

**IN THE COURT OF APPEAL, FIJI**  
**ON APPEAL FROM THE HIGH COURT OF FIJI**

**CRIMINAL APPEAL AAU 97 of 2014**  
**(High Court HAC 78 of 2013)**

**BETWEEN** : **SAMISONI RABAKA**

**Appellant**

**AND** : **THE STATE**

**Respondent**

**Coram** : **Calanchini P**  
**Chandra JA**  
**Aluthge JA**

**Counsel** : **Mr T Lee for the Appellant**  
**Mr L Burney for the Respondent**

**Date of Hearing** : **2 July 2018**

**Date of Judgment** : **10 August 2018**

**JUDGMENT**

**Calanchini P**

- [1] The appellant was charged with one count of rape contrary to section 207(1), 2(b) and (3) of the Crimes Act 2009. The particulars of the offence were that the Appellant on 5

February 2013 at Veikoba in Valelevu penetrated the vagina of (name not published) a child under the age of 13 years with his finger.

- [2] Following a trial in the High Court before a Judge sitting with three assessors, the assessors returned unanimous opinions of guilty. In a judgment delivered on 18 July 2014 the learned trial Judge indicated his agreement with the guilty opinions of the assessors and convicted the appellant of the offence of rape. On 25 July 2014 the appellant was sentenced to a term of imprisonment of 16 years with a non-parole term of 15 years. An already in place domestic violence restraining order was extended until further order of the Court.
- [3] On 14 August 2014 the appellant filed a timely notice seeking leave to appeal against conviction and sentence. An amended notice of appeal was filed on 15 March 2016. In that notice there were three grounds of appeal against conviction and one ground against sentence. A single judge of the Court refused leave to appeal against conviction and granted leave to appeal against sentence in a Ruling delivered on 5 May 2016.
- [4] At the commencement of the appeal hearing Counsel for the appellant informed the Court that the appellant does not seek to renew his application for leave to appeal against conviction and will pursue the one ground of appeal against sentence for which leave had been granted. That ground of appeal is that:

*“The learned trial Judge caused the sentence to be harsh and excessive by treating as an aggravating factor:  
— — — that he would put a four year old vulnerable witness through the ordeal of giving evidence to the Court.”*

- [5] These remarks appear in paragraph 11 of the sentencing decision. For this particular factor the learned Judge added a further 2 years to his starting point sentence of 14 years. It was conceded by the respondent that the right to a trial is a constitutional right which implies a right to plead not guilty and a right to compel the prosecution (i.e. the State) to

prove its case beyond reasonable doubt. A convicted person cannot be punished to exercising a constitutional right to be tried for the offence for which he has been charged.

- [6] On the other hand when an accused person pleads guilty to such an offence at any stage of the proceedings so as to avoid a trial and thereby not put a young vulnerable witness through the ordeal of giving evidence and being cross-examined, a discount in sentencing is given. The earlier the indication of pleading guilty the greater is the discount.
- [7] It must be noted that the appellant, who represented himself at the trial, directed only 1 question to the young complainant. Counsel for the respondent submitted that the degree of trauma caused by the complainant being required to give evidence was considerably less than would have been the case under a more vigorous cross-examination. As well, Counsel for the appellant submitted that the appellant's last prior conviction was in 2006 for an unrelated matter. The present offence was committed in February 2013. Counsel submitted that some discount for character should have been included in the sentencing decision.
- [8] In this case it is clear that the sentencing discretion has miscarried. When the sentencing decision is read as a whole it is my opinion that a different sentence should have been passed. As a result I would quash the sentence passed by the trial Judge and I would substitute a sentence of 13 years imprisonment with a non-parole term of 11 years.

**Chandra JA**

- [9] I agree with the reasoning and conclusions of Calanchini P.

**Aluthge JA**

- [10] I have read the draft judgment of Calanchini P and agree with the decision and the reasons given.



Orders:

1. *Appeal against sentence is allowed.*
2. *The sentence passed in the High Court is quashed.*
3. *The appellant is sentenced to a term of 13 years imprisonment with a non-parole term of 11 years with effect from 25 July 2014.*

*W. Calanchini*

Hon Mr Justice W.D. Calanchini  
PRESIDENT, COURT OF APPEAL



*S Chandra*

Hon Mr Justice S Chandra  
JUSTICE OF APPEAL

*A Aluthge*

Hon Mr Justice A Aluthge  
JUSTICE OF APPEAL