

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

CRIMINAL APPEAL NO.AAU 0030 of 2014
(High Court Criminal Case No. HAC 124 of 2012)

BETWEEN : **MOHAMMED ALFAAZ**

Appellant

AND : **THE STATE**

Respondent

Coram : Chandra, JA
Prematilaka, JA
Fernando, JA

Counsel : Ms. Nasedra. S for the Appellant
Mr. Babitu. S for the Respondent

Date of Hearing : 20 February 2018

Date of Judgment : 08 March 2018

JUDGMENT

Chandra, JA

[1] I agree with the reasoning and conclusions of Prematilaka, JA.

Prematilaka, JA

[2] This appeal arises from the conviction of the Appellant on four counts under the Crimes Decree, 2009 (now the Crimes Act, 2009). All offences are alleged to have been committed on 17 September 2012 at Nadi in the Western Division against P (name withheld).

- [3] The first count of sexual assault is under section 210 (1) (a) and (2) for having unlawfully and indecently assaulted P by licking her vagina with his tongue, the second count of rape is under section 207 (1) and (2) (a) for having had carnal knowledge of P without her consent, the third count of rape is under section 207 (1) and (2) (a) for having had carnal knowledge of P by inserting his penis into her anus without her consent and the fourth count of rape is under section 207 (1) and (2)(a) for having penetrated the mouth of P with his penis without her consent.
- [4] After trial the assessors expressed unanimous opinions that the Appellant was guilty of all counts. The Learned High Court Judge on 30 January 2014 concurred with their opinion and convicted the Appellant in his Judgment. On 05 February 2014 the Learned Judge imposed sentences of 08 years of imprisonment on count one and 13 years, 07 months and 15 days of imprisonment on each of the second, third and fourth counts. All sentences were directed to run concurrently with 12 years as the non-parole period (*i.e.* during which the Appellant is not eligible to be released on parole).

Preliminary observations

- [5] The Appellant had sought leave to appeal against the conviction on five grounds of appeal and against the sentence on 03 grounds of appeal. The single Judge of the Court of Appeal had refused leave to appeal in respect all grounds of appeal on 12 August 2016. However, the Appellant had sought to renew those grounds of appeal before the Full Bench in an application filed on 23 February 2017 as permitted by section 35(3) of the Court of Appeal Act. The Legal Aid Commission had filed written submissions in relation to the grounds of appeal urged before the single Judge. The State also had replied to the same grounds of appeal in its written submissions. Therefore, it could safely be assumed that it is those grounds of appeal that would have to be considered by this Court in this appeal.

Grounds of Appeal

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

The grounds of appeal against the conviction are:

Ground 1

'The learned Judge erred in law in admitting the confession in the voir dire.'

Ground 2

'The learned Judge has erred in not adequately directing the assessors on the medical report.'

Ground 3

'The learned Judge erred in law by not giving adequate directions of the 1st charge and misdirecting the assessors on the 2nd, 3rd and 4th charges when there existed unreliable and insufficient evidence to prove the latter charges.'

Ground 4

'The learned Judge in not adequately directing the assessors on the circumstantial evidence.'

Ground 5

'The learned Judge erred in law when his Lordship failed to draw his mind to the Turnbull guideline requirement on identification and thereafter failed to give directions to the assessors on identification.'

The grounds of appeal against the sentence are:

Ground 1

'The learned Judge failed to pick the starting point on count 1 from the current sentencing tariff.'

Ground 2

'The learned Judge for counts 2, 3 and 4 chose a higher starting point rather than the set tariff.'

Ground 3

'The Appellant was punished twice by the presiding Judge for the same facts.'

- [7] However, in the written submissions filed by the Legal Aid Commission on behalf of the Appellant and then, at the hearing of the appeal the counsel for the Appellant informed court that the first and fifth grounds of appeal would not be pursued. Accordingly, I would not consider those grounds of appeal in this judgment.
- [8] Third and fourth grounds of appeal would be considered along with what the Legal Aid Commission had considered as the strongest ground namely the second ground of appeal. Even the Appellant's written submissions have focussed mainly on ground 2.

Summary of evidence

- [9] The victim had been 07 years old at the time of the incident. The Appellant is her father's brother who was living with the victim's family. On the day of the incident as usual she had gone to school and after the school was over the Appellant is alleged to have picked her up at a certain point and taken to the kitchen of another nearby house where no one was present. In the kitchen he is said to have committed all four acts set out in separate counts. A neighbouring boy called John Davis had seen, through the window, the Appellant getting the victim to suck his penis inside the kitchen and he had alerted his mother.
- [10] In his caution interview which had been admitted at the trial, the Appellant had shed more light on what happened between him and the victim. It is pertinent to quote his revelations from the caution interview (with the victim being referred to as P).

"Q13 : where were you on Monday 17/9/12 at about 4 p.m.
 A : I came home at 11 a.m. and when it was the time for school children to come home then I went towards the road and was waiting at my uncle's house?
 Q14 : Then what happened?
 A : I was at my uncle's house standing between the kitchen and the house as the space is there. When I saw P I called her and she came to me.
 Q15 : Then what happened?
 A : When P came to me I hold her and took her into the kitchen. I then left her lie on the table, pulled her pants and panty and inserted my tongue in her vagina and started licking it.
 Q16 : Then what happened?
 A : After licking her vagina then I inserted my erected penis into her vagina and started pushing in and out.
 Q17 : Then what happened?
 A : After sometime I told her to turn around and then I inserted my penis inside her anus and started pushing in and out. When I inserted my penis into her anus she cried out but I still kept on doing it and after sometime I told her to get up.
 Q18 : Then what happened?
 A : Then I let her suck my penis. I was letting her suck my penis when one Fijian boy saw us and I quickly pulled the clothes of P and told her not to tell anyone and left from there.

- [11] Dr. Susana Mataki Nakeleva had given evidence on the medical examination done on the victim on 19 September 2012 by Dr. Cenaito who had since resigned and gone to Tonga for work. Dr. Susana had handled two examinations of teenage rape victims but not a single case of child rape before, though she had been a doctor for 20 years.
- [12] According to the Medical Examination Form, the victim had been produced with a history that had been recorded as *'Found patient in an empty house with naked boy, she was found to be sucking his penis.'* The medical findings are *'hymen extended wide open /hymen not intact'*. Professional opinion recorded is *'virginal examination confirms sexual assault either through penile penetration or fingering occurred.'*
- [13] Dr. Susana had elaborated in her evidence that if a 07 year old had engaged in sex with an adult one would normally expect injuries. According to her, bleeding might have stopped after two days and the healing process could be a little faster in the vagina (of a child) than in the case of an adult. On being questioned possibly on no mention of swelling in the Medical Examination Form, the doctor had said that the

presence of swelling (presumably at the time of examination) depends on the time period that has lapsed since the incident and the mode of penetration. According to her after two days bleeding could have stopped and mild swelling could have been there. On being questioned by the assessors the victim had said that bleeding had been there for two hours.

[14] Much of the Appellant's evidence had been on the allegations against police officers who had arrested him and recorded his charge statement and caution interview. On being specifically questioned at the trial on the four separate acts that form the counts, he had denied them. However, the Appellant had said that he had no problems with the victim prior to the incident.

[15] I would now proceed to consider the grounds of appeal. As I said before, I would focus on ground 02 along with grounds 03 and 04.

Ground 2

'The learned Judge has erred in not adequately directing the assessors on the medical report.'

Ground 3

'The learned Judge erred in law by not giving adequate directions of the 1st charge and misdirecting the assessors on the 2nd, 3rd and 4th charges when there existed unreliable and insufficient evidence to prove the latter charges.'

Ground 4

'The learned Judge erred in not adequately directing the assessors on the circumstantial evidence.'

[16] If I may recapture the Appellant's argument it is that at present a child's evidence requires corroboration if given unsworn and there is no such corroboration of the victim's evidence and in particular, with regard to the count on anal penetration there is no corroborative medical evidence and therefore, the conviction on count 03 cannot

be sustained. He also argues that the Learned Judge had failed to address the assessors on that aspect of the matter.

- [17] It appears from the record that the victim's evidence is unsworn. The Learned Trial Judge had questioned the victim to ascertain whether she was competent to give evidence, recorded that she had answered properly and proceeded to take her evidence. There is nothing on record to indicate that the defense had objected to the victim being called as a witness or her continuing to give evidence at any stage of the proceedings on the basis of her being incompetent. Neither had the Trial Judge encountered any reason to rule on the victim's capacity during her evidence. It was held in **G v DPP** [1997] 2 All ER 755 that the question whether a child is capable of giving 'intelligible evidence' does not require any input from experts such as child psychiatrists, because it is a simple test well within the capability of a judge or magistrate.

- [18] **ARCHBOLD Criminal Pleading, Evidence and Practice 2017** at page 1386 states

'It is plainly advisable to take any objection to competency before the witness is sworn or commences to give evidence... The incompetency of a witness may become apparent, however, only after he has commenced evidence... and, at common law, the objection has been allowed to be taken at any time during the trial... It was said that where a judge has admitted a witness as competent to give evidence, but upon proof of facts affecting the capacity of the witness, and upon observation of his subsequent behavior, changes his opinion with regard thereto, he may stop the examination, and direct the jury to consider the case exclusively on the evidence of the other witnesses It would clearly be within his discretion to discharge the jury..... Where the issue of competency is re-examined at the end of a witness's evidence, the court will no more be addressing credibility at that stage than when conducting the competency test at the outset '

- [19] In terms of section 129 of the Crimes Decree 2009 (now Crimes Act 2009) no corroboration of the complainant's evidence, irrespective of the age, is necessary for the accused to be convicted and no warning to the assessors is also required to be given relating to the absence of corroboration. However, in terms of section 10(1) of the Juveniles Act, if any child of tender years called as a witness, in the opinion of the court, does not understand the nature of the oath his or her evidence could still be taken if in the opinion of the court he or she is possessed of sufficient intelligence to

justify the reception of such evidence and to understand the duty of speaking the truth. According to the proviso to section 10(1) when the evidence of a child is so taken on behalf of the prosecution the accused is not liable to be convicted unless such evidence is corroborated.

[20] The Supreme Court in Kumar v State Criminal Petition No.CAV0024 of 2016: 27 October 2016 [2016] FJSC 44 where the child victim had given sworn evidence, had partly concurred and partly disagreed with the conclusions arrived at on section 10(1) of the Juvenile Act in State v AV Criminal Case No.HAC192 of 2008: 02 February 2009 [2009] FJHC 18 and similar views expressed in the majority decision in Kumar v State Criminal Appeal No.AAU0049 of 2012: 04 March 2015[2015] FJCA 32.

[21] The Supreme Court agreed with State v AV and Kumar v State to the following extent.

'Accordingly, I would declare that the requirement in section 10(1) of the Juveniles Act for the unsworn evidence of a child to be corroborated is inconsistent with the Constitution and is therefore invalid. For that reason, the trial judge's direction to the assessors that corroboration of the girl's evidence was not required was correct.'

[22] The reasons for the above assertion given in Kumar is as follows.

'..... independent evidence implicating a defendant in the sexual abuse of a child will very often not exist. It will invariably be the child's word against that of the defendant. So long as there is a rule requiring that a child's unsworn evidence be corroborated, children will be less protected from sexual abuse.'

[23] However, the Supreme Court departed from State v AV and Kumar v State to the following extent in respect of the common law requirement of giving a warning of the danger of convicting on uncorroborated evidence of a child.

'I am in respectful disagreement with Goundar JA's judgment in the Court of Appeal that the "competence inquiry" which the judge is required by section 10(1) to conduct before a child can give evidence, and the requirement at common law for a warning of the danger of convicting a defendant on the uncorroborated evidence of a child, are inconsistent with the Constitution and therefore invalid. However, whether the requirement for a warning of this kind should remain part of the common law is another matter., I believe that Fiji should follow the path taken in England many years ago, and

treat that requirement as no longer representing part of our common law. Accordingly, the fact that the trial judge did not give the assessors that warning does not undermine Kumar's conviction. Having said that, there may be some cases in which the trial judge thinks that a warning of this kind is desirable. That may have something to do with the nature of the child's evidence, or the way it was given, or it may have something to do with the assessors themselves. The trial judge is in the best position to assess that. So although there should no longer be any requirement on trial judges to give a warning of this kind, they may do so if they think that it is appropriate in a particular case.'

[24] Then on the 'competence inquiry' the Supreme Court declared

'I shall return to what impact the trial judge's failure to conduct a "competence inquiry" should have on Kumar's conviction when I have considered the other grounds of appeal, though I should add just one thing. It is good practice for a judge to tell the child that he or she must tell the truth. I have not considered whether that rule of practice could be said to have been elevated to a rule of law....'

'.....the trial judge should have determined before the girl gave evidence whether she could give sworn evidence. If he had decided that she could not, he should then have determined whether she could give unsworn evidence

'I do not believe that the assessors were less likely to accept the girl's evidence if it had been unsworn than if it had been sworn. And if it had been apparent to the trial judge in the course of the girl's evidence that she did not satisfy the conditions for giving even unsworn evidence, he would have directed the assessors to disregard her evidence. The fact that he did not do that means that he must have thought that she was intelligent enough to understand that she had to tell the truth. In the circumstances, despite the trial judge not having done what section 10(1) required him to do, no substantial miscarriage of justice occurred'

[25] Thus, in the light of the decision in Kumar the current legal position, in my view, could be stated as follows.

- (i) There is no longer any legal requirement for the unsworn evidence of a child to be corroborated to secure a conviction.
- (ii) Although there should no longer be any legal requirement on trial judges to give a warning of the danger of convicting a defendant on the uncorroborated evidence of a child, they may do so if they think that it is appropriate in a particular case.

- (iii) The Trial Judge should conduct a 'competence inquiry' required by section 10(1) of the Juvenile Act before a child can give evidence to ascertain whether the child could give sworn evidence and if not unsworn evidence. However, failure to do so would not *per se* be fatal to a conviction but it is a good practice for a judge to tell the child that he or she must tell the truth.

[26] In the backdrop of this legal position I shall now consider the above ground of appeal. It is now clear that the Appellant's argument that at present a child's evidence requires corroboration if given unsworn as a matter of an indispensable legal condition is not reflected in the recent judicial thinking. Further, the Trial Judge seems to have questioned the victim prior to the commencement of her evidence to ascertain her competence and had been satisfied that she had answered the questions properly. Yet, the Trial Judge had not taken her evidence on oath presumably because he would have felt that the victim may not have understood the nature of the oath. However, I think that it could be safely assumed that the Judge had gone through the 'competence test' and satisfied himself that the victim was possessed of sufficient intelligence to justify the reception of her unsworn evidence. The Trial Judge had not entertained any doubt about her capacity to give a true account of the events either at the commencement of or during the trial. In the circumstances, the failure to specifically tell the victim that she must tell the truth would not constitute a non-direction affecting the final outcome.

[27] On the other hand the conviction of the Appellant in this case is not solely based on the victim's evidence. I find that the Appellant's caution interview provides ample corroboration to the victim's testimony and medical evidence of vaginal penetration or fingering also lend support to the victim's evidence that she had been subjected to sexual abuse. The evidence of John Davis also provides support in some way to the victim's evidence. Therefore, in this case there was no necessity on the part of the Trial Judge as a matter of law to give a warning of the danger of convicting the Appellant on the uncorroborated evidence of the victim.

[28] I shall now refer to her evidence in verbatim

Q38: This bad thing was done by any part of Alfaaz's body: Tongue.

Q39: Where did he use his Tongue: down

Q40: Did he used another part of his body: down

Q41: What you mean by down: Panu (Penis)

Q42: Where did Alfaaz use this Panu: down

Q43: What is down: Pussy Vagina

Q44: Did Alfaaz use Panu anywhere else: Bump (Backside)

Q45: Dis Alfaaz use Panu anywhere else: No.

Q46: After Alfaaz did this thing did he tell you anything: Yes. Not to tell anyone.

Cross-examination

Q47: I put it to you Alfaaz never put his penis into your vagina: He did.

Q49: I put it to you Alfaaz never put his tongue in your vagina: He did lick my vagina.

Q50: I put it to you Alfaaz never put his penis at your back side: He did that.

Q52: I put it to you it was not Mr. Alfaaz who raped you? He did that.

[29] Therefore, there is clear evidence by the victim that the Appellant had committed the offences set out in the first three counts. I agree that the victim's evidence has not touched on the allegation set out in count 04 *i.e.* the penetration of her mouth. But, the evidence on that count is amply provided by John Davis whose evidence remained intact even after the cross-examination.

[30] I also agree that neither the Medical Examination Form nor the doctor's evidence confirms an act of anal intercourse relating to count 03. Nevertheless, the evidence on the act of anal intercourse is proved by the Appellant's own confession in the caution interview to go with the victim's own evidence. There is no challenge to the admissibility of his caution interview before this Court. In Hassan v Reginam

Criminal Appeal No.57 of 1977: 28 July 1978 [1978] FJCA 18 the Court of Appeal held citing previous authorities

"It is well established law that a man may be convicted, even of murder, solely upon his confession R V Sykes (1913) 8 Cr. App. R.233. McKay V The King (1935) 54 CLR 1. It has been stated in this Court that it is customary to look for some evidence of surrounding circumstances which are consistent with the confession. Such evidence need not be corroboration in the strict sense of the term, but merely evidence of facts which are not inconsistent with those set out in the confessional statements." (emphasis added)

[31] A similar view was held in **Khan V State** Criminal Appeal No AAU 0069 of 2007:

'It is well established law that the accused may be convicted of any crime upon his own confession alone. But as is pointed out by Ridley J in Sykes v R 8 Cr App 233 at page 236, the necessity seldom, if ever, arises, as the Court always examines the surrounding circumstances to ascertain if the confession is consistent with other facts which have been proved. In the present case there was evidence accepted by the learned trial Judge, and clearly by the assessors also, of several other circumstances suggesting strongly that the confession of the appellant was true.'

[32] The Learned Trial Judge had summed up to the assessors the evidence of John Davis relating to the charge on penetration of the victim's mouth as follows and in my view it is a fair and a balanced account on this issue.

'The next witness for the prosecution was John Davis. He is 18 years of age now. On 17.9.2012 he had seen the accused making his brother's daughter suck his penis inside the kitchen of Munaf's house. He had seen this from a distance of about 25 feet. He was standing on a hill. The window of the kitchen was open. This had happened after school time.'

'This is an independent witness. You watched him giving evidence in Court. What was his demeanour like? How he react to being cross examined and re-examined? Was he evasive? How he conduct himself generally in Court? Given the above, my directions on law, your life experiences and common sense, you should be able to decide whether witness's evidence, or part of a witness's evidence is reliable, and therefore to accept and whether witness's evidence, or part of evidence, is unreliable, and therefore to reject, in your deliberation. If you accept the evidence of this witness beyond reasonable doubt then you have to consider whether this evidence is sufficient to establish all elements of the 4th charge.'

- [33] On the medical evidence the Learned Judge's summing up is as follows.

'Doctor was called as the next witness for the prosecution. She is a doctor with 20 years experience. She is not the person who examined the victim. She marked and tendered the medical report P3. According to the report hymen extended and wide open and was not intact. The professional opinion confirms sexual assault either through penile penetration or fingering.'

'Under cross examination, she admitted if there was penile penetration there would be swelling. But she said that it will depend on time of examination after the incident as it could have been healed. She further said that medical findings are consistent with the history

'The doctor is an independent witness. If you believe her evidence, there is corroboration on sexual intercourse. However, there are no injuries or swelling in the vaginal area. You have to decide whether that is possible due to time lapse. Further the doctor is not the person who examined the victim. She was giving evidence on a report prepared by another doctor. Before attaching any weight to this evidence you have to keep these factors in mind.'

- [34] Given the facts and circumstances of this case, I find the above directions to be an adequate, fair and a balanced presentation of the medical evidence to the assessors on vaginal penetration. Obviously, one would not expect medical evidence to substantiate a charge of penetration of the mouth or the licking of vagina.

- [35] In **R v Powell** [2006] 1 Cr.App.R.31, CA it was held *inter alia* that infants simply do not have the ability to lay down memory in a manner comparable to adults and special effort must be made to fast-track such cases. I think the same reasoning is applicable to a child of 07 years as well. Therefore, one would not expect perfectly logically arranged evidence in the case of a child witness particularly when the child is the victim of the crime and probably carries both physical and psychological scares with her.

- [36] It had been remarked regarding an adult victim of rape in **Bharwada Bhoginbhai Hirjibhai v State of Gujarat** [1983] AIR 753, 1983 SCR (3) 280 that

'(1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen; (3) The powers of observation differ from person to person. What one may notice, another may not. It is unrealistic to expect a witness to be a human tape recorder;''

- [37] The Supreme Court in Lulu v State Criminal Petition No. CAV0035 of 2016: 21 July 2017 [2017] FJSC 19 said referring to Bharwada in the context of apparent discrepancies in an adult rape victim's recollection but which do not shake the basic version '*Their evidence is not a video recording of events.*' In my view, one has to be even more generous with and understanding of the evidence of a child witness who may have been traumatized by a completely alien experience in cases of rape and other forms of sexual assaults affecting her ability to narrate the incident in graphic details.
- [38] In R v. B [2011] Crim.L.R.233, CA it was held that the age of a witness is not determinative of his ability to give truthful and accurate evidence, and, if found competent, it is open to a jury to convict on the evidence of a single child witness, whatever his age.
- [39] Therefore, I do not think that there is merit in the Appellant's complaint that the Trial Judge had not adequately directed the assessors on the medial report.
- [40] In my view, neither the opinion of the assessors nor the verdict of the Learned Judge could be considered as unreasonable. I also think, having regard to the evidence led the Appellant could have been convicted of all counts and therefore the verdict of guilt against the Appellant could be supported. I have no doubt that on the available evidence the case against the Appellant has been proved beyond reasonable doubt and on the whole of the facts the only reasonable and proper verdict would be one of guilt. I reject the 02nd ground of appeal.
- [41] The Appellant's next complaint relates to the adequacy of directions on the 01st count and alleged misdirection on 02nd to 04th counts. The Appellant also complains of inadequacy of directions on circumstantial evidence.
- [42] The Supreme Court and this Court on more than one occasion had commented on constant complaints on alleged non-directions and misdirection. Knowing that I am being repetitive it is nevertheless apt once again to quote from Raj v State Petition for Special Leave to Appeal No.CAV0003 of 2014: 20 August 2014 [2014] FJSC 12 where the Supreme Court remarked

'At trial, defence counsel could have raised with the judge the proper direction to the assessors.....

'The raising of direction matters in this way is a useful trial 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. We do not believe this was intended in this case.'

[43] It is clear that the defense had not raised any non-directions and misdirection with the Learned Trial Judge at the end of his summing-up. Nevertheless, I examined the summing-up carefully and find that The Learned Trial Judge had devoted paragraphs 14 to 24 to inform the assessors of the four counts in the Information and the elements of offences set out therein. Therefore, I am satisfied that the directions on all counts are adequate. I have already dealt with the evidence available to sustain the convictions on the four counts.

[44] The Appellant also complains that adequate directions have not been given on circumstantial evidence. It appears that what the Appellant considers as circumstantial evidence appears to be is the evidence of John and perhaps even the caution interview. However, John's evidence is 'eye-witness' evidence and not a piece of circumstantial evidence. He had given direct evidence on seeing the Appellant getting the victim to suck his penis. It is true that the victim had not spoken to that act in her evidence. However, the Trial Judge had placed the evidence of both the victim and John before the assessors who seemed to have believed and acted upon John's evidence in relation to the 04th count. The evidence of a single witness, if believed, is sufficient to bring home a charge against an accused and therefore in this case the assessors were entitled to express an opinion of 'guilty' against the Appellant on the sole evidence of John.

[45] **Mani v. The State** Criminal Appeal No. AAU0087 of 2013: 14 September 2017 [2017] FJCA it was held as to the nature of on a caution interview as follows.

'Therefore, a confession is not circumstantial evidence because an accused speaks to his or her direct involvement and knowledge of a crime that has been committed. Whether what an accused says in a confessional statement is sufficient to bring home the charges against him is a different question

altogether. Therefore, no direction on circumstantial evidence is required in respect of the Appellant's confession.'

[46] Therefore, I see no merits in 03rd and 04th grounds as well. Accordingly I reject the 03rd and 04th grounds of appeal.

[47] I shall now consider the grounds of appeal against sentence.

Ground 1

'The learned Judge failed to pick the starting point on count 1 from the current sentencing tariff.'

Ground 2

'The learned Judge for counts 2, 3 and 4 chose a higher starting point rather than the set tariff.'

Ground 3

'The Appellant was punished twice by the presiding Judge for the same facts.'

[48] The Legal Aid Commission on behalf of the Appellant has conceded in the written submissions that there is no merit on grounds 01 and 02 and therefore, I would not deal with them.

[49] The 03rd ground of appeal against sentence is based on the aggravating factors the Learned High Court Judge had considered. He had added 03 years and 04 years respectively to counts 01 and 02 to 04 on account of the aggravating factors which are as follows.

- '(a) The victim was of a younger and tender age,*
- (b) The accused breached the trust bestowed on him as uncle,*
- (c) The victim was subjected to more than one sexual act,*
- (d) The accused had made the victim sexually active at a young age,*
- (e) The accused had traumatized the life of the victim,*
- (f) The accused had made the victim relive her experience in Court,*

(g) The accused showed no remorse for his actions and no repentance.

- [50] It is essential to refer to the decision in **Raj v State** Petition for Special Leave to Appeal No. CAV0003 of 2014: 20 August 2014 [2014] FJSC 12 in considering the Appellant's complaints on the sentence. The Supreme Court held in **Raj** as follows.

*'[54] Counsel referred us to **Simeli Bili Naisua v. The State** Crim. App. No. CAV 0010 of 2003. At paragraphs 19, 20 Goundar JA in the Supreme Court set out the correct approach to sentencing appeals. It is worth repeating those clear directions:*

*"[19] It is clear that the Court of Appeal will approach an appeal against sentencing using the principles set out in **House v The King** [1936] HCA 40; (1936) 55 CLR 499 and adopted in **Kim Nam Bae v The State** Criminal Appeal No.AAU0015 at [2]. 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;*
- (ii) Mistook the facts;*
- (iv) Failed to take into account some relevant consideration.*

- [51] The Appellant complains that the aggravating factors listed by the High Court Judge under (a) and (d) are the same. I think, there is merit in this submission in that the Judge appears to have fallen into the error of 'double counting' as highlighted in **Senilolokula v State** Criminal Appeal No.AAU0095 of 2013:14 September 2017 [2017] FJCA 100.

- [52] Though not taken up by the Appellant, I find that '*The victim was subjected to more than one sexual act*' under (c) should not have been treated as an aggravating factor as the Appellant had been charged in respect all four sexual acts. It is a well-established principle in sentencing that charged acts should not be treated as aggravating factors.

- [53] The Appellant also complains that taking the matters listed under (f) and (g) into consideration as aggravating factors would violate his constitutional right to a fair trial. In Raj the Supreme Court said

'However the suggestion that he was remorseful could count for nothing. He had pleaded not guilty, which was his right. But in doing so, he had put the complainant through the misery, fear, and embarrassment of having to give evidence and be cross-examined. Then he gave no evidence. Such a combination has been considered to amount to no mitigation at all: Asesela Drotini v. The State Crim. App. AAU0001/2005S 24th March 2006. She gave evidence in court from behind a screen. Indeed in his appeal, and by his appeal against conviction, he has maintained his innocence. No value can be attached to such remorse.'

- [54] The Supreme Court had made the above observations to emphasize a proposition of law in sentencing that in cases where an accused had contested the charges against him as he is entitled to do in law and gone through a full trial *inter alia* necessitating the victim to narrate her torment once again in court, he is not entitled to any discount or reduction of sentence on account of 'remorsefulness'. In fact there is no remorse or repentance on the part of an accused in that situation. However, that does not permit a Trial Judge to consider lack of remorse and repentance as an aggravating factor. The Learned Judge had wrongly considered them as aggravating factors in this instance which in my view is wrong in principle and constitutes an error of law.

- [55] I am also of the view that there is merit in the submissions of the Appellant that there is no rational basis to add 03 years for the aggravating factors in respect of the 01st count of sexual assault and add 04 years for the same aggravating factors in respect of the other counts of rape. The aggravating factors are common irrespective of the nature of the counts.

- [56] I shall now consider whether the above errors committed by the High Court Judge in arriving at the sentence should disturb the ultimate sentence. I find that the Supreme Court had made in Koroicakau v The State Criminal Appeal No.CAV0006U of 2005S: 04 May 2006 [2006] FJSC 5 very relevant observations in this regard. I also find that the Court of Appeal had followed the same reasoning in several subsequent decisions.

'This argument misunderstands the sentencing process. It is not a mathematical exercise. It is an exercise of judgment involving the difficult and inexact task of weighing both aggravating and mitigating circumstances concerning the offending, and recognising that the so-called starting point is itself no more than an inexact guide. Inevitably different judges and magistrates will assess the circumstances somewhat differently in arriving at a sentence. It is the ultimate sentence that is of importance, rather than each step in the reasoning process leading to it. 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.' (emphasis added)

[57] In Raj the Supreme Court remarked as follows

'[57] The learned judge referred to State v. AV [2009] FJHC 24; HAC 192.2008, 21st February 2009 where it had been said:

"Rape is the most serious form of sexual assault Society cannot condone any form of sexual assaults on children ... Sexual offenders must be deterred from committing this kind of offences."

[58] The judge correctly identified the tariff for rape of a child as being between 10-16 years imprisonment (Mutch v. State Cr. App. AAU 0060/99, Mani v. State Cr. App. No. HAA 0053/021, State v. Saitava Cr. Case No. HAC 10/07, State v. Tony Cr. App. No. HAA 003/08).'

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

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

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

- [59] 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 woman'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)

- [60] **Matasavui v State** Criminal Appeal No.AAU0036 of 2013: 30 September 2016 [2016] FJCA 118 the Court of Appeal dealing with the matter of sentence in a case of rape remarked

'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.'

- [61] The facts of the case speak to the extreme gravity of the offences committed by the Appellant. Sentences on such offences should reflect the highest possible degree of deterrence within the law to the prospective offenders who may otherwise be tempted to use children of tender years, who are most vulnerable to fall prey to them, to satisfy their sexual desires. Sentences on sexual crimes, particularly on children should also reflect the strongest disapproval of the society to such attempts to treat children as 'easy targets'.
- [62] The sentences imposed on the Appellant are well within the tariff for such offences. In the circumstances of this case, when I review the sentences imposed, I do not think that the ultimate sentences of 08 years imprisonment on the 01st count and 13 years, 07 months and 15 days on 02nd to 04th counts are anything but proportionate to the gravity of the offences. Even if I consider for the sake of argument that there was the single count of sexual assault and another single count of rape, I would consider the sentences imposed on the Appellant to be justified.
- [63] Thus, I conclude that the third ground on the sentence also has no merits and I reject the same.

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

Fernando, JA

[65] I agree with the reasoning and conclusions reached by Prematilaka, JA

The Orders of the Court are:

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



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Hon. Mr. Justice S. Chandra
JUSTICE OF APPEAL

A handwritten signature in blue ink, appearing to read "C. Prematilaka", written over a dotted line.

Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL

A handwritten signature in black ink, appearing to read "A. Fernando", written over a dotted line.

Hon. Mr. Justice A. Fernando
JUSTICE OF APPEAL