

IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CRIMINAL APPEAL NO. AAU 0056 of 2013
[High Court Criminal Case No. HAC 127 of 2011]

BETWEEN : **BIJENDRA**

Appellant

AND : **THE STATE**

Respondent

Coram : Prematilaka, JA
A. Fernando, JA
P. Fernando, JA

Counsel : Mr. M. Yunus for the Appellant
Ms. P. Madanavosa for the Respondent

Date of Hearing : 14 September 2016

Date of Judgment : 30 September 2016

JUDGMENT

Prematilaka, JA

- [1] This appeal arises from the conviction of the Appellant on the representative count under section 207 (1) and [2] (a) of the Crimes Decree, 2009 alleged to have been committed on 28 November 2010. The Amended Information dated 19 April 2012 describes the particulars of the representative count as the Appellant having had carnal knowledge of P (name withheld) without her consent.

- [2] After trial the Appellant was found guilty of the representative count, the Learned High Court Judge, having concurred with the verdict, imposed a sentence of 13 years of imprisonment and directed that he should serve a minimum term of 11 years before being eligible for parole.

Preliminary observations

- [3] The Appellant had appealed against the conviction and the sentence out of time by way of a letter addressed to and received by the Registrar on 20 May 2013. Legal Aid Commission had filed an amended petition of appeal dated 28.07.2014 following an order of Court on 05 June 2014 only against the conviction on two grounds. At the hearing into the leave to appeal application on 17 October 2014 the Counsel for the Respondent had informed Court that he was not objecting to the application for leave to appeal being considered despite the delay. Chandra RJA had refused leave in respect of both grounds of appeal on the conviction on 26 November 2014. The Appellant on 22 January 2015 had sought to have the application for leave determined before the full Court, presumably under section 35(3) of the Court of Appeal Act. Legal Aid Commission had, thereafter, filed amended grounds of appeal on 22 March 2016 containing 03 grounds of appeal against the conviction and one against sentence. Legal Aid Commission had once again filed additional grounds of appeal on 30 March 2016 with 04 grounds of appeal against the conviction and one against the sentence.
- [4] Legal Aid Commission on behalf of the Appellant and the Respondent had tendered written submissions before the hearing of the Appeal in this Court and at the hearing the Counsel for the Appellant informed court that he was not pursuing appeal ground 2 against the conviction.
- [5] Therefore, the Counsel for the Appellant confined himself only to Grounds 1, 3 and 4 against the conviction and the sole ground against the sentence.

Grounds of Appeal

[6] Therefore, the grounds of appeal that would be considered are as follows.

Ground 1

- (i) 'The Learned Trial Judge caused the trial to miscarry when he relied upon the hearsay evidence of the complainant when mentioning the complainant's aunt one Umra in his summing up at paragraph 12 and 13 without the said Umra being summoned as a witness nor made available for the Appellant.'

Ground 3

- (ii) 'The Learned Trial Judge erred in law and in fact when he failed to direct the assessors on the use of recent complaint evidence to assess the credibility of the complainant.'

Ground 4

- (iii) 'The Learned Trial Judge erred in law and in fact when he misdirected the assessors in respect of the standard of proof by using the phrase "fanciful doubt" resulting in miscarriage of justice.'

Ground on Sentence

- (iv) The Learned Trial Judge erred in exercising his sentencing discretion to the extent that he :
 - (a) Punished the Appellant by adding 7 years as aggravating feature which was excessive;
 - (b) Failed to give more reduction for his mitigating factors.

- [7] Before proceeding to consider the grounds of appeal, I think it is necessary to place on record a narration of the prosecution evidence and that of the Appellant. The prosecutrix, an un-married woman of 24 years had been suffering from serious acne. On 24 November 2010 her mothers' sister, Umra Wati with whom the complainant was living at that time (her parents being away in Lautoka) had taken the victim to the Appellant who had claimed to be possessed by a spirit and offered to help the victim to cure her through his healing powers. The Appellant had served them kava, done 'sevusevu', called up the spirit and described her past, whilst being possessed, to impress and make her believe that he had some super natural powers. He had then demanded \$350 for the medication. Though the complainant had said that she did not have that much of money, Umra Wati had taken the victim again to the Appellant on 27 November, a Saturday saying that she had to go through two processes. The Appellant had again performed 'sevusevu' and made the victim drink kava as an offering from the spirit and gone through the same ritual. She had given him FJD 150 after the 'process' believing in what he said. Thereafter, Umra and the Appellant had engaged in a conversation while the complainant had been asked to wait in another room. After a while Umra had taken the victim home and told that she had to sleep with the Appellant as she was possessed by a spirit and on hearing that she had been shocked and argued with Umra who had said that if she did not sleep with him she would suffer for life. Umra had snatched the victim's mobile phone and not returned it until Sunday except when there was an incoming call and even while the complainant was answering such calls Umra had stood by her. Umra had also prevented one of the victim's cousins visiting her over the weekend and locked the front and back doors of the house and kept the keys with her so that she could not even run away. The victim had repeated that she did not want to sleep with the Appellant.
- [8] On the following day Umra had been heard speaking to the Appellant over the phone. He had arrived at 7.30 p.m. on Saturday with kava and cigarettes for what he called the first secession of healing. He had performed 'sevusevu' and called up the spirit. Thereafter, he had said that the time had come for the victim to sleep with him but she had refused. Then, the Appellant had threatened her and said that he was setting the 'reverse process' in motion which would see her entire family being 'finished' in 10 days. He had made kava dirty and thrown the cigarettes into the bowl. The victim had got scared but still refused to sleep with him and asked him to leave her alone.

- [9] Umra had then slapped the victim and locked her inside the room. The Appellant and Umra had gone out to the sitting area and after a while taken her also there where she had been forced to drink kava to neutralise the reverse spell until she was fully intoxicated and dizzy. She had felt her tongue thick and numb. The Appellant had been calling spirits. A little after midnight Umra had pushed the victim into the room and while the victim was seated on the floor both Umra and the Appellant had engaged in some rituals for about an hour. Thereafter, the Appellant had asked Umra to go out of the room and the Appellant had locked the room with keys given by Umra. The victim had heard Umra increasing the volume of the television very high.
- [10] Then, the Appellant had pushed the victim onto the bed and forced himself on her. He had removed her clothes and she had screamed in vein but no help had come from Umra. The Appellant had then taken his clothes off and told the victim that he was not possessed but was just faking. He had started kissing her mouth and all over the body including her genitals. Thereafter, the Appellant had pushed her head down to his genitals and made her suck them for 2-3 minutes. She had felt like vomiting and the Appellant had pushed her head back and then entered his erected penis in her vagina. He had done it for 05 times at intervals till morning. The complainant had felt that it was the end of her world and wanted to hang herself. At about 7.30 in the morning the Appellant had opened the door and said that the 'process' was over.
- [11] Umra had called the victim to the sitting room and asked her not to reveal what had happened to anyone and that the second part was still to come. Umra had also said that it was not rape but a normal happening. Though the victim had called her family on Sunday she had not told them of what happened as Umra was standing by her and she had threatened to ruin the victim's life if she had spilled the beans. She had been in pain, particularly in the vagina area, during the whole of Sunday. Umra had forced her not to go to work on Monday but she had left home, gone to the work place and told her peers of the ordeal. The officials at her work place had gone to her home and got her luggage. In the afternoon on Monday she had reported the matter to Velelevu Police. She had been examined at the hospital on the 30th November.

- [12] Umra, surprisingly was not charged nor was called as a witness by the prosecution or the defence.
- [13] The Appellant, a vegetable vendor took up the position that he had told the victim and Umra that the complainant had to have sex with her boyfriend to cure all her ailments and it was not good for him to do it as he was married with children. He had explained them the 'procedure' and even on the 27th he had told them of the need for 'sex' for the victim. The Complainant had agreed to have sex but had said that her boyfriend was abroad. Then he had gone to the victim's house in the night and met both her and Umra where he did 'sevusevu'. He had made grog and all of them had consumed it. Having had dinner the complainant had had a wash and asked him also to wash his face and mouth. She had boiled water and given toothpaste to him. The complainant had then showed the room and brought a blanket from Umra's room. Inside the room after chatting for about half an hour the victim had as requested by him removed her dress and asked him to unclip her brassiere. Thereafter, they had engaged in sexual intercourse three times. After that the victim had peeled some fruits for him. Thereafter, he had gone home.
- [14] Medical evidence reveals that the victim had been examined on 30th November, within two days of the incident, and the presence of echymosis on the right arm caused by bruising by a blunt object such as wood or door room. Bruising on the posterior vaginal wall (lower edge of vagina) caused by a finger or an erected penis forcefully entering vagina had also been observed. There had been bleeding from bruising. Victim's hymen had not been intact. The victim had completed menstruation by that time. The conclusion is the presence of evidence of penetration of something.

Ground 1 - 'The Learned Trial Judge caused the trial to miscarry when he relied upon the hearsay evidence of the complainant when mentioning the complainant's aunt one Umra in his summing up at paragraph 12 and 13 without the said Umra being summoned as a witness nor made available for the Appellant.'

[15] The sentences complained of are as follows

'At home Umra told her that she would have to sleep with the deceased because he could see that she was possessed by the spirit Mohini Churus.'

'Umra told her that if she didn't sleep with him she would suffer for her life.'

'Umra told her not to tell anyone.'

[16] Since Umra was not called as a witness the above evidence becomes hearsay. Those statements are based on the victim's evidence given at the trial. However, the defence had not objected to this evidence being elicited by the prosecution from the complainant at the trial. Secondly, the defence had not made an application to call Umra as a defence witness. Thirdly the defence had not asked for any re-direction on these statements despite the Trial Judge having afforded an opportunity to both counsel. To begin with, I shall deal with the last in some detail.

[17] In the Supreme Court case of Ananda Abey Raj v. The State CAV 0003 of 2014: 20 August 2014 [2014 FJSC 12] the Chief Justice quoted the following remarks made in Segran Murti v. The State Crim. App. No. CAV0016/2008S: 12 February 2009 paragraphs 11, 15, 21-23 and Truong v. The Queen [2004] HCA10; 2004 ALJR 473.

'In the instant case, counsel for the Petitioner was asked by the trial judge whether he sought any re-direction at the end of the summing up. Counsel agreed with prosecuting counsel there was nothing else to direct on This omission is in itself usually sufficient to disregard a ground such as is raised here.' (emphasis mine)

[18] In Ananda Abey Raj's case His Lordship the Chief Justice commenting upon the failure of both counsel to remind the judge of an omission in the direction to the assessors, had this to say.

'The raising of direction matters in this way is a useful function and in following it, counsel assist in achieving a fair trial. In doing so they act in their client's interest. The appellate courts will not look favourably on cases where counsel have held their seats, hoping for an appeal point, when issues in directions should have been raised with the judge.'

- [19] Nevertheless, I will now consider whether the misdirection complained of could have affected the end result. Before acting upon the testimony of a witness the following questions should be asked. Both go to the credibility of the witness.
- (i) Is the witness truthful?
 - (ii) Is the witness's testimony reliable?
- [20] A truthful witness could sometimes be unreliable or his or her version could be distorted due to the intervention of extraneous factors. Therefore both tests are important. In determining whether a witness is truthful and reliable the court would be assessing the testimonial trustworthiness of the witness. Such assessment would have to be based on an objective application of several tests of credibility, such as the tests of promptness/spontaneity, probability/improbability, consistency/inconsistency, contradictions/omissions (*inter se & per se*), interestedness/disinterestedness/bias, the demeanour and deportment in court, and the availability of corroboration where relevant.
- [21] Analysing the evidence of the prosecution carefully, I find that the victim's testimony has stood the test of probability, consistency, want of contradictions, promptness and been enhanced by the corroboration in the form of medical evidence, though in terms of section 129 of the Criminal Procedure Decree, 2009 corroboration is no longer required in cases of sexual nature and no warning by the judge of lack of corroboration is also required in terms of the same section (see also Kean v State Criminal Appeal No. AAU 95 OF 2008: 13 November 2013 [2013 FJCA 117].
- [22] It may also be mentioned, as a passing remark, that there is no apparent motive for the victim to have falsely implicated the Appellant for having committed rape. I have no doubt that on evidence the case against the Appellant has been proved beyond reasonable doubt.
- [23] Rajinder Raju v. State of H. P. Criminal Appeal No. 670 of 2003 decided on 07.07.2009 R.M. Lodha, J. speaking on behalf of the Supreme Court of India expressed the following sentiments which, in my view, are equally relevant even in Fiji.

'In the context of Indian Culture, a woman victim of sexual aggression would rather suffer silently than to falsely implicate somebody. Any statement of rape is an extremely humiliating experience for a woman and until she is a victim of sex crime, she would not blame anyone but the real culprit. While appreciating the evidence of the prosecutrix, the Courts must always keep in mind that no self-respecting woman would put her honour at stake by falsely alleging commission of rape on her.'

- [24] I may also add that the hearsay statements complained of are not on matters which are in serious dispute. The Appellant's position consistently has been that he had sexual intercourse with the victim as alleged but with her consent. In the light of the fact that the Appellant's defence is that of consent as opposed to a denial of the act itself those hearsay material in the summing up do not add anything material or substantial to the prejudice of the Appellant.
- [25] Further it does not appear that the assessors had to rely on the truthfulness of that hearsay material to form their opinion that the Appellant was guilty of the charge against him. Neither did the Trial Judge direct the assessors to do so.
- [26] Therefore, regarding the three impugned statements contained in the summing up to the assessors, I am of the view that with or without such statements no reasonable assessors would have arrived at a different finding on the compelling evidence available. Therefore, I conclude that no substantial prejudice has resulted from the reference to the said hearsay evidence in the summing up which is the basis of this ground of appeal. I reject appeal Ground 1.

Ground 3 - 'The Learned Trial Judge erred in law and in fact when he failed to direct the assessors on the use of recent complaint evidence to assess the credibility of the complainant.'

- [27] The gist of the complaint is on the following words of the Trial Judge.

'Priyanka slept all day and then on the Monday went to work where she told her boss and her colleague what had happened. (It is an agreed fact that you must accept that she had told her colleagues on November 29th). They took her to the Police and that is where we will leave Priyanka's evidence.'

[28] The Appellant's argument is that there was no direction by the Trial Judge on how to consider recent complaint evidence which was a crucial omission in the summing up.

[29] The agreed fact number 11 is as follows

'Priyanka Chand complained to her work colleagues on 29-11-10 before 5.30 p.m. that a person had sex with her without her consent. She was then accompanied by some of her work colleagues to her aunt's place at Lot 19 Daniva Road, Nasinu on 29.11.10 to collect her bag and then to the Valelevu Police Station to lodge her report.'

[30] It is clear from the summing up that the Trial Judge had not guided the assessors towards implicating the Appellant through the above words complained of. He was fully entitled to say what he had said in the light of the agreed facts as highlighted above. He had not even gone so far as to cover the full purview of the agreed fact.

[31] The Appellant relies on Senikarawa v. The State Criminal Appeal No. AAU 0005 of 2004S:24 March 2006 [2006] FJCA where the Court of Appeal said

'If the evidence of recent complaint is admitted then the jury should be directed that such complaint is not evidence of the facts complained of and cannot be regarded as corroboration, but goes to the consistency of the conduct of the complainant with her evidence given at the trial.'

[32] However, the Court of Appeal made the above recommendation in the backdrop where in her evidence the complainant had said that she complained to her mother about the rape by the appellant but the mother had given no evidence that her daughter complained to her of rape but only of other matters (which were uncharged acts) and that the accused put chillies on her private parts. The mother had said that she couldn't recall if her daughter told her of any other sexual assault. She had said 'she may have told me but I don't recall.' In that context the Court of Appeal said

'It will be seen that there is no evidence of consistency of recent complaint by the complainant and the mother. The mother does not confirm her daughter's evidence that she complained to her about being raped by the appellant. It follows that there was no evidence of recent complaint of rape fit to be put to the assessors. The judge's direction to the assessors was therefore wrong and a material misdirection. It could not be used to enhance the credibility of the complainant and the assessors should have been so advised. We are of the opinion that this constitutes a substantial miscarriage of justice.'

[33] The Court of Appeal further said

'The principle on which the evidence is admitted is to support and enhance the credibility of the complainant. The jury, in assessing the truth of the complainant's evidence, may take into account evidence as to the consistency between that evidence and evidence of her contemporaneous complaint. It can be an aid to her credit (Spooner v. R [2004] EWCA Crim. 1320, Eng. Court of Appeal).'

[34] In Ananda Abey Raj's case the Supreme Court has dealt with in great detail the 'recent evidence' rules and said that Senikarawa may have been setting too flexible a rule.

[35] On the other hand the Supreme Court in Ananda said

'At trial, defense counsel could have raised with the judge the proper direction to the assessors. In Abdul Khair Mohammad Islam [1997] 1 Cr. App. R. 22 Buxton LJ said: "We are told that before speeches, and very usefully and properly, in accordance with the practice repeatedly urged by this Court, counsel discussed with the judge any particular directions that he should give to the jury. It was apparently agreed that he should remind the jury of the particular, and limited, nature and effect of the complaint evidence. In the event, however, no such direction was given, At the end of the summing-up neither counsel reminded the judge of that omission."

[36] Unfortunately, in the instant case no counsel asked for re-direction on the alleged non-direction.

[37] In the instant case, however what the Learned Judge told the assessors was based on an agreed fact fit to be put to the assessors. He had not said anything on the 'recent complaint' that the assessors would have considered as enhancing the credibility of the complainant either. The Appellant has admittedly had sexual intercourse with the complainant. In the circumstances though the Trial Judge had failed to direct the assessors strictly as prescribed in Senikarawa I do not think that unlike in that case, the non-direction in the instant case has resulted in any substantial miscarriage of justice. Therefore, I reject appeal Ground 3 too.

Ground 4

'The Learned Trial Judge erred in law and in fact when he misdirected the assessors in respect of the standard of proof by using the phrase "fanciful doubt" resulting in miscarriage of justice.'

- [38] This ground of appeal is based on the following sentences found in the summing up.

'The burden of proving the case against the accused is on the Prosecution and how do they do that? By making sure of it. Nothing less will do. This is what is sometimes called proof beyond reasonable doubt. If you have any doubt then that must be given to the accused and you will find him guilty- that doubt must be reasonable one however, not just some fanciful doubt'.

- [39] The Appellant's complaint is that the assessors would have been confused as the phrase 'fanciful doubt' was not explained as the real question was whether the doubt was reasonable. He relies on the case of R v. Dam (1986) SASR 422 where it had been held that the direction of the trial judge that the jury should convict if the doubt entertained by them as to the accused's guilt was merely a 'fanciful' doubt was incorrect, because the real question was whether the doubt was reasonable, meaning, whether, in the circumstances, the doubt was entertained at all, resulting in setting aside the conviction due to the said misdirection.

- [40] In the first place Dam was a case based on circumstantial evidence unlike the case before us where in addition to the direct evidence of the victim, even the Appellant had admitted sexual intercourse but allegedly with the victim's consent. Secondly, the parts of the summing frowned upon by the court of appeal in Dam was as follows

'If you have no doubt about her guilt then you will convict: if you think there is a doubt but it is merely a fanciful doubt then you will still convict because that is not a reasonable doubt; it is a doubt beyond reason. If you have a reasonable doubt about guilt then you will acquit, find her not guilty. The burden of proof is on the Crown to prove the charge beyond reasonable doubt.'

- [41] The direction ‘if you think there is a doubt but it is merely a fanciful doubt then you will still convict because that is not a reasonable doubt’ was criticised in Wilson, Tchorz and Young (1986) 22 A Crim R 130 in the following terms

‘This direction postulates a doubt about guilt which the jury think exists. It then invites them to subject their mental state to examination in order to determine whether the doubt about guilt which think to exist, is to be characterised as fanciful or reasonable.’

- [42] I am of the view that the impugned direction in the present case cannot be equated with or is not similar to the disapproved direction in Dam and Wilson. Though the word ‘fanciful’ appears in all three, the comparison ends there, for the message conveyed by the use of the word ‘fanciful’ in Dam and Wilson on the one hand and in the case before us on the other hand are vastly different. The direction we are dealing with, in my mind, had not gone any further than merely warning the assessors against being influenced by fanciful or unreasonable possibilities or notions.

- [43] In addition, in Mohan v. State Criminal Appeal No. AAU103 of 2011: 03 December 2015 ([2015] FJCA 155) the Court of Appeal said:

‘As regards the argument on misdirection on the topic of proof beyond reasonable doubt, the Learned Judge has correctly directed the assessors on the topic as seen in paragraphs 7 and 15 of the summing up especially in paragraph 7 he has not only explained what proof beyond reasonable doubt is, in addition he has said that it cannot be a fanciful doubt.’

- [44] Therefore, there is no misdirection as complained by the Appellant and I reject appeal Ground 4 as well.

Ground on Sentence

The Learned Trial Judge erred in exercising his sentencing discretion to the extent that he:

(c) Punished the Appellant by adding 7 years as aggravating feature which was excessive;

(d) Failed to give more reduction for his mitigating factors.

[45] In Ananda Abey Raj v. The State CAV 0003 of 2014: 20 August 2014 [2014 FJSC 12] His Lordship the Chief Justice while approving the decision in Naisua v. State Crim. App. No. CAV 0010 of 2013: 20 November 2013 ([2013] FJSC 14) reiterated that the Appellate Courts will interfere with a sentence if it is demonstrated that the trial judge made one of the following errors:

- (i) Acted upon a wrong principle
- (ii) Allowed extraneous or irrelevant matters to guide or affect him;
- (iii) Mistook the facts;
- (iv) Failed to take into account some relevant considerations.

[46] The Appellant submits that the Learned High Court Judge was wrong to have taken 02 additional acts of rape as an aggravating factor. I agree that there is merit in this submission. The single count of rape against the Appellant was a representative count. Other alleged acts of rape were uncharged acts. In Mataunitoga v. The State Criminal Appeal No. AAU 125 of 2013: 28 May 2015 ([2015] FJCA 70) the Court of Appeal said

'The effect of a representative count is that the offender is convicted of only one incident of the alleged sexual act. In the appellant's case, he is convicted of one incident of rape (count 1) and one incident of indecent assault (count 2), and not multiple offences as disclosed in the facts. When sentencing on a representative count, the court is not entitled to impose a sentence in respect of uncharged crimes (R v Jones [2004] VSCA 68 at [13]).'

[47] Therefore, the Learned High Court Judge had acted on a wrong principle in treating two additional acts of rape as an aggravating factor. Consequently, the 03 years of imprisonment added on account of *'lack of remorse and the humiliation of additional acts of rape'* cannot stand. Accordingly, I set aside that part of the sentencing order and the 03 years added.

[48] However, in my view given the facts and circumstances of this case, the Trial Judge had been somewhat generous in taking 07 years as a starting point. It is true that in Kasim v State Criminal Appeal No. AAU 0021 of 1993: 27 May 1994 ([1994] FJCA 25) the Court of Appeal said:

'We consider that in any rape case without aggravating or mitigating features the starting point for sentencing an adult should be a term of imprisonment of seven years. It must be recognized by the Courts that the crime of rape has become altogether too frequent and that the sentences imposed by the Courts for that crime must more nearly reflect the understandable public outrage. We must stress, however, that the particular circumstances of a case will mean that there are cases where the proper sentence may be substantially higher or substantially lower than that starting point'

- [49] However, in **Drotini v. The State** Criminal Appeal No.AAU0001 of 2005S: 2006 24 March 2006 ([2006] FJCA 26) the Court of Appeal, though not having ventured into altering the starting point, suggested in **Kasim** said:

'The continuing frequency of such cases has resulted in a general increase in the levels of sentence ordered in rape cases by the courts in Fiji. We endorse this trend.'

- [50] I believe that since the Court of Appeal expressed the above sentiments in **Drotini** more than 10 years ago the frequency of sexual abuses including rape has only increased. Therefore, in my view the starting point in this case should be taken as 09 years instead of 07 years. I feel justified in doing so in view of the following judicial pronouncements too.

- [51] Dr. Anand, J on behalf of the Supreme Court of India said as follows in the criminal appeal of **The State of Punjab vs Gurmit Singh & others** 1996 AIR 1393, 1996 SCC (2) 384.

'We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault - it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim; a rapist degrades the very soul of the helpless female.'

'Of late, crime against women in general and rape in particular is on the increase. It is an irony that while we are celebrating women's rights in all spheres, we show little or no concern for her honour. It is a sad reflection on the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes.'

- [52] In Lokesh Mishra v. State of NCT Delhi CRL. A. 768/2010 decided on 12 March 2014 by the High Court of Delhi, Kailash Gambhir, J. said

'It is appalling to see that rape rears its ugly facade almost every day. 'Rape' is one such dark reality in the Indian Society that devastates a women's soul, shatters her self-respect and for a few, purges their hope to live. It shakes the insight of a woman who once was a 'happy person', and had no clue of being a victim of the said horrifying and nightmarish encounters... "

- [53] In the Supreme Court in Anand Abey Raj, the Chief Justice quoted the following remarks made in State v. AV [2009] FJHC 24: HAC 192.2008: 21 February 2009

'Rape is the most serious form of sexual assault Sexual offenders must be deterred from committing this kind of offences.'

- [54] The Appellant also complains that the Trial Judge was wrong to have added 04 years imprisonment on account of subterfuge, deceit and misrepresentation and therefore it was excessive.

- [55] It is clear from the victim's evidence that the Appellant had told her just before sexually abusing her that he was not possessed and but only faking. This evidence stands unchallenged. Therefore, it is clear that the Appellant knew all along that he was engaged in a false and fraudulent misrepresentation that he could cure her of her acute acne bothering her for a long time. The victim, a young girl of 24 would have been greatly stressed by the condition of acne. The Appellant had by subterfuge won her confidence initially using shrewd and calculated methods and then forced himself on her in a most cruel manner against her will. His conduct deserves the highest condemnation. Therefore, I believe that instead of 04 years, 06 years would be the reasonable addition in lieu of his reprehensible conduct.

- [56] The Appellant also complains that he deserves more than 02 years of reduction under mitigating factors because he was a first offender. The Learned Trial Judge had deducted 02 years on account of his family circumstances and his hitherto clear record. He was lucky to have received any reduction for family circumstances as in Ananda the Supreme Court said:

'His responsibility for his 5 year old son and 53 year old mother was in reality of little mitigatory value... He had pleaded not guilty, which was his right. But, in doing so, he had put the complainant through the misery, fear and embarrassment of having to give evidence and be cross-examined. Such a combination has been considered to amount to no mitigation at all.'

- [57] Similar sentiments were echoed in **Drotini** as well. In any event the Trial Judge had considered his clear record up to then thereby taking into account his having been a first offender. Thus, I see no reason as to why the Appellant should be afforded the luxury of more reduction under mitigating circumstances.
- [58] It is well recognized that the punishment must reflect society's abhorrence of the crimes. While there are guidelines, judicial recognition and acceptance of a number of grounds over the years, there is no exhaustive list of aggravating and mitigating factors cast in stone. They are not static and should change with time and depend to a great extent on the circumstances of each and every case. What matters is the ultimate sentence that should be in harmony with the collective societal conscience of right and wrong, for if not, people's faith in the established mechanism of administration of justice will fade and their respect for law and order will diminish. No society can afford to tolerate an innermost feeling among the people that offenders of sexual crimes committed against mothers, daughters and sisters are not adequately punished by courts and such a society will not in the long run be able to sustain itself as a civilized entity.
- [59] Thus, I am of the view that the starting point in this case would be 09 years, 06 years would be added for aggravating factors and 02 years would be deducted for mitigating factors making the sentence the Appellant should serve as 13 years. I would now consider whether this overall sentence is justified.

- [60] Saleem Marsoof J. in the Supreme Court said in Quari v State Criminal Petition No. CAV 24 of 2014 decided on 20 August 2015; [2015] FJSC 15

"In my considered view, it is precisely because of the complexity of the sentencing process and the variability of the circumstances of each case that judges are given by the Sentencing and Penalties Decree a broad discretion to determine sentence. In most instances there is no single correct penalty but a range within which a sentence may be regarded as appropriate, hence mathematical precision is not insisted upon. But this does not mean that proportionality, a mathematical concept, has no role to play in determining an appropriate sentence."

- [61] I believe that the ultimate object of the Sentencing and Penalties Decree, 2009 coupled with the judicial guidelines is to help judges arrive at a just and fair sentence proportionate to the gravity of the offence for an accused considering all the circumstances of the case while maintaining an acceptable degree of uniformity and consistency. It is not to insist on a straightjacket approach to sentencing. Mathematical accuracy is not what is expected in sentencing.

- [62] In Koroicakau v The State Criminal Appeal No. CA0006 of 2005S decided on 04 May 2006; [2006] FJSC 5 the Supreme Court observed

"When a sentence is reviewed on appeal, again it is the ultimate sentence rather than each step in the reasoning process that must be considered. Different judges may start from slightly different starting points and give somewhat different weight to particular facts of aggravation or mitigation, yet still arrive at or close to the same sentence. That is what has occurred here, and no error is disclosed in either the original sentencing or appeal process"

- [63] In R v Radich [1954] NZLR 86 the New Zealand Criminal Court of Appeal said

"... one of the main purposes of punishment ... is to protect the public from the commission of such crimes by making it clear to the offender and to other persons with similar impulses that, if they yield to them, they will meet with severe punishment."

"If a Court is weakly merciful, and does not impose a sentence commensurate with the seriousness of the crime, it fails in its duty to see that the sentences are such as to operate as a powerful factor to prevent the commission of such offences."

"The Court of Appeal , in considering an application for reduction of sentence, must be reasonably satisfied that the sentence is manifestly excessive or wrong in principle, or there must be exceptional circumstances calling for its revision.

[64] **R v Goodrich** (1955) 72 WN (NSW) 42 and **R v AEM** [2002] NSWCCA 58 are subsequent cases that had followed the principle in **R v Radich** (supra). **Tevita Jone Rami v. Reginam** [Supreme Court, 1963] (Macduff C.J) F.L.C. p.69 also quoted **R v Radich** (supra) with approval. In Fiji **Prasad v The State** Criminal Appeal No. HAA0032 of 1994 decided on 30 September 1994; [1994] FJHC 132 and **Turuturuvesi v State** High Court Criminal Appeal No: HAA006 of 2011 decided on 13 July 2011; [2011] FJHC 384 have followed **R v Radich** (supra) and **Tevita Jone Rami v. Reginam** (supra).

[65] Having considered the appeal against sentence in the light of the above decisions I am convinced that there is no justifiable reason for this Court to interfere with the overall sentence imposed by the Learned High Court Judge. I have also reminded myself of the following observations in this regard.

[66] In **Veen v The Queen (No 2)** [1988] 164 CLR 465 Mason CJ, Brennan, Dawson and Toohey JJ said at 476:

"... sentencing is not a purely logical exercise, and the troublesome nature of the sentencing discretion arises in large measure from unavoidable difficulty in giving weight to each of the purposes of punishment. The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to the appropriate sentence but sometimes they point in different directions."

[67] In **R v Engert** [1995] 84 A Crim R 67 Gleeson CJ said at 68 after discussing **Veen v The Queen (No 2)** (supra):

"A moment's consideration will show that the interplay of the considerations relevant to sentencing may be complex and on occasion even intricate. ...

It is therefore erroneous in principle to approach the law of sentencing as though automatic consequences follow from the presence or absence of particular factual circumstances. In every case, what is called for is the making of a discretionary decision in the light of the circumstances of the individual case, and in the light of the purposes to be served by the sentencing exercise."

[68] Therefore, considering all the circumstances of the case I am not inclined to interfere with the sentence imposed on the Appellant as one of the purposes of sentencing is to deter offenders or other persons from committing same or similar offences. I think the sentence of 13 years imprisonment with a minimum period of 11 years to be served before the Appellant being eligible for parole is fully justified. The sentence is not excessive. There are no exceptional circumstances for this Court to revise it. The sentence has not caused any substantial miscarriage of justice to the Appellant and therefore, I reject the ground of appeal on sentence.

[69] Therefore, I conclude that the appeal should stand dismissed and the conviction and sentence be affirmed.

A. Fernando, JA

[70] I am in agreement with the reasoning and conclusion of my brother judge Prematilaka JA.

P. Fernando, JA

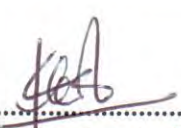
[71] I am also in agreement with the reasoning and conclusion of Prematilaka JA.

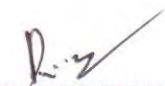
The Orders of the Court are:

1. *Appeal is dismissed.*
2. *Conviction and Sentence are affirmed.*




.....
Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL


.....
Hon. Mr. Justice A. Fernando
JUSTICE OF APPEAL


.....
Hon. Mr. Justice P. Fernando
JUSTICE OF APPEAL