

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

CRIMINAL APPEAL NO.AAU0036 OF 2013
[High Court Criminal Case No. HAC 302 of 2011]

BETWEEN : **ILAITIA MATASAVUI**

Appellant

AND : **THE STATE**

Respondent

Coram : **Dr. Almeida Guneratne, JA**
Prematilaka, JA
Perera, JA

Counsel: : **Mr. J. Savou for the Appellant**
Mr. A. Singh with Mr. S Babitu for the Respondent

Date of Hearing : **13 September 2016**

Date of Judgment : **30 September 2016**

JUDGMENT

Dr. Almeida Guneratne, JA

[1] I have had the advantage of reading my brother, Justice Prematilaka's judgment in draft with which I agree, both in respect of the conviction as well as the sentence.

[2] However, I would like to add some comments of my own.

- [3] The need for the ensuing comments flow from what my brother, Prematilaka, JA himself has recapped in his Judgment at paragraph [18] and the first limb of paragraph [19] thereof, though countered in paragraph [20]. Thereafter proceeding up to paragraph [28], His Lordship concluded in so far as Ground 1(ii) of the Grounds of Appeal was concerned in rejecting the same.
- [4] Then, there is Ground 2. I propose to address them cumulatively particularly where the trial Judge is supposed to have “told the Appellant in full view of the Assessors that the Appellant was not credible”.
- [5] As my brother, Prematilaka, JA found from the proceedings, the Learned High Court Judge had not said so in his directions but, had only said that, the accused (appellant) had been evasive.
- [6] This being a criminal case (unlike a civil case where such distinctions between “an evasive witness” and/or a “witness lacking in credit worthiness” might be regarded as being a distinction without a difference) it is necessary to appreciate the said distinction given the impression such a direction could create on assessors.
- [7] In my view, such a direction, may run the risk of creating an impression on them like “ink being absorbed by blotting paper” with the consequence that, whatever directions a Judge may have given to them thereafter the first impression could remain in their minds, when they retire to deliberate in regard to their opinion.
- [8] For that reason, I feel that, a trial Judge should exercise caution in using terminology, such as a witness’s evidence though not being ‘credible’, nevertheless was ‘evasive’ which could carry the same connotation, visiting the minds of assessors, given the flexibility of the English Language.
- [9] However, my brother, Prematilaka, JA, has in his assessment of the evidence and the trial Judge’s directions in the overall and his conclusion that the prosecution had proved its case “beyond reasonable doubt” stands vindicated, the standard of proof being not “beyond any doubt”.

Prematilaka, JA

- [10] This appeal arises from the convictions of the Appellant on three counts under section 207 (2) (a) of the Crimes Decree 2009 alleged to have been committed on 14 September 2011. The Information dated 27 October 2011 describes the particulars of the first count as the Appellant having penetrated the vagina of P (name withheld) with his tongue without her consent, the second count as the Appellant having penetrated the vagina of P with his finger without consent and the third count as the Appellant having had carnal knowledge with P without her consent.
- [11] After trial the Appellant was found guilty of all three counts and the Learned High Court Judge, having concurred with the opinion of the assessors, imposed a sentence of 12 years of imprisonment with a non-parole period of 11 years on 05 April 2013 on each count to run concurrently.

Preliminary observations

- [12] The Appellant had filed a timely application for leave to appeal against the conviction on 04 grounds and the sentence on a single ground. At the hearing into the leave to appeal application against the sentence and conviction, Justice Goundar in the Ruling dated 14 January 2015 had considered all grounds of appeal and leave to appeal had been granted on Grounds one and two against the conviction and on the sole Ground against the sentence.
- [13] The Appellant had not tendered written submissions before the hearing in this Court and the counsel for the Appellant informed court that he would rely on the 'Skeleton Submission' filed at the leave stage. The Respondent had filed written submissions in respect of the main Appeal. The Appellant had not sought to have the grounds rejected at the leave stage determined by this Court in terms of section 35(3) of the Court of Appeal Act.
- [14] At the hearing the counsel for the Appellant confined himself to Grounds 1(ii) and 2 against the conviction and the sole ground on the sentence.

Grounds of Appeal

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

Ground 1(ii)

- (i) 'At paragraph 27 line 6 when he made the observation that if the victim were not telling the truth, she would not have gone through the trouble to have her private part medically examined by a doctor.'

Ground 2

- (ii) 'That the learned trial judge erred in law and principle when he told the Appellant in full view of the Assessors that the Appellant was not credible.'

Ground on Sentence

- (iii) 'The learned sentencing judge erred in law and fact when he chose as an aggravating feature matters which had already been accounted for when the court had convicted the appellant.'

[16] Before proceeding to consider the grounds of appeal, I think it would be useful if I place on record a brief narration of the prosecution evidence and that of the Appellant. According to the prosecutrix, a married woman of 28 years having three children and the Appellant were next-door neighbours. Occasionally the Appellant was invited to share meals with the victim's family. On 14 September 2011, while the victim was collecting firewood in the bush around noon the Appellant had approached, told that he liked and grabbed her. The victim had raised cries but to no avail. The Appellant had then placed the cane knife he was holding in the neck of the victim and ordered her not to shout, threatening to kill her otherwise. Thereafter, the Appellant had removed her garments one by one, started licking her vagina, then put his finger inside it and finally his penis in her vagina. After returning home the victim had narrated the incident to her husband and both

had reported it to the police in the same evening. She had been subjected to a medical examination on the following day. The medical evidence revealed injuries in the victim's vulva consistent with forced sexual penetration.

- [17] The Appellant's position was a complete denial and rather belatedly he, only whilst giving evidence, attributed his having seen the victim in the act of copulation with her father three weeks back near a river as a motive for her having implicated him falsely.

Ground 1(ii) - 'At paragraph 27 line 6 when he made the observation that if the victim were not telling the truth, she would not have gone through the trouble to have her private part medically examined by a doctor.'

- [18] The Appellant's complaint is that this portion of the direction was unfair to him and Goundar JA at the leave stage held it to be arguably so. Goundar JA referred to some observations by the Court of Appeal in **Joseph Ben Vasu v. The State**; Criminal Appeal No. AAU0011 of 2006S: 24 November 2006 ([2006] FJCA 69]) where it had been held that, the question, why would a complainant make up a story of being raped, is a forbidden question because it assumes that the absence of a persuasive reason for the complainant behaving in a particular way enhances the prosecution case.

- [19] While acknowledging that there is some merit in the above argument, I must also point out that the said observations of the Learned High Court Judge is unfair by the victim as well, for she did not 'take all the trouble' to have her private parts examined on her own volition but the police as part of the investigation produced her to a medical professional for examination. Since the doctor was busy on the day of the incident she was produced on the following day.

- [20] At the hearing of the Appeal, the Counsel for the Respondent pointed out that the counsel for the Appellant had not requested a re-direction from the Learned Trial Judge on what is now complained of as being an unfair observation on the part of the Judge. In fact, at the conclusion of the summing up the prosecution had not asked for any re-direction but the counsel for the Appellant had made certain remarks and the Learned High Court Judge had advised the assessors to take note of them. However, such remarks had not

even touched the impugned direction and no request whatsoever had been made by the Appellant's counsel for a re-direction to the assessors.

- [21] 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 of 2008S: 12 February 2009 ([2009] FJSC 5) 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.'

- [22] 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.'

- [23] 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 posed by court. Both go to the credibility of the witness.

- (i) Is the witness truthful?
- (ii) Is the witness's testimony reliable?

- [24] 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.

[25] Analysing the evidence of the prosecution very carefully, I find that the victim's testimony has stood the test of probability, consistency, want of contradictions, promptness and 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]).

[26] There is no credible motive for the victim to have falsely implicated the Appellant whose evidence that his having seen the victim in the act of having sexual intercourse with her father three weeks back near "the river" as a motive for her having implicated him falsely lacks any creditworthiness, for *inter alia* he had come out with it for the first time at the trial. I have no doubt that on the evidence before court the case against the Appellant has been proved beyond reasonable doubt.

[27] In 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.'

[28] Therefore, regarding the impugned observations of the Trial Judge in the summing up to the assessors, I am of the view that with or without such a misstatement 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 said portion of the summing up which is the basis of this ground of appeal. I reject appeal Ground 1(ii).

Ground 2 - ‘That the learned trial judge erred in law and principle when he told the Appellant in full view of the Assessors that the Appellant was not credible.’

[29] Goundar JA has said in the Ruling on the leave to appeal application that if such a statement is supported by the court record, then arguably the appellant had not received a fair trial. At the hearing of the Appeal the counsel for the Appellant conceded that there is no such statement in the proceedings at all. Neither do I find anything to that effect in the record. There is no affidavit filed by the counsel or the Appellant that the Trial Judge had indeed uttered what is attributed to him. However, the Learned Trial Judge had recorded the words ‘evasive witness’ twice in the proceedings while the Appellant was giving evidence.

[30] Therefore, I am of the view that this ground of appeal is devoid of any merits. Secondly the Trial Judge was entitled to observe and make a note of the demeanour of any witness including the Appellant. There is no complaint by the Appellant on the use of the phrase ‘evasive witness’ by the Learned High Court Judge. Therefore I conclude that there is no merit in this ground of appeal and reject it.

Ground on Sentence - ‘The learned sentencing judge erred in law and fact when he chose as an aggravating feature matters which had already been accounted for when the court had convicted the appellant.’. ‘In addition, although not a specific ground of appeal against sentence we would like to submit that the period in remand of one year and six months fourteen days was never separately discounted for his Lordships sentence.’

[31] Though not pleaded as a specific ground of appeal I will make some observations on the period of remand of one year, six months and fourteen days not having been separately discounted by the trial judge. This period had been treated as a mitigating factor. It appears from the record that the Appellant had been originally detained from 22 September 2011 to 30 September 2011 on the warrant of the Magistrate until he was produced before the High Court. From 30 September 2011 until he was sentenced on 05 April 2013 the Appellant was on remand on the directions of the High Court. This is the total period of remand referred to in the sentencing order. The trial in the High Court commenced on 02 April 2013. Thus, the period of remand during which the Appellant

was held in custody prior to the trial was approximately 01 year 04 months and 11 days. This period should be regarded as a period of imprisonment already served in terms of section 24 of the Sentencing and Penalties Decree 2009. Nevertheless, when the period of remand during the trial is also taken into account the total period of remand is about 01 year, 06 months and 14 days as stated by the Trial Judge. However, even before the Sentencing and Penalties Decree 2009 came into operation, making an appropriate reduction in sentence for time spent in remand in imposing sentences was a long standing practise (vide Basa v. State Criminal Appeal No. AAU 24 of 2005:24 March 2006 ([2006] FJCA 23).

[32] Ideally, the Learned High Court Judge should have deducted the pre-trial period of remand of about 01 year 06 months and 14 days after the term of imprisonment namely the head sentence was decided and imposed following the usual sentencing procedure. In this instance he had considered it as a mitigating factor and presumably given appropriate allowance though not set out in mathematical terms which is not the proper way to give effect to Section 24 of the Sentencing and Penalties Decree 2009 in terms of the Supreme Court in Sowane v State Appeal Case No. CAV0038 of 2015: 21 April 2016 ([2016] FJSC 8). However, I am conscious of the fact that the Trial Judge did not have the benefit of the Supreme Court decision when he meted out the sentence.

[33] The Supreme Court in Sowane said

'The provision is mandatory. For the court shall regard any period of time during which the offender has been held in custody prior to the trial of the matter or matters as a period of imprisonment already served by the offender, "unless a court otherwise orders. "'

'By what methodology is that to be done? In the past courts have commenced that process by fixing a sentence on a range approved by decisions of the courts, usually with the authority of one of the appellate courts. The sentencing judicial officer proceeds to give some increase of sentence for specified aggravating factors, and some discount for approved mitigating factors. Within mitigating factors is often included the period spent on remand by the offender in custody awaiting his trial. If this is done, the final term of imprisonment imposed could sometimes fall well below the normal tariff for such offending.'

'Alternatively the sentencing court could carry out the calculation by the above method, and initially without regard to the period spent in custody, state the sentence for the particular offending. Secondly, the court could go on to set out the actual sentence to be served, after deducting the period of prior custody referred to in section 24. Such a judgment would state what the court's sentence was for the gravity of the offending, and at the same time – by the court's order pursuant to section 24 – set out and hand down the effective sentence that must be served, prior to the consideration of any eligibility for parole, a matter not of sentence but of administrative action within the jurisdiction of the Corrections Department.'

'Uniformity of approach to sentencing procedure is important. Whilst both methods may serve the spirit of the Decree, nonetheless a preferred procedure must be decided upon.'

[34] The Supreme Court further said

*'[17] Our attention was drawn to a recent High Court case, when the same issue came up: **State v. SBN** HAC 083/2010 11th April 2016. The learned judge, following the usual sentencing procedure, had arrived at the appropriate sentence. His lordship then went on to order the remaining period (after deduction of time spent on remand) that the offender must serve. The terms of the sentence were set out as follows:*

"14. In the result, you are sentenced to an imprisonment term of 12 years with a non-parole period of 10 years. Considering the time spent in custody, the remaining period to be served is:

Head Sentence – 05 years, 11 months and 26 days

Non-parole period – 03 years, 11 months and 26 days."

[18] This method has the advantages of simplicity and clarity, and makes order as to the actual minimum period to be served as part of the sentencing order of the court. The interpretation and calculation is not left to Corrections. We conclude this is the proper way to give effect to section 24.'

[35] I find from the sentence ruling that in addition to the period of remand 01 year 06 months and 14 days the only other factor taken as a mitigating factor is the fact that the Appellant had no previous convictions and was a first offender. Thus, if the period of remand is taken out from the 03 years deducted for mitigating factors still the Appellant has got almost 1 ½ years for being a first offender which is reasonable. In **Basa v The State** Crim. App. No. AAU0024 of 2005: 24 March 2006 the offender had spent 1 year 1 month and 14 days in custody awaiting trial. The judge had allowed of that period only 1 year to be deducted from his sentence. The court said:

“... When calculating the appropriate sentence for any offence, the Judge should allow for any substantial period in custody but it is not necessary to make a precise calculation. The allowance of a year was a perfectly proper amount.”

On the other hand, the entire period of remand of 01 year 06 months and 14 days need not necessarily be deducted. Therefore, I am of the view that there is no need to give further allowance for the period of remand from the final sentence of 12 years, for such an exercise would result in double reduction. Nevertheless, I take liberty to repeat that the method whereby the judge, following the usual sentencing procedure, first arrives at the lead sentence and then goes on to order the remaining period, after deduction of time spent on remand prior to trial, that the offender must serve, must be adopted to ensure compliance with section 24, clarity, simplicity, and uniformity of sentencing practice.

[36] I will now deal with the main point of contention on sentence. The Learned High Court Judge identified the following as aggravating factors and added 05 years on account of them. But, it is apparent that the learned trial judge had not chosen as aggravating features any factors which had already been accounted for when the court convicted the appellant.

- (i) ‘The Complainant and her husband were your neighbours, and were friendly to you. They often invited you to their house, to share a meal with them. Prior to the incident, you were on friendly terms with them. However, by committing the offence of rape on the complainant, you betrayed the trust they had in you.’
- (ii) ‘When committing this offence, you put a knife on the complainant’s neck, and threatened to kill if she resisted. This behaviour seriously aggravates the offence. Those who threaten women with a knife, and then rape them, must always expect a severe sentence. In other words, the more serious the threat, the higher the sentence will be.’

(iii) 'When caution interviewed by the police on 21st September, 2011, you told the police that you don't know the reasons why the complainant, reported (to)(sic) the police on 14th September, 2011. During the trial on 3rd April, 2013, you saw fit to defame the character of the complainant by saying that, the reason she reported the matter to police, was because you saw her having sex with her father. The assessors and court rejected this view. Nevertheless, your utterances above mentioned revealed your depraved character, and a message ought to be given to you to stop belittling people.'

(iv) 'Your offending showed your utter disregard to the complainant's right to a peaceful life.'

[37] Goundar JA had decided that arguably the factors set out in paragraph (iii) and (iv) above were not aggravating factors. According to the 'Skeleton Submissions' dated 6 August 2014 filed on behalf of the Appellant at the leave stage he was complaining only about paragraphs (ii) and (iii) above and the counsel for the Appellant totally relied on those submissions. Thus, I shall confine myself only to those two aspects. However, leave was refused on the second part of the ground of appeal on sentence on the issue of the remand period not having been separately discounted from the sentence as sufficient weight had been given to the appellant's remand period as a mitigating factor.

[38] In *Ananda Abey Raj's* case 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.

[39] From the written submissions or the oral submissions made at the hearing it is not clear which of the above permissible headings the Appellant seeks to bring the sentencing appeal. However, I guess that the Appellant might be relying on ground (ii) enumerated in *Ananda Abey Raj's* case.

[40] 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 where the victim was a 16 year old girl.

'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.'

[41] 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... " (emphasis mine)

[42] In the Supreme Court in *Ananda 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.'

- [43] In **Drotini v The State** Criminal Appeal No. AAU0001 of 2005S:24 March 2006 ([2006] FJCA 26) the Court of Appeal recognised threat of violence among several other factors as an aggravating factor. Threats to kill the victim and frequency of crimes along with the need for deterrence *inter alia* were recognised as aggravating factors in ***Ananda Abey Raj***.
- [44] 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.
- [45] In the facts and circumstances of this case, betrayal of trust, threat of violence and physical harm backed by being armed and painting the victim as a promiscuous woman or one with loose morals adding insult to injury and causing, perhaps, irreversible damage to the family life of the victim being the wife and a mother of 03 siblings are, in my view factors that could legitimately be taken to be aggravating factors. I find no fault with the Learned High Court Judge for having done so.
- [46] I may also add that the pain of getting raped is bad enough. It may leave psychological scars for life. Having her character assassinated unfairly by the rapist makes it worse. This reminds me of 'the man falling from the tree being butted by the bull'. Rape is committed against the will of the victim where the sympathy is rightly on her. Sexual intercourse with her own father suggests an adulterous and incestuous act voluntarily indulged in by her attracting condemnation and social stigma and therefore, having serious repercussions on her family and social life. The Appellant does not say that the victim saw him observing the alleged act of intercourse between her and her father near a

river. Then, how can the victim have a grudge against the Appellant over that? In any event, why should she wait two weeks to fabricate a story of rape against him? It is not a defense to the charge of rape either. In my view, the court cannot turn a blind eye to this kind of wild accusations being harped on the victim. Such behavior could only aggravate the punishment. However, I may hasten to add that even if one concedes only for the sake of argument that the above conduct may not constitute an aggravating factor, I firmly believe that the other aggravating factors and attending circumstances present in the case would justify the totality of the ultimate sentence of 12 years imprisonment. In my view, sentencing should not be looked at as some form of mathematical gymnastics.

- [47] 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."

- [48] 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 decree of uniformity and consistency. It is not to insist on a straightjacket approach to sentencing. Mathematical accuracy is not what is expected in sentencing.

- [49] 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"

[50] 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."

[51] **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).

[52] Having considered 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 sentence imposed by the Learned High Court Judge. I have also reminded myself of the following observations.

[53] 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."

- [54] 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.”

- [55] In **Viliame Tamani v. The State** Criminal Appeal No.AAU0025 of 03S: 4 March 2005 where the Appellant was charged with two offences in indecent assault, one of rape and six of incest over a period January 1995 to June 1997 and *inter alia* was sentenced to 11 years on the count of rape the Court of Appeal said “ *This is an extremely serious case. The learned judge correctly assessed the case when considering the sentence..... We are satisfied the sentence is correct.*’

- [56] 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 12 years imprisonment with a non parole period of 11 years is fully justified. The sentence is not excessive. There are no exceptional circumstances for this Court to revise it. The sentences have not caused any substantial miscarriage of justice to the Appellant and therefore, I reject this ground of appeal.

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

Perera, JA

- [58] I have read in draft the judgment of His Lordship Prematilaka JA, and I agree with His Lordship’s reasoning and the conclusions on the appeal against conviction.
- [59] However, though I agree that the appeal against the sentence should be dismissed, I regret that I am unable to agree with His Lordship’s reasoning on the appeal against sentence in that the following factor has been considered as an aggravating factor;

“When caution interviewed by the police on 21st September, 2011 you told the police that you don’t know the reasons why the complainant reported the rape to police on 14th September 2011. During the trial on 34^d April 2013, you saw fit to defame the character of the complainant by saying that, the reason she reported the matter to police, was because you saw her having sex with her father. The assessors and the court rejected this view. Nevertheless, your utterance abovementioned revealed your depraved character, and a message ought to be given to you to stop belittling people.”

[60] As pointed out by the learned single Judge of Appeal in the ruling on leave to appeal dated 14 January 2015, the appellant’s defence was that the allegation against him is fabricated by the complainant because he witnesses the complainant having sex with her father. The assessors and the learned trial judge have not believed this position taken up by the accused. However, the learned trial judge has considered the fact that the appellant raised this defence as an aggravating factor.

[61] In order to decide whether the factor adverted to above is an aggravating factor or not, I thought it appropriate to first refer to the Sentencing and Penalties Decree 2009 (“Sentencing and Penalties Decree”) for guidance. Section 4(2) of the Sentencing and Penalties Decree outlines the factors that a court must have regard to in sentencing offenders. Section 4(2)(j) of the said Decree reads thus;

“(j) the presence of any aggravating or mitigating factor concerning the offender or any other circumstance relevant to the commission of the offence;”

[62] According to the above subsection, the aggravating or mitigating factors the sentencing court should have regard to, should be relevant to the commission of the offence. It stands to reason that the factors that are not relevant to the commission of the offence cannot be taken into account to increase or decrease the sentence imposed on an offender. Therefore, in my view, the above provisions of the Sentencing and Penalties Decree make it plain that the conduct of an offender after the commission of the offence cannot be considered as an aggravating factor.

[63] While I agree that an allegation of the nature that is made against the complainant in this case has the potential to attract condemnation and social stigma, in my view, when the court convicts an accused who makes such an allegation, the matter ends there since the assessors who represented the society and the judge have dismissed that allegation. On

the other hand, a court of law cannot either directly or indirectly impose restrictions on an accused person on the defence he wants to take, unless such restriction is provided by law.

[64] Section 13(2) of the 2009 Constitution provides an accused person the right to *'call witnesses and present evidence, and to challenge evidence presented against him or her'*. It follows that an accused person's right to challenge the evidence against him cannot be restricted directly or indirectly unless such restriction is provided by law. In a case of rape, even the defence of consensual sexual intercourse implies sexual promiscuity and has the potential of attracting social stigma. If the fact that such defence was taken would result in the sentence being enhanced, in my view, that approach restricts an accused person's right to properly defend himself by challenging the evidence against him.

[65] It is pertinent to note that the issue at hand where questions have been asked from the complainant and evidence has been given pertaining to her previous sexual history with a person other than the accused, is an aspect that is regulated by law under section 130 of the Criminal Procedure Decree 2009.

[66] In terms of the said provisions, *'in any case of a sexual nature, no evidence shall be given, and no question shall be put to a witness, relating directly or indirectly to the sexual experience of the complainant with any person other than the accused; or the reputation of the complainant in sexual matters, except by leave of the court'*. I was unable to find in the court record that leave was granted for the accused to question the complainant and then to have given evidence regarding the complainant having had sexual intercourse with her father. If leave was not granted, these questions and the evidence should not have been allowed. If leave was granted under section 130 of the Criminal Procedure Decree, and the evidence was presented with the leave of court, then the fact that such a defence was raised could not have been considered as an aggravating factor.

[67] I wish to add that the fourth factor which the learned trial judge has listed as an aggravating factor also in my view cannot be considered as an aggravating factor to enhance a sentence for the reason that every criminal offence would amount to a disregard to a victim's peaceful life.

[68] However, despite the fact that the learned trial judge has taken into account irrelevant considerations as aggravating factors, I find that the final sentence imposed in this case is not in any way excessive given the circumstances of the 'offending'.

[69] This is a case where a neighbour declares his interest on the complainant and then rapes her by threatening her with a knife. The present-day society is a disciplined society and it has moved a long way from giving precedence to human instincts. If the type of behaviour and the attitude demonstrated in the 'offending' in the instant case is not denounced and not dealt with adequately, no female member of the society will feel safe. In the circumstances, I am not convinced that the sentence of 12 years imprisonment with the non-parole period of 11 years imposed on the appellant should be disturbed.

The Orders of the Court are:

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



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Hon. Dr. Almeida Guneratne
JUSTICE OF APPEAL

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Hon. Justice C. Prematilaka
JUSTICE OF APPEAL

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Hon. Justice V. Perera
JUSTICE OF APPEAL