

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

CRIMINAL APPEAL NO.AAU 0060 of 2013  
[High Court Criminal Case No. HAC 329 of 2011]

BETWEEN : JOELI TAWATATAU

Appellant

AND : THE STATE

Respondent

Coram : Chandra, JA  
Prematilaka, JA  
Perera, JA

Counsel : Ms. Tarai. M for the Appellant  
Mr. Vosawale. M for the Respondent

Date of Hearing : 05 May 2017

Date of Judgment : 26 May 2017

**JUDGMENT**

Chandra, JA

[1] I agree.

Prematilaka, JA

[2] This appeal arises from the conviction of the Appellant on a single count under section 207 (1) and [2] (a) of the Crimes Decree, 2009 (now the Crimes Act, 2009) alleged to have been committed on 22 September 2011. The Amended Information

dated 03 June 2013 describes the particulars of the count as the Appellant having had carnal knowledge of P (name withheld) without her consent.

- [3] After trial the three assessors expressed a unanimous opinion that the Appellant was guilty of the said count. The Learned High Court Judge on 07 June 2013, having concurred with their opinion, convicted the Appellant and imposed a sentence of 08 years of imprisonment with a non-parole period of 06 years which should really have been stated as the period during which the Appellant would not become eligible to be released on parole in terms of section 18(1) of the Sentencing and Penalties Decree, 2009 (now Sentencing and Penalties Act 2009).

#### **Preliminary observations**

- [4] The Appellant had invoked the appellate jurisdiction of the Court of Appeal against the said conviction and sentence by way of a letter dated 09 June 2013 addressed to the Court of Appeal Registry. Several additional grounds of appeal had been submitted later. Written submissions on behalf the Appellant and the Respondent also had been tendered on all grounds of appeal. Chandra RJA had allowed leave to appeal in respect of 04 grounds of appeal against the conviction and on a single ground of appeal against the sentence on 01 August 2014. The Appellant had not sought to have the application for leave to appeal determined before the Court duly constituted to hear and determine the appeal under section 35(3) of the Court of Appeal Act relating to other grounds where leave was refused.
- [5] The Appellant in person and the Respondent had tendered written submissions, where both parties had confined themselves to the grounds of appeal allowed by Chandra RJA, and at the hearing the Counsel for the Appellant and the Respondent also followed suit.

#### **Grounds of Appeal**

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

### **Ground 1**

- (i) *'The Learned Trial Judge acted unfairly against the Appellant in his summing up at paragraph 26 line 9 to line 10, when he made an adverse inference after stating that Defence witness Siteri Gade admitted that she was a serving prisoner.'*

### **Ground 2**

- (ii) *'The Learned Trial Judge erred in law and in fact when he failed to consider in his judgment that the complainant and the supporting witnesses had been inconsistent and significant material evidence being that the alleged bed sheet was not tendered.'*

### **Ground 3**

- (iii) *'The Learned Trial Judge erred in fact when he failed to consider in his judgment that the doctor was not called to confirm allegations via a medical certificate on the presence of injuries as alleged by the complainant (PW1) and her aunt (PW3).'*

### **Ground 4**

- (iv) *'That the learned judge erred in law and in fact in failing to direct himself that the guilty verdicts are unreasonable based on the paucity of evidence led by prosecution at the trial.'*

### **Ground on Sentence**

- (v) *'The Learned Judge erred in law when he failed to discount the appellant's period in remand separately from the mitigating factors.'*



### Summary of evidence

- [7] The complainant, an un-married woman of 21 years and the Appellant, 36 years old and a father of two minor children had met each other following an accidental telephone call and a love affair had begun between the two. At about 11.00 p.m. on 21 September 2009 the Appellant had called the complainant and insisted that she should bring the camera to Tacirua and she had agreed, reluctantly though, to come just to handover it and return home. As soon as she arrived in Tacirua in a taxi, the Appellant and his nephew had got in and instructed the taxi driver to go to Newtown. When they reached Newtown, the Appellant had requested the complainant to get down from the taxi and come to his friend's place. The complainant had agreed but had told the Appellant that she could not stay long. All of them had then gone to the Appellant's friend's house. After a while, she had begged him to allow her to leave but the Appellant had not acceded to her request. Thereafter, the Appellant had got his friend's family to vacate the bedroom and sleep in the sitting area so that the Appellant and the complainant could use the bedroom.
- [8] Once inside the bedroom, the Appellant had begged her to have sex with him but she had refused. He had tried to kiss her and pushed her onto the bed but no sexual intercourse had taken place in the night. They had breakfast in the house next door and once again the Appellant had gone inside the said bedroom and asked the complainant to follow. While both of them were inside the bedroom the Appellant had tried to kiss the complainant and tried very hard to remove her garments. She had pushed him away but the Appellant had got on top of her despite her resistance. When she tried again to push him away he had pushed her forehead down on the bed and landed two punches on her thighs. She had told him that she did not want to have sex with him. Thereafter, the Appellant had penetrated her vagina with his penis. She had still resisted by pushing him away but the Appellant had then throttled her neck. At that point, unable to resist any longer she had given in and the Appellant's penis had kept moving in and out of the complainant's vagina for about 05 minutes. She had once again said that she did not agree to what the Appellant was doing to her.

- [9] After the act, the Appellant had given some hot water to the complainant to clean herself and also called his friend to see what had happened i.e. the blood on her and the bed. According to the complainant the blood had come from her vagina. Both of them had then left in a taxi to go to her aunt's place with whom she was staying at Laucala Beach. She had not complained to the police on her way home as the Appellant was in the taxi and she was scared to do so. Upon reaching home, the aunt had observed that the complainant was weak and asked her what had happened. She had told the Aunt that the Appellant had raped her and both had agreed that the complainant should report the matter to police. Accordingly, the complainant had made a complaint to the police on 23 September as she was too weak to do so on the same day and she had been later taken to CWM hospital on 26 September. She was emphatic that the Appellant had raped her.
- [10] The complainant's aunt Seini Lagakali had seen the complaint's hands and face or forehead swollen; looking dirty, ugly and shattered on her arrival along with a boy or a man whom Seini identified as the Appellant. She had been confused and not confident. Seini had questioned her and the complainant had told her that the Appellant had raped her. She had suggested going to the police and the complainant had agreed. Accordingly, both of them had visited Valelevu Police Station and given statements.
- [11] The Appellant's counsel had conceded at the close of the prosecution case that there was a case for the Appellant to answer. However, the Appellant did not testify but called Siteri Gade, the wife of Dike Manasa in whose house the alleged act of rape had taken place. Dike Manasa had been a close friend of the Appellant. Siteri on her own had revealed that she was staying in Woman's Prison at Korovou at the time of giving evidence. She confirmed that the Appellant and the complainant, whom she had seen for the first time, had come in the early hours of 22 September to their house while they were sleeping and later at the request of the Appellant, she along with her husband had allowed them to use the bedroom while they slept in the sitting room. In the morning the Appellant and the complainant had had breakfast and after breakfast both had gone into the bedroom. After a while both had come out of the bedroom and the complainant had been normal. She had not said anything to her but had taken a



shower. Siteri had given her some clothes. Both had left their house at about 4.00 p.m. After they left, Siteri had removed the bed sheet and laundered it but had seen nothing on it.

[12] I shall now deal with the grounds of appeal.

**Ground 1** - 'The Learned Trial Judge acted unfairly against the Appellant in his summing up at paragraph 26 line 9 to line 10, when he made adverse inference after stating that Defence witness Siteri Gade admitted that she was a serving prisoner.'

[13] Before I proceed any further I should place on record the observations of His Lordship the Chief Justice in Ananda Abey Raj v The State CAV 0003 of 2014: 20 August 2014 [2014 FJSC 12] on the complaints of any non-direction and misdirection in appeal. Quoting 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, His Lordship said

*'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.'*

[14] In Ananda Abey Raj's case His Lordship the Chief Justice further commented upon the failure of both counsel to remind the judge of an omission in the direction to the assessors and 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.'*

[15] In this case the Learned High Court Judge had asked both counsel whether any re-directions were required and they had replied in the negative.

[16] The sentences complained of in the summing up is as follows.

*'She admitted, she's serving time at Korovou Women's Prison, at the moment. What you make of DWI's evidence, is entirely a matter for you.'*

[17] A plain reading of the sentence complained of makes it abundantly clear that the Learned High Court Judge has not said that Defence witness Siteri Gade admitted that she was a serving prisoner (emphasis mine) though the Defence counsel had informed the Judge in the absence of assessors that she was serving a prison sentence. Instead, what the Judge had said was that Siteri Gade admitted that she was serving time at the said Prison. She began her evidence at the trial by stating that *'I am currently staying at Women's Prison at Korovou.'* Under cross-examination she said *'I am in Women's Prison in Korovou.'* Therefore, the Learned Judge had not said anything that may have conveyed to the assessors any inference other than what the witness herself had already conveyed in her evidence. The Learned Judge followed it up by stating *'what you make of DWI's evidence is entirely a matter for you.'* Thus, I disagree that the Learned High Court Judge had conveyed any adverse inference by the sentence aforesaid in the summing up.

[18] The Counsel for the Appellant also complained that the Learned Judge should have directed the assessors that they should disregard Siteri Gade's status in evaluating her evidence. What is the status of the witness that the Judge could possibly have requested the assessors to ignore? There was no evidence of her exact status before court *vis-à-vis* the prison. Had the Judge gone any further, the assessors, being laymen may have got the impression that Siteri was in fact serving a sentence as a convicted prisoner. The Judge had averted that danger by not addressing the assessors any further other than reminding them of her own evidence but adding that they were free to arrive at any conclusion upon her evidence.



- [19] **Merumeru v. The State** [1968] 14 FLR 177 was a case where the appellant, while serving a sentence of imprisonment, was tried for the offence of assault occasioning actual bodily harm to the Deputy Controller of Prisons. The alleged offence took place in the prison and witnesses were called, both by the prosecution and for the defence, who were convicted persons serving sentences. In his summing up the trial judge told the assessors that they must give such weight as they thought appropriate to the evidence of those witnesses, but warned them that it was evidence from a source which put them on their guard and should be scrutinised with care and examined to see if it was corroborated by or consistent with other evidence which they felt able to accept. The Court of Appeal held that

*" Later he dealt individually with the evidence of the defence witnesses. It is quite clear from his own Judgment that he did not believe the two principal defence witnesses Viliame Vakarewakuila and Waisaki Madiqi and it may well be that his summing up conveyed that to the assessors. But there is nothing wrong in that, provided he left the matter to the assessors to form their own opinions, and he did that."*

- [20] Therefore, I do not think that the Judge should necessarily have given a direction of the so called status of Siteri in the summing up and in my view the assessors would not have arrived at a different conclusion even if such a direction had been given. I am also of the view that lack of such a specific direction has not resulted in any miscarriage of justice.

- [21] On the other hand Siteri's evidence in material particulars corroborates the version of the complainant except on the point that she had not seen any blood stain on the bed sheet. The complainant seems to have been confronted with this evidence in cross-examination and she had replied that Siteri was lying in stating that she had collected a bed sheet without blood stain on it. Thus, given a free hand to decide upon Siteri's evidence by the Learned Judge, I am not surprised that the assessors had chosen not to place reliance on her evidence on the lack of blood stains on the bed sheet and thereby disbelieve the complainant. Accordingly appeal ground one is rejected.



**Ground 2 -** ‘The Learned Trial Judge erred in law and in fact when he failed to consider in his judgment that the complainant and the supporting witnesses had been inconsistent and significant material evidence of the alleged bed sheet not having been tendered .’

[22] The Appellant firstly complains in his written submissions of three statements found in the complainant's evidence under oath which are alleged to be contradictory to her statement to the police. However, the three statements set out in the written submissions are really omissions alleged to be not found in her police statement. But, not a single of such alleged omissions had been highlighted in the cross-examination of the complainant. The police statement of the complainant had not been even referred to in her evidence. Therefore, merely because her police statement is found in the Court Record the Court of Appeal cannot peruse it and look for omissions in the complainant's evidence under oath. The effect of such omissions or inconsistencies could be considered if the complainant had been confronted with them at the trial and allowed her the opportunity to explain, if possible. Thus, I do not find any merit in this submission. In that context the observations made in Gyan v. State [1963] 9 FLR 105 need not be considered.

[23] Secondly, the Appellant also complained of an alleged inconsistency between the evidence of the complainant and her aunt Seini Lagakali. The complainant had said that the Appellant pushed down her forehead onto the bed, punched her thighs, and even strangled her prior to committing rape. Seini Lagakali had said that she saw her niece's face swollen and her having swollen thighs, hands and forehead. I do not think that there is any material inconsistency between these two witnesses. The evidence of these two witnesses relate to two different aspects with a time span coming in between. The complainant speaks of what was done to her while her aunt speaks of what she observed. An act and the outward manifestation of it need not be the same and exactly matching. I would not reasonably expect these two witnesses to be exact and mathematically precise with regard to the cause and effect of the Appellant's use of force on the complainant. If they are, then that would surprise me and give rise to a doubt of a total fabrication.

- [24] Even assuming for the sake of argument that there is some inconsistency between the two testimonies, when such inconsistency should not be attached with any unwarranted importance at the trial is stated succinctly in **Bharwada Bhoginbhai Hirjibhai v State of Gujarat** [1983] AIR 753, 1983 SCR (3) 280 by the Supreme Court of India where it was held *inter alia*

*'Over much importance cannot be attached to minor discrepancies ..... Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses therefore cannot be annexed with undue importance. More so when the all-important "probabilities-factor" echoes in favour of the version narrated by the witnesses.'*

- [25] I am of the view that the alleged inconsistency pointed out by the Appellant is of very minor nature and need not have been specifically pointed out when the Learned Judge had fully set out the evidence of the complainant and her aunt in verbatim in the summing up. Therefore, in my view the assessors would not have expressed any other opinion other than the one recorded even if the Judge had pointed out the so called inconsistency to them in the summing up.
- [26] The Appellant also argues that the failure on the part of the prosecution to produce the bed sheet is critical to the issue whether the case had been proved beyond reasonable doubt. Defence witness Siteri Gade has said in evidence that she laundered the bed sheet within a day or two. Therefore, even if there had been blood stains on the bed sheet after the act of rape as claimed by the complainant they may have disappeared with the washing. The investigators do not seem to have even searched for the said bed sheet and it had not been listed as an exhibit either. Thus, the prosecution cannot be faulted for not having produced the bed sheet at the trial. The bed sheet was not an indispensable item of evidence to prove the prosecution case. The defence too had not asked the investigating officer PC 3538 Alvind Kumar anything about the bed sheet. If the bed sheet had been so critical, Siteri could have produced that herself when she gave evidence. In the circumstances, I reject the second ground of appeal too.



**Ground 3 -** 'The Learned Trial Judge erred in fact when he failed to consider in his judgment that the doctor was not called to confirm allegations via a medical certificate on the presence of injuries as alleged by the complainant (PW1) and her aunt (PW3).'

[27] According to the complainant she had been taken to CWM hospital on 26 September, i.e. the 05th day after the incident. One Dr. Tusneer Singh, his hand written statement dated 26 September and the Medical Report of the same day had been listed among the disclosures. However, the prosecution called or produced none at the trial. It cannot be denied that had medical evidence been made available at the trial it might have shed some light on the act of sexual intercourse and other injuries. What telltale signs of the acts spoken to by the complainant may have remained after five days can only be surmised at this stage. The prosecution had not explained at the trial stage as to why the medical evidence was not led. Their submission before this court is that the requirement of corroboration in law for rape cases has been removed by section 129 of the Criminal Procedure Decree (now Criminal Procedure Decree Act) and therefore medical evidence, being of corroborative nature, was not absolutely necessary to prove the case.

[28] In **Bharwada Bhoginbhai Hirjibhai v State of Gujarat** (supra) the Supreme Court of India further said

*'Corroboration is not the sine-quo-non for a conviction in a rape case. In the Indian setting, refusal to act on the testimony of a victim of sexual Assault in the absence of corroboration as a rule, is adding insult to the Injury. Viewing evidence of the girl or the women who complains of rape or sexual molestation with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion, is to justify the charge of male chauvinism in a male dominated society.'*

[29] Section 129 of the Criminal Procedure Act states that

*'Where any person is tried for an offence of a sexual nature, no corroboration of the complainant's evidence shall be necessary for that person to be convicted; and in any such case the judge or magistrate shall not be required to give any warning to the assessors relating to the absence of corroboration'*



- [30] Thus, it appears that jurisprudence elsewhere had developed without any statutory compulsion not to insist on corroboration of the victim's testimony in rape cases which has been now codified by section 129 of the Criminal Procedure Act. Therefore, technically the position taken up by the State cannot be assailed (see also Kean v State Criminal Appeal No. AAU 95 OF 2008: 13 November 2013 [2013 FJCA 117]).
- [31] However, I am of the view that the legislators would not have intended by section 129 to sanction withholding corroborative evidence, if available, from court. In other words section 129 could not have intended to deprive the court of corroborative material, if and when readily available, because both the assessors and the judge would always like to see that the evidence would not only satisfy the elements of the offence but also their conscience that not only the guilty would not go unpunished but also that the innocent would not be convicted. Thus, I believe that all what section 129 seeks to achieve is that an accused would not go scot-free merely because the complainant's evidence is not corroborated by other evidence, be it expert evidence such as medical evidence or otherwise. Section 129 is a shield protecting a truthful but uncorroborated testimony of a complainant but should not be used as a sword against an accused.
- [32] In the instant case there is no doubt that the prosecution could have led medical evidence. In fact, at the last pre-trial conference the prosecution had indicated that it would rely on the medical report too. However, in terms of law it was not a *sine qua none* to prove the case beyond reasonable doubt against the Appellant. The Appellant seems to be under a misapprehension that such evidence was absolutely necessary to prove the complainant's allegation of act of sexual intercourse and lack of consent.
- [33] While it is true that medical evidence in a rape case could shed light on either one or both of the said elements, surprisingly, in this case the Appellant had not challenged either of them in the cross-examination of the complainant. There was not even a suggestion to the complainant that the Appellant had not penetrated her vagina or that it happened with her consent. The act of sexual intercourse and consent or lack of it, were matters within the exclusive knowledge of only the complainant and the

Appellant. The complainant had testified to both the act of sexual intercourse and lack of consent. The Appellant had not challenged her evidence in cross-examination. Neither had he testified to the contrary. The Appellant appears to have confronted the complainant only with Siteri Gade's position that the bed sheet had no blood stains only to get an answer from her that Siteri was lying.

- [34] In the circumstances, the assessors were entitled to act purely on the evidence of the complainant if they had believed her version. Though there was no medical evidence the injuries on the complainant's body to a great degree had been corroborated by her aunt's evidence whose observations of the complainant's demeanour and injuries also had gone unchallenged in the cross-examination even by way of a suggestion. Further, defence witness Siteri Gade's evidence, by and large, had corroborated the complainant's evidence. Therefore, in my view the medical evidence, if led, would not have changed their opinion. The chances are that medical evidence might have further corroborated the complainant. Therefore, in my view failure to lead medical evidence has not resulted in a miscarriage of justice. I reject the third ground of appeal.

**Ground 4 -** 'That the learned judge erred in law and in fact in failing to direct himself that the guilty verdicts are unreasonable based on the paucity of evidence led by prosecution at the trial.'

- [35] The gist of the Appellant's complaint is that it was unreasonable for the Learned Judge to have accepted the complainant's evidence on penile penetration without medical evidence. According to his submissions, the testimony of the complainant on oath which he has termed as hearsay evidence is not enough to prove the fact of penetration beyond reasonable doubt and medical evidence is the only credible evidence to prove penetration. Thus, the Appellant argues that the trial Judge had erred in law and in fact in affirming the guilty verdict of the assessors without weighing the entirety of evidence before him at the trial. He also has submitted that the verdict is unreasonable or cannot be supported having regard to the evidence resulting in gross miscarriage of justice.



- [36] The Learned Judge in his judgment has stated *inter alia* that he had reviewed the evidence, directed himself in accordance with the summing up, and held that the assessors' verdict was not perverse and it was open to them to reach the conclusion they had reached on the evidence. Accordingly he had accepted the assessors' verdict.
- [37] The Appellant relies on Ram v. State Criminal Appeal No. CAV0001 of 2011: 09 May 2012 [2012 FJSC 12] to argue that the learned Judge should have independently assessed the evidence for him to satisfy that the ultimate verdict is supported by evidence and is not perverse. However, in Kaiyum v State Criminal Appeal No. AAU 0071/2012: 14 March 2014 [2014 FJCA 35] the Court of Appeal held otherwise on the basis that the above statement in Ram was *obiter dicta* and the Supreme Court had approved on other occasions the practice of the trial Judge writing a short judgment confirming with the assessors' opinion in compliance with section 237 of the Criminal Procedure Act 2009 in the following terms.

*'While we accept that in Ram the Supreme Court did state that an independent analysis of evidence by the trial judge was necessary to ensure the verdict is supported by evidence, the remark is only an obiter dicta. We say this because the remark was made in the course of formulating the test when a guilty verdict is challenged on the basis that it is unreasonable or cannot be supported having regard to the evidence ( see, section 23 (1) (a) of the Court of Appeal Act). In subsequent cases, the Supreme Court has clarified that where the trial judge agrees with the opinions rendered by the assessors, section 237 of the Criminal Procedure Decree does not require the trial judge to carry out an independent analysis of evidence before pronouncing judgment. But the Supreme Court has endorsed that "a short written judgment, even where conforming with the assessors' opinions is a sound practice" (State v Miller (unreported CAV 8 of 2009; 15 April 2011, Mohammed v State (unreported CAV 2 of 2013; 27 February 2014))'*

- [38] Therefore, I do not think that the complaint of the Appellant on this score is sustainable.
- [39] His complaint of lack of medical evidence has already been dealt with in some detail earlier. The Appellant seems to think that the complainant's evidence in regard to the act of sexual intercourse and want of consent is hearsay evidence. This is a complete misconception. Her evidence is direct and the best evidence on both elements. Her aunt's recent complaint evidence corroborates the complainant's evidence on the



effects of use of force by the Appellant. Medical evidence is only of corroborative value. No medical evidence taken alone could prove a case of rape except in a rare and exceptional case where for example the complainant is dead.

[40] If the Appellant had considered the medical evidence to be so crucial he could have called the doctor as part of his defence. At the end of the prosecution case he conceded that there was a case to answer which means that he thought that there was at least a *prima facie* case placed by the prosecution before court even without the medical evidence both on the act of rape and lack of consent, the two ingredients of the offence he was charged with. He did not answer the prosecution case with regard to those two matters. Apart from the complainant only the Appellant could have testified to one or both of the critical elements of the offence in the affirmative or negative. Neither did he call his friend Dike Manasa but only called Siteri Gade, friend's wife. Siteri's evidence does not constitute a frontal attack on the complainant's evidence on the act of sexual intercourse and lack of consent. On the contrary, in general even Siteri corroborates the complainant's version of events that took place in Siteri's house.

[41] The Appellant relies on the case of Kaiyum in support of his argument that in the absence of medical evidence the case against him had not been proved beyond reasonable doubt and therefore the verdict is unreasonable and cannot be supported having regard to the evidence. In Kaiyam one of the complaints of the Appellant was on the inadequacy of the medical evidence led by the prosecution and the court had found that the inadequacy could be explained having regard to the other evidence and held that no criticism can be made regarding the medical evidence in that case. Thus, Kaiyum is not an authority to the Appellant's proposition that no rape could be proved without medical evidence. On the other hand Kaiyum has not considered section 129 of the Criminal Procedure Act 2009. In terms of section 129 no prosecution in respect of an offence of a sexual nature should fail for lack of corroboration of the complainant's evidence provided her testimony could be relied upon. It further states that no direction on the absence of such corroboration is also required. Thus, even the judge need not necessarily direct himself or herself on the lack of medical evidence being corroborative material in a case of rape in his judgment.

[42] I have carefully examined the entirety of evidence led in this case and I cannot help but feel that the Appellant had taken advantage of the complainant who had trusted him to the extent that she thought that her relationship with him was 'unbreakable'. She is described as a humble and quiet person who would not talk back even when in disagreement. To his detriment, the Appellant appears to have been under the impression that because the complainant was his girlfriend he had an open licence to have sexual intercourse with her even against her consent. I am certain that the Appellant knew very well that when he penetrated her vagina, he was doing it against her will because by that time she had finally given up her resistance having been overpowered by the Appellant's superior physical strength and rough tactics. The Appellant had simply betrayed her.

[43] Analysing the evidence of the prosecution carefully, I find that the victim's testimony has stood the test of probability, consistency, lack of contradictions, promptness and been enhanced by the corroboration in the form of the observations made by her aunt. 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.

[44] 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 said

*'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....; 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.'*

[45] When a verdict is challenged on the basis that it is unreasonable, the test is whether the trial judge could have reasonably convicted on the evidence before him (vide Ram and Kaiyum). In my view neither the opinion of the assessors nor the verdict of the Learned Judge could be considered as unreasonable. I think having regard to the evidence led the Appellant could have been convicted of the charge levelled against



him and therefore the verdict of guilt against the Appellant could be supported. I would follow Ram where the Supreme Court held that '*an appellate court will not set aside a verdict of a lower court unless the verdict is unsafe and dangerous having regard to the totality of evidence in the case*'. Thus, the forth ground of appeal is rejected.

**Ground on sentence** 'The Learned Judge erred in law when he failed to discount the appellant's period in remand separately from the mitigating factors.'

[46] The Learned High Court Judge had considered the Appellant's period of remand, i.e. 01 year and 08 months under mitigating factors along with the fact that the Appellant had committed a sex offence for the first time, though having 07 previous convictions and given a reduction of 04 years for both under mitigating factors.

[47] Section 24 of the Sentencing and Penalties Act 2009 states that

*'If an offender is sentenced to a term of imprisonment, any period of time during which the offender was held in custody prior to the trial of the matter or matters shall, unless a court otherwise orders, be regarded by the court as a period of imprisonment already served by the offender.'*

[48] In Sowane v. State CAV 0038 of 2015: 21 April 2016 [2016 FJSC 8] the Supreme Court, following Basa v State AAU0024 of 2005: 24 March 2006 [2006 FJCA 23] approved the practice of arriving at the head sentence after considering the aggravating and mitigating factors as it 'has the advantages of simplicity and clarity' and thereafter regard any period of remand already served by the Appellant and give a substantial allowance for that period. Such reduction need not be the exact days or even weeks spent on remand.

[49] The Court of Appeal in Domona v State AAU 0039 of 2013: 30 September 2016 [2016 FJCA 110] following Sowane said that in future the time spent in remand must not be considered as a mitigating factor and it should be considered separately as stipulated by law. I couldn't agree more. Giving reasonable and substantial



allowance to the period of custody after the final sentence is arrived to determine the head sentence brings clarity and transparency to the sentencing process apart from being compliant with section 24 of the Sentencing and Penalties Act 2009.

[50] Therefore, it is clear that the Learned Judge should have considered the Appellant's period of remand after arriving at the final sentence. However, both Sowane and Domona were decided in the year 2016 and the trial Judge did not have the benefit of them when he decided the Appellant's case in the year 2013. Nevertheless, there is merit in the Appellant's complaint.

[51] Now the question is how this Court should approach the Appellant's complaint. In Ananda Abey Raj v. The State CAV 0003 of 2014: 20 August 2014 [2014 FJSC 12] while approving the decision in Naisua v. State Crim. App. No. CAV 0010 of 2013: 20 November 2013 ([2013] FJSC 14), the Supreme Court 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.

[52] 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'*

- [53] 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.'*

- [54] It is clear that the trial Judge has started the usual sentencing process with 07 years imprisonment which is the lowest point of the tariff for adult rape cases going up to 15 years. In **Koroivuki v State** Criminal Appeal No. AAU 0018 of 2010: 05 March 2013 [2013 FJCA 15] it was held that as a matter of good practice, the starting point should be picked from the lower or middle range of the tariff. In this regard the Appellant has got the maximum allowance. The trial Judge has reduced 04 years for the first offence and period of remand under mitigating factors. I am certain that if not for the remand period the trial Judge would not have deducted 04 years for the Appellant being found guilty of a sex offence for the first time under mitigating factors.

- [55] I would like to remind myself of the following words of wisdom also in dealing with this ground of appeal. Dr. Anand J. on behalf of the Supreme Court of India said in **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.'*



- [56] 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 ..... 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... "*

- [57] 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.'*

- [58] 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.'*

- [59] Saleem Marsoof J., in the Supreme Court said in **Quari v State** Criminal Petition No. CAV 24 of 2014: 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."*

- [60] 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 (see Bijendra v State Criminal Appeal No, AAU 0056 of 2013: 30 September 2016 [2016 FJCA 111], Turogo v State Criminal Appeal No, AAU 0008 of 2013: 30 September 2016 [2016 FJCA 117], Matasavui v State Criminal Appeal No. AAU 0036 of 2013: 30 September 2016 [2016 FJCA 118]).

[61] I have revisited all the circumstances of the case and feel that the Appellant may have been somewhat lucky to have escaped with a sentence of 08 years imprisonment with a non-parole period of 06 years. The last person who the complainant thought, would rape her would have been her boyfriend, the Appellant who should have been her protector and guardian. Therefore, I am convinced that the ultimate sentence of 08 years imprisonment should not be disturbed as it meets the ends of justice.

[62] In a somewhat similar case Rainima v State Criminal Appeal No. AAU 0022 of 2012: 27 February 2015 [2015 FJCA 17] the Court of Appeal said as follows:

*'Similarly, the trial judge has taken into account the remand period of the appellant also as a mitigating factor in determining the sentence....the deduction of 5 years for the offence of rape in this case can be reasonably accounted for the time spent in remand, the guilty plea and the good behavior (good character) of the appellant... I am of the view that the sentence imposed by the trial court is lawful and this court should not intervene with it. Therefore, pursuant to section 23(3) of the Court of Appeal Act, Cap. 12, the appeal is dismissed and the sentence imposed by the trial Judge is affirmed.'*

[63] Therefore, considering all the circumstances of the case I am not inclined to interfere with the sentence imposed on the Appellant. I think the sentence of 08 years imprisonment with a minimum period of 06 years to be served before the Appellant becoming 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.

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

**Perera, JA**

[65] I have read in draft the judgment of Prematilaka JA and I agree with His Lordship's reasons and conclusion.

**The Orders of the Court are:**

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



.....  
**Hon. Mr. Justice S. Chandra**  
**JUSTICE OF APPEAL**

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

.....  
**Hon. Mr. Justice V. Perera**  
**JUSTICE OF APPEAL**