suggestion made by Counsel for the defence had not been translated and put to her.

19. The learned Trial Judge had at paragraph 35 of his judgment, set out what he believed to be the fundamental issue before the court when he stated: “It would be necessary for this Court to further analyse the evidence of this witness, to determine whether the change was due to sympathy she felt towards her father or was it because she had been initially lying about the indecent assault committed on her by the father at the instigation of her mother, as suggested by the defence.” In stating this, the learned Trial Judge had failed to realize that ‘sympathy for the father’ could be either because of the love she felt towards him or because she knew that she had lied in the first instance and thus as a result of the realization of guilt, whether with or without any instigation by her mother. Love and the feeling of guilt are emotions that can both bring about sympathy. Thus the basis on which he proceeded to analyse the evidence is faulty.

20. The learned Trial Judge who saw the witness testifying and her demeanour throughout her examination by both counsel had not commented in his judgement or otherwise of any impact on the child witness of the lengthy cross examination by the Defence Counsel. This Court on its own cannot come up with other possible reasons for the recantation of the evidence by the child witness, save that of what is mentioned by the Trial Judge, since we have not had the benefit of seeing her testifying. We however bear in mind what was stated by the **Lord Chief Justice, Lord Judge** in the case of **R VS Baker [2010] EWCA Crim 4**, namely: *“We emphasise that in our collective experience the age of a witness is not determinative on his or her ability to give truthful evidence. Like adults some children will provide truthful and accurate testimony, and some will not. However children are not miniature adults, but children, and to be treated and judged for what they are, not what they will, in years ahead, grow to be.”* (emphasis added)
21. The learned Trial Judge had also taken into consideration that the victim had narrated what the accused had done to her the previous night, no sooner she saw her mother the next day and thus had dismissed the defence suggestion that the mother had coached the daughter to fabricate the case against the father because of her animosity towards him. It is to be noted that the accused (Appellant) was separated from the victim’s mother at the time of the incident and the learned Trial Judge had not commented on the Appellant’s testimony that the mother of the victim had told him that he would be “seeing much more” from her, when he refused her request for reconciliation. It is also to be noted that it was the mother who had requested the Appellant to keep the children with him that evening. The learned Trial Judge had also stated that the very detailed account given by the victim “is not indicative of a child whose imagination has run riot after watching a blue film or having kissed a person behind a sofa as suggested by the defence.”
22. It had been the learned Trial Judge’s view that “the recantation and change in her evidence was due to the sympathy she felt towards her father who 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.” This conclusion reached by the learned Trial Judge is baseless in view of what is stated in paragraph 18 above. It is difficult to conceive that the victim who was 8 years old narrated what she said in her examination-in-chief, without any realization of what her testimony would entail and came to realize it only in cross-examination. According to the evidence of the mother of the victim, the victim had hesitated in telling her what had happened thinking that the mother will go and fight with her father the Appellant or will go to the police. Thus she knew very well the consequences of what she was saying from the very outset, even to her mother. The witness throughout had given evidence via video link from outside the precincts of the court. The father had remained in custody from the date of his

arrest, namely the day after the alleged incident up to date.

23. The Judge's conclusion that the recantation and change in her evidence was due to the sympathy she felt towards her father who she loved is possibly an 'assumption' he has made and not based on what the witness had told court nor a necessarily accurate, logical and justifiable 'inference' that could be drawn from the fact that the witness loved her father. A Court cannot make assumptions in a case, for a case has to be decided on the basis of proved facts before it and not on the basis of what it presupposes or takes for granted. However a court is free to draw an inference from facts provided they are accurate, logical and can be justified. An 'inference' is an intellectual act by which one concludes that something is true in light of something else being true, or seeming to be true. An 'assumption', on the other hand, is something we take for granted or presuppose. It is part of our system of beliefs and not something based on facts. To come to a conclusion against an accused on the basis of an inference drawn from a fact, that should be the one and only inference to be drawn from that fact.
24. We could understand a trial court analysing the evidence before it, of a vulnerable witness in a sexual assault case being "mindful of the fact that it is dealing with the evidence of a child witness and decide whether the child is lying about the incident of sexual assault or has decided to recant or change the truth of the incident of sexual assault due to external factors such as pressure, threat, duress, sympathy, etc". But that would be in a case where the child witness had been vacillating in her testimony, but, finally coming round to say that the incident as charged, had in fact happened. That may probably be a case to analyse the victim's evidence, although with a lot of caution. But when the victim and sole witness maintains her denial of the incident even in re-examination and goes on to say that she lied in her examination-in chief, is in my view a situation where there is 'no evidence' to analyse. It is somewhat similar to the situation referred to by the learned Trial Judge at paragraph 40 of his judgment, namely "There could be instances when a vulnerable witness recants her version at the very beginning of her evidence or refuses to speak. In such instances, there is nothing a court could do." (see paragraph 15 above) I do not see a difference between a witness who refuses to speak or recants the version at the very beginning of evidence, and a witness who retracts both in cross-examination and re-examination what was said in examination-in chief. In both instances there is 'no evidence' before the court. To draw a distinction between a vulnerable witness who recants the version at the very beginning of evidence or refuses to speak and a vulnerable witness who recants the version of evidence given in examination-in chief; both in cross-examination and re-examination would amount to discrimination between accused

persons facing prosecutions and would be in violation of **article 27 of the Constitution** which guarantees to every person “*the right to equal protection of the law without discrimination*”. No trial court could or should in our view substitute its opinion contrary to what a victim has testified, to convict an accused. A person is convicted on the evidence before the court and depending on its credibility and the weight that could be attached to it.

25. It is clear from the quoted proceedings below that the learned trial judge, after the closure of the prosecution case, had doubts about the continuation of the case, when counsel for the Appellant informed court that he intended to make a submission of no case to answer. This is either because he felt that there was no evidence or because he felt that the victim’s evidence in examination-in-chief had become manifestly unreliable in view of her evidence in re-examination where she categorically stated that what she had told court in her examination-in-chief were lies. This also shows that he had not believed the victim’s evidence given in examination-in chief. There was no evidence in the defence case which could have given a boost to the prosecution case, save the fact it created further doubts. The quoted proceedings reads as follows:

“Court: Actually whether it is necessary or not I would like the State to reconsider you follow if it is necessary to go further or not. I would like the State to reconsider, I am aware that learned counsel is unable to make a decision of her own on this matter, it would be better is you are armed with the proceedings and you show it to Attorney General, discuss the matter with him and come and let me know whether you intend to proceed with this case or not and you can save a trouble of no case to answer. If you do so I will make the necessary.” (verbatim but emphasis added)

26. We are in a difficulty to understand why this case proceeded after the conclusion of the prosecution case, especially in view of the learned Trial Judge’s observations as referred to at paragraph 24 above. **Section 183 of the Criminal Procedure Code** states:

“*If at the close of the evidence in support of the charge, it appears to the court that a case is not made out against the accused person **sufficiently** to require him to make a defence, the court **shall dismiss the case** and shall forthwith acquit him.*” (emphasis added)

This, in our view the trial court could do ex mero motu or on an application by the defence. The Trial Judge does not have to seek the opinion of the Attorney

General to dismiss a case under any circumstances, for that would go against the concept of the ‘independence of the Judiciary’, enshrined in article 119(2) of the Constitution. The learned Trial Judge in his Ruling on the No Case submission has correctly cited the law applicable in such an instance, namely the case of **R Vs Stiven 1971 SLR 137**, where it had been held that: “when there has been no evidence to prove the essential elements of the offence charged or when the evidence for the prosecution has been so discredited or is so manifestly unreliable that no reasonable tribunal could safely convict on it”; the court shall dismiss the case and acquit the accused. At the close of the prosecution case there was absolutely no evidence against the Appellant to require him to make a defence, since the victim and the sole witness to the incident had completely retracted her earlier testimony. There may have been reasons for her doing so, and until and unless she had gone back to her original stance and given an explanation to her contradictory evidence, a court had no option but to determine that this was a case where there was no evidence.

27. It is clear from paragraph 14 above that the learned Prosecutor herself had doubted the evidence of the victim and had questioned the victim as if she was a hostile witness, although no formal application had been made to treat her as hostile. This explains why the learned Trial Judge had asked “the State to reconsider” whether “it is necessary to go further or not” and to come and let him know whether the State “intends to proceed with this case”.
28. Evidence is anything presented in support of an assertion. It is the demonstration of a fact or the means from which an inference may logically be drawn as to the existence of a fact. It is the means which tend to prove or disprove any matter of fact. If what is presented is completely withdrawn, there is nothing to support the assertion or fact and there is no means to draw any inference as to the existence of a fact. It is where the evidence in the examination-in-chief has thereby been wiped out and reached a state of ‘No Evidence’ or ‘nothingness’.
29. In the case of **The Republic VS Francis Azemia, SC CR 50/2011**, the Trial Judge stated in his Summing Up to the Jury at the trial that all the evidence led by the Prosecution pertaining to taking of blood samples and in relation to it been sent to India for DNA testing and the opening remarks of the Prosecutor as to the DNA evidence which he said strongly implicated the accused; should be disregarded when the Prosecution failed to produce the DNA report to Court. This Court in an appeal against the conviction by Francis Azemia, allowing the appeal went on to state that there had been a serious miscarriage of justice as a result of the failure to produce the report as it would have amounted to “*mental gymnastics for any Jury to disassociate from their minds*” the evidence pertaining to DNA evidence, despite the Trial Judge’s direction to disregard that evidence. There must always be a consistency and continuation of the evidence on a material point without

retraction, the only exceptions being the retracted evidence been brought back to the trial or the availability of a reasonable explanation for the retraction. In this case the victim did not later come back to state that what she told in examination-in chief is in fact the truth but instead further damaged the prosecution case by stating in her re-examination that what she told in examination-in chief were all lies. The possible reason attributed by the learned Trial Judge for the retraction has already been dealt with at paragraphs 18, 19, 22 and 23 above.

30. We could have understood if the learned Trial Judge had questioned the victim at the conclusion of her evidence, for determining the credibility of the recantation, but even this had not been done. In the American case of **People V Shilitano (Shilitano II)** [218] N.Y. 161, 112 N.E. 733 (1916), it had been recommended to hold an ‘evidentiary hearing’ to determine the credibility of the recantation. The court on its own cannot look for possible reasons for the victim’s contradictory evidence. To rely on her evidence even if she had gone back to her original position, in the light of her testimony in cross-examination and more so in re-examination, would be unjust as her evidence would be manifestly unreliable. It is clear from the evidence of the victim itemized at paragraphs 12, 13 and 14 above, that the victim had not only denied that any incident happened but had **admitted several times that she lied to court** about the incident.

31. A decision in a case is made on the basis of evidence that is truthful. That is why witnesses swear upon the bible “to speak the truth, the whole truth and nothing but the truth” and others make a solemn and sincere declaration “to speak the truth, the whole truth and nothing but the truth”. In this case although the child gave unsworn evidence the learned Trial Judge had satisfied himself that the child witness understood what is meant by telling the truth. This is why the learned Trial Judge had correctly stated at paragraph 40 of his judgment: “It is the duty of the Court to analyse the evidence before it and be mindful of the fact that it is dealing with the evidence of a child witness and decide whether the child is lying about the incident of sexual assault or has decided to recant or change the truth of the incident of sexual assault due to external factors such as pressure, threat, duress, sympathy, etc.”. In the circumstances of this case there should have been a clear pronouncement by the learned Trial Judge that the evidence given in examination-in-chief is the truth and that given under cross examination and re-examination was false due to love or sympathy towards the father; if one were to argue that the evidence given in examination-in-chief can be relied upon to convict the Appellant. There is no half way house between truthful and false evidence for either the evidence is truthful and can be relied upon or false and needs to be rejected. It is only the witness himself or herself who could give an explanation as to why he or she gave false evidence on some matter and not for the court to make such an assumption. We have scrutinized the judgment carefully and see no

pronouncement from Court that the evidence given in cross examination and re-examination is false, although there is a pronouncement that “the victim spoke the truth in her evidence in chief”. Further the nature of the evidence of the victim in this case is such that the principle of divisibility of credibility of evidence cannot be applied.

32. ‘Evidence’ of a witness in any trial is not limited to his or her examination-in-chief, but the cross-examination and re-examination. Therefore we are in a difficulty to understand, what the learned Trial Judge meant when he stated in the penultimate paragraph of the judgment, namely paragraph 49: “For all the aforementioned reasons, I will proceed to reject the evidence of the defence and accept the ‘evidence’ of the victim in respect of the indecent assault committed on her by the accused, her father.”, when the victim had completely retracted everything she had said in her examination-in-chief, under the cross-examination and re-examination. Which part of the evidence was he accepting?
33. If reliance is sought to be placed only on evidence elicited in examination-in-chief, the fundamental right of an accused to cross-examine a prosecution witness that is enshrined and entrenched in article 19(2)(e) of the Constitution will be made meaningless. Recantation of evidence whether by a sympathy-stricken witness or conscience-stricken penitent or criminal conspirator to defeat the ends of justice; also makes the entirety of his or her evidence inherently unreliable and destroys the basis of his or her earlier testimony before the court. Reliance on such unreliable evidence will also contravene the enshrined and entrenched right of an accused to a fair hearing under article 19(1) of the Constitution, which necessarily incorporates the fundamental obligation on the Prosecution to prove its case beyond a reasonable doubt.
34. In view of the novelty of the issue that has arisen in this case and since there has been no local precedent on this I have decided to look at this case from the point of view as to what weight should be given to the evidence in examination-in chief, rather than as a matter of law, treat the evidence in examination-in-chief as having been wiped out as a result of the recantation. This necessitates this Court to examine whether there has been any evidence to prove the essential elements of the offences as particularised in the charge and as stated at paragraphs 8 and 9 above. In this light I have examined the evidence given in examination-in-chief in relation to the two charges to see whether there was evidence pertaining to the “penetration of a body orifice, namely, the anus of the victim by the Appellant, with his penis” and whether there was evidence pertaining to “licking the vagina of the victim” as set out in the particulars.
35. The victim had throughout her evidence in examination-in chief used such words such as “put his penis into my buttocks”, in describing the act of penetration. Even



the learned Prosecutor had throughout referred to ‘buttocks’, ‘bum’, ‘bum bum’ while questioning the victim. It is only once, and that, in re-examination the victim had used the word, ‘anus’ in describing the act of penetration, but soon thereafter to the very next question by the learned Prosecutor: “And this incident that you have explained to the court is it true? the answer of the victim had been a definite ‘No’. Thus the victim had known the difference between ‘anus’ and ‘buttocks’. The learned Trial Judge had accepted that there was no penetration at paragraph 39 of his judgment and made reference to this in convicting the Appellant as stated at paragraph 2 above. Nowhere in the testimony of the victim is there a reference to “licking the vagina”. The only reference had been to “kissing the vagina”. The learned Trial Judge in convicting the Appellant has not taken these factors into consideration in his judgment as evinced at paragraph 2 above.

36. The ‘buttocks’ or ‘bum’ are the two rounded portions of the anatomy, located on the posterior of the pelvic region between the lower back and the perineum. It is not a body orifice. ‘Anus’ on the other hand is a body orifice. It is the opening at the end of the alimentary canal through which solid waste matter leaves the body. There is a difference between ‘kissing’ and ‘licking’ in that ‘kissing’ is to touch with the lips or press the lips against, usually to express love or affection or passion, or as part of a greeting; while ‘licking the vagina’ is to stroke the vagina with the tongue and essentially suggestive of sexuality. It cannot be said that the child witness could not distinguish between ‘buttocks’ and ‘anus’ and ‘kissing’ and ‘licking’. If not it was the duty of the learned prosecutor to have clarified by asking a simple question as to from where she passes stools and how she greets someone and eats a lollipop. A prosecutor cannot be vague even when examining a child witness and should find a way to ascertain what really happened especially in a case of sexual assault or committing an act indecency. In creole, the language in which the child witness testified, ‘buttocks’ is referred to as ‘fes’ and ‘deryer’ and anus as ‘trou fes’ and ‘trou deryer’ and ‘kissing’ as ‘anbrase’ and ‘licking’ as ‘lise’. At the hearing of the appeal it was sought to be argued that in a ‘French kiss’ the tongue is involved. In a ‘French kiss’ the participants’ tongue extends to touch each other’s lips or tongue but not the vagina. I am therefore of the view that even if this Court were to accept the victim’s evidence in her examination-in chief, as true; he essential elements of the two charges as particularised had not been established.

37. I have also decided to look at this case and from the view of the second limb of the Stiven principle, namely, when the evidence for the prosecution has been so discredited or is so manifestly unreliable that no reasonable tribunal could safely convict on it. In this case the evidence has been discredited not by other evidence but by the very witness who testified denying her earlier testimony in examination-in-chief and stating in no uncertain words that she lied to court in her examination-in-chief. We have examined some of the English cases such as

**Regina VS W and M[2010] EWCA Crim 1926; Joyce and Joyce [2005] EWCA Crim 1785 and PM and The Queen [2008] EWCA Crim 2787** to see as to what extent a court can act upon evidence given by a witness (child or otherwise), in examination-in-chief, when it has been retracted in cross-examination, but have failed to come across a single case where a determination had been made to convict an accused where the child witness had specifically stated that she lied to court in her examination-in-chief, and where the prosecutor and the Trial Judge had themselves entertained doubts as to the reliability of the child witness' evidence during the course of the proceedings.

38. The evidence of both doctors who examined the victim and testified before the Trial Court had been inconclusive. PW 3, a gynaecologist, who examined the victim, about 24 hours after the alleged incident had said that he had not found any lacerations or any abrasions in the anus. There had not been any hematoma on other parts of the body. The evidence of PW 3 therefore cannot be relied upon to corroborate the victim's testimony in her examination-in-chief. PW 2, the second doctor to examine the victim, three days after the alleged incident had also not been of assistance to the prosecution case. He too had confirmed that there were no lacerations or abrasions in the victim's anus. He had however said that "in children the anal splinter is very strong and almost very closed" and therefore there was a possibility for getting some cuts around the anal arteries. However in view of the absence of evidence from the victim as to anal penetration and the learned Judge's own finding that there was no anal penetration; the doctors' evidence becomes totally useless.

39. We are all concerned with the rise in sexual abuse cases of young children in the Seychelles and our society's abhorrence of such conduct. We therefore wish to echo the words of this Court in **Francis Azemia VS R, CR APP, SCA 14/2012 decided in December 2014; [2015] 2 LRC 798 at 811-812**: *"...It is this type of case, especially in a small jurisdiction like ours, where every citizen is alive to what goes on around him, which puts the judiciary under severe social pressure and puts it to its utmost test in maintaining its impartiality and independence and its commitment to always act in accordance with the rule of law. We need to say that the present outcome of this case is not delivered with a Gaiete de Coeur at our level. However, as impartial and independent judges sitting at the Court of Appeal, the highest court of the land, we owe it to ourselves that we own and operate a justice system in our democratic society that works properly with each and every component of the system, discharging its duties and responsibilities properly and professionally. If that is not so, the risk is not only for a defendant who may be imprisoned but is also for the nation that is imprisoned for life, through a flawed system that will not uphold the principles of due process and the rule of law, in their courts of law...Our constitutional and professional responsibility as impartial and independent judges require that we satisfy this*

*aspiration of the people not only for a fair justice system that operates fairly throughout... We owe it to our people, to ourselves and to every single individual: that every single case that comes to us should pass the test of utmost credibility and integrity according to the established principles of law.”*

40. In view of the many deficiencies in the prosecution case we have no hesitation in allowing the appeal and acquitting the Appellant forthwith.

A.Fernando (J.A)

**I concur:.**

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B. Renaud (J.A)

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