

IN THE SUPREME COURT OF FIJI
CRIMINAL APPELLATE JURISDICTION

CRIMINAL PETITION NO: CAV 0009/2018
[On Appeal From Court of Appeal No. AAU 030/2014]

BETWEEN : **MOHAMMED ALFAAZ**

Petitioner

AND : **THE STATE**

Respondent

Coram : Hon. Chief Justice Anthony Gates, President of the Supreme Court
Hon. Mr. Justice Saleem Marsoof, Judge of the Supreme Court.
Hon. Mr. Justice Sathya Hettige, Judge of the Supreme Court.

Counsel : Mr. M. Fesaitu for Petitioner
Dato' Shyamala Alagendra for Respondent

Date of Hearing : 16 August 2018

Date of Judgment : 30 August 2018

JUDGMENT

Gates, P

1. I have read the judgment of Hettige J in draft. I agree with his Lordship's conclusions, the reasons, and with the orders proposed.

Marsoof, J

2. I have read the judgment of Hettige J, in draft, and agree with his conclusions and proposed orders.

Sathvaa Hettige, J

3. This is an application for special leave to appeal against the Judgment of the Court of Appeal dated 8th March 2018 affirming conviction and sentence imposed on the petitioner by the High Court on three counts of rape and one count of sexual assault and dismissal of his appeal by the Court of Appeal.

4. By the Information dated 29th October 2012 the petitioner was charged with three counts of rape and one count of sexual assault committed by the petitioner against his brother's daughter, 'AN' (name is suppressed) in the High Court of Fiji at Lautoka as follows: -
 - (i) Count one: Petitioner on the 17th day of September 2012 at Nadi in the Western Division unlawfully and indecently assaulted 'AN' by licking the vagina of the said 'AN' with his tongue contrary to section 210 (1) (a) and (2) of the Crimes Decree, No 44 of 2009 (now Crimes Act, 2009)
 - (ii) Count two: The petitioner on the 17th day September 2012 at Nadi Western Division had carnal Knowledge of 'AN' without her consent contrary to section 207(1) and (2) (a) of the Crimes Decree No. 44 of 2009 (now Crimes Act 2009)
 - (iii) Count three: The petitioner on the 17th day of September 2012 at Nadi in the Western Division had carnal knowledge of 'AN', by inserting his penis into the anus of the said 'AN' without her consent contrary to section 207 (1) and (2) (a) of the Crimes Decree of 2009 (now Crimes Act 2009)
 - (iv) Count four: The petitioner on the 17th day of September 2012 at Nadi in the Western Division penetrated the mouth of 'AN' with his penis without her consent contrary to section 207 (1) and (2) © of the Crimes Decree, 2009 (now Crimes Act 2009)

5. Since the caution interview of the petitioner wherein the petitioner has admitted the commission of the offence was challenged as to the voluntariness and truthfulness of the caution interview statement a 'voir dire' trial was conducted from 24th November 2013 to 27th November 2013 by the High court and the learned trial Judge held that the caution interview and charge statement were admissible in evidence.

6. After trial in the High Court which lasted from 27th January 2014 to 30th January 2014 before the assessors who returned with a unanimous verdict of guilty of all four counts against the petitioner, the learned High Court Judge delivered the judgment convicting the petitioner of all four counts as charged and on 5th February 2014 the petitioner was sentenced to terms of imprisonment of 13 years 7 months and 15 days for each of the rape convictions and 8 years imprisonment for sexual assault conviction with a non-parole period of 12 years.
7. Being aggrieved by the decision of the learned High Court Judge the petitioner sought leave to appeal from the Court of Appeal on five grounds of appeal against the conviction and 3 grounds of appeal against the sentence. On 12th August 2016 the single Judge of the Court of Appeal (per Callanchini J) refused the application for leave to appeal as all the grounds urged by the petitioner were not arguable.
8. Being dissatisfied with the decision of the single Judge the petitioner filed the same grounds of appeal to renew his appeal against the conviction and sentence before the Full Court of Appeal on 23 February 2017. However, the grounds of appeal were restricted to 3 grounds of appeal as the counsel for the petitioner did not want to proceed with the 1st and 5th grounds.
9. I would now state below only the 3 grounds of appeal that were argued and heard in the Court of Appeal against the conviction and three grounds of appeal against the sentence.

Grounds of Appeal against the Conviction

- (i) 'The trial Judge has erred in not adequately directing the assessors on the medical report'
- (ii) 'The learned trial Judge erred in law by not giving adequate directions of the 1st charge and misdirecting assessors on the 2nd, 3rd and 4th charges when there existed unreliable and insufficient evidence to prove the latter charges.

- (iii) 'The learned trial Judge erred in not adequately directing the assessors on the circumstantial evidence'

Grounds of Appeal against the Sentence

- (i) *'The learned Judge failed to pick the starting point on count one from the current sentencing tariff.'*
 - (ii) 'The learned Judge for counts 2, 3 and 4 chose a higher starting point rather than the set tariff.'
 - (iii) The petitioner was punished twice by the presiding Judge for the same facts.'
10. The Full Court of Appeal (Chandra J, Prematilaka J and Fernando J) on 8th March 2018 dismissed the petitioner's appeal against the conviction and sentence and affirmed the conviction and sentence imposed by the learned High Court.
 11. The petitioner now seeks special leave to appeal from the Supreme Court against the Judgment of the Court of Appeal dated 8 March 2018 dismissing the petitioner's appeal and affirming his conviction and sentence.
 12. Before dealing with the petitioner's application for special leave I would like to outline the summary of facts in this case as follows.

Facts in Brief

13. The victim in this case had been 7 years old at the time of the incident. The petitioner is her father's brother who was living with the victim's family. On the day of incident as usual she had gone to school and after the school was over the petitioner 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 petitioner getting the victim to suck his penis inside the kitchen and he had alerted his mother.

14. It is relevant to state at this stage that the petitioner in his caution interview at page 103 of the Supreme Court case record has admitted commission of all three acts of rape and one sexual assault on the victim. After a voir dire trial the caution interview was held to be admissible in evidence.

Agreed facts

15. It is useful to consider the agreed facts in this case as parties at the trial court have reached a consensus with regard to the relationship of the petitioner and the victim-child who was 7 years old at the time of the incident.

At page 81 of the High Court record the State counsel and the defence counsel on behalf of the parties have reached the following agreed facts:

1. *It is agreed that the accused is Mohammed Alfaaz. The accused is a hairdresser by profession.*
2. *It is agreed that the complainant is AN.*
3. *It is agreed that the complainant and the accused are related. The accused is the uncle of the complainant.*
4. *It is agreed that the accused resides with the family of the complainant at Sabeto, Nadi.*

The agreed facts establishes the identity of the accused (petitioner) and the identification was not an issue at the trial in this case as the complainant when testifying identified the petitioner as the person who raped her and the petitioner was residing in the same house with the same family. The petitioner was well known to the victim as her uncle.

Jurisdiction of the Supreme Court

16. The Supreme Court derives exclusive jurisdiction to hear and determine appeals from all judgments of the Court of Appeal under section 98 (3) (b) of the Constitution of the Republic of Fiji. Section 98 (4) of the Republican Constitution of Fiji also provides that an appeal may be brought to the Supreme Court from a final Judgment of the Court of Appeal unless the Supreme Court grants leave to appeal.
17. Section 7(2) of the Supreme Court Act No. 14 of 1998 sets out the stringent criteria for grant of special leave which is as follows:

"In relation to a criminal matter, the Supreme Court must not grant special leave to appeal unless-

A question of general legal importance is involved;

A substantial question of principle affecting the administration of criminal justice is involved; or

Substantial and grave injustice may otherwise occur."

18. It is manifest from the above provisions contained in section 7(2) of the Supreme Court Act of 1998 special leave should not be granted as a matter of course.
19. In **Aminiasi Katonivualiku v State** (2003) FJSC Crim. App. No.CAV 0001/1999s 17th April 2003 clarified the jurisdiction of the Supreme Court at page 3 as follows:

"It is plain from this provision that the Supreme court is not a Court of criminal appeal or general review nor is there an appeal to the court as a matter of right and whilst we accept in an application for special leave some elaboration on the grounds of appeal may have to be entertained, the Court is necessarily confined within the legal parameters set out above, to an appeal against the judgment of the Court of Appeal which in this instance, was an order for new trial.

20. In **Dip Chand v State** CAV0014/2012 the Supreme Court observed as follows:

“Given that the criteria set out in section 7(2) of the Supreme Court Act No. 14 of 1998 are extremely stringent and special leave is not granted as a matter of course, the fact that the majority of the grounds relied on by the petitioner for special leave to appeal have not been raised in the Court of Appeal makes the task of the petitioner of crossing the threshold requirements for special leave even more difficult.”

21. Time and again the Supreme Court in Fiji has pronounced in a series of Judgments that it is an extremely difficult task for a petitioner to pass the stringent threshold criteria contained in section 7 (2) of the Supreme Court Act No. 14 of 2014. The petitioner has a greater burden to establish his ground of appeal as a ‘question of general legal significance and that there is substantial and grave injustice’ that warrants leave from the Supreme Court.

22. In the recent judgment in **Sharma v State** [2017] FJSC 5; CAV0031.2016 the Supreme Court on threshold requirements in section 7 (2) of the Supreme Court Act of 1998 observed as follows:

“It is observed that the injustice that is said to have occurred must not only be one that is substantial but also one that is grave. As such, even if the party succeeds in establishing that some injustice had been caused, that by itself may not be sufficient to obtain relief unless the party is capable of establishing that the injustice referred to is one that meets the threshold laid down in section 7 (2) paragraph (c) of the Supreme Court Act.”

23. The Supreme Court went on further and observed:

“The Supreme Court in Fiji is not a court in which decisions of the Court of Appeal will be routinely reviewed. The requirement for special leave is to be taken seriously. It will not be granted lightly. Too low a standard for its grant undermines the authority of the Court of Appeal and distract this court from its role as the final appellate body by burdening it with appeals that do not give rise to matters of general importance or principles or in the criminal jurisdiction, substantial and grave injustice.

24. I agree with the learned State Counsel who referred to this judgment in the written submissions of the respondent as the petitioner has a difficult task to establish that substantial and grave injustice may otherwise occur if special leave is not granted.
25. Now I would deal with the grounds of appeal urged by the petitioner in the Supreme Court. In the amended petition of appeal dated 31st July 2018 filed by the petitioner, the grounds of appeal in the Supreme Court has been restricted to only two grounds against the conviction and one ground of appeal against the sentence which are as follows:

Grounds of Appeal against Conviction

- (i) The learned Judge had erred in not directing the assessors on the medical report.
- (ii) The learned Judge in not adequately directing the assessors on the circumstantial evidence.

Ground of appeal against the sentence

The appellant was punished twice by the trial Judge for the same evidence.

26. When the petitioner's application was taken up for hearing on 16th August 2018 the petitioner was represented by a counsel from the Legal Aid Commission. The learned counsel submitted that the medical report tendered in evidence at the trial

does not show any evidence in regard to the 3rd count on anal penetration. The findings of the doctor who medically examined is only in relation to the vaginal area and his submission that the learned Judge failed to adequately direct the assessors on the absence of any findings of anal penetration constituted a substantial and grave error.

27. It is relevant at this stage to state that at the hearing of this appeal on 16th August 2018 when the court questioned the learned counsel for the petitioner as to whether at the end of summing up by the learned trial Judge the opportunity was afforded to the petitioner for redirection if there was a non-direction on the question of insufficient evidence of the medical report about the 3rd count. The reply by the Counsel was “no”. The court pointed out and drew the attention of the Counsel to the last paragraph 74 of the summing up of the Judge at page 49 of the summing up dated 30 January 2014 wherein it is stated that “*any redirections*”? Learned counsel finally agreed with the court’s observation. It is obviously clear from the case record that the invitation was afforded to the petitioner to ask for redirection but the petitioner did not seek to utilize it. It appears from the failure of the petitioner not to seek redirection when the opportunity was afforded by court, that the petitioner has done this deliberately to find an appeal point.

28. In **Varasiko Tuwai v State** [2016] FJSC 35, 26 August 2016; the Supreme Court made the following observation.

“Before I go any further I must say that the trial Judge had asked the parties if they needed any re-directions in the matter. The parties did not seek any re-directions on the grounds they alleged that the directions were inadequate. Was this done for a deliberate reason to find a ground of appeal? If that is so, the appellate courts approach must be stringent.

Litigants must not wait for trial judges to make mistakes to find a point of appeal. The transparent nature of litigation requires that the trial judge be given an opportunity to correct any errors made. If the trial judge has asked the parties to seek re-directions and they do not and subsequently raise the issue in the appellate Court then in the

absence of any cogent reason, it should be held against that party as having employed a deliberate tactic to find an appeal point."

29. The Court of Appeal in dealing with this ground of appeal observed in Paragraph 42 of the judgment as follows:

"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. CAV 0003 of 2014: 20 August 2014 [2014] FJSC 12 where the Supreme Court said

"At trial the 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 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."

30. It is important to address our minds carefully when there is a ground of appeal on misdirection or non-direction alleging that the learned trial judge has erred by failing to direct the assessors adequately on non-direction and the appellate courts must not approach the issue leniently if the opportunity had been afforded to the petitioner for re-direction at the end of summing up and if they did not seek re-direction.

31. In the present case the petitioner was asked by the trial Judge whether he sought any redirection (Para 74 of the summing up High Court record) (supra) at the end of the summing up it appears from the record that there was no reply given by the petitioner. This omission is in itself sufficient to disregard this ground of appeal in

this court.(**Segran Murti v The State**; Crim. App. No. CAV0016/2008s 12th February 2009.)

32. The doctor who testified in this case for the prosecution was one with 20 years experience. She was not the doctor who examined the victim. She said in her evidence that according to the medical report (P 3) that the hymen extended and wide open and was not intact. The professional opinion confirmed sexual assault on the victim either through penile penetration or fingering. The doctor further said under cross-examination by the defence counsel that there would have been a swelling in the vaginal area if there was penile penetration. But that it will depend on the time of examination after the incident as it could have been healed. She also testified and said that medical findings are consistent with the history. The evidence of the medical report at page 106 (P3) of the High Court Record shows that the victim had been examined by the doctor on 19. 9 2012 two days after the incident on 17. 9.2012.

Second ground of appeal against conviction on circumstantial evidence.

33. The petitioner alleged that the learned trial Judge erred in not adequately directing the assessors on the circumstantial evidence at the trial. Before I deal with this ground of appeal it is relevant to consider the petitioner's caution interview statement dated 20 September 2012 at page 103 of the High Court record. The caution interview statement has been admitted in evidence at the trial.
34. The prosecution case in the trial court was that the petitioner had sexually assaulted and raped the victim of 7 years old who was the niece of the petitioner. In the caution interview the petitioner admitted the commission of all unlawful acts referred to in all four counts against him. The petitioner's admission of the commission of sexual assault and rape of the victim contained in the caution interview is as follows:

"Q 13: 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.

Q 14: 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.

Q 16: The what happened

A : After licking her vagina then I inserted my erected penis into her vagina and started pushing in and out.

Q 17: Then what happened ?

A: After some time 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 but I still kept on doing it and after some time I told her to get up.

Q 18: 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 tell anyone and left from there.

Q 19: Can you saw me the place you had sexual intercourse with Arasida ?

A: yes.

It is important to state that the caution interview evidence after it has been admitted in evidence at a voir dire trial regarding its voluntariness conducted by High Court is not circumstantial evidence.

35. The petitioner's complaint is that the second ground of appeal against conviction relates to count 4 in the Information and the Court of Appeal considered that there was no evidence brought out from the complainant when she testified in court on the 4th count on rape. However, Court nonetheless, found that the evidence of John Davis who was an independent witness was sufficient to convict the petitioner .

I would like to reproduce the observations of the Court of Appeal when it considered that evidence in paragraph 29 of the Judgment.

Para 29 of the judgment:

“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 4. i.e. penetration of her mouth. But the evidence on that count is amply provided by John Davis whose evidence remained intact even after cross-examination.”

36. It is to be noted that petitioner's caution interview evidence provided sufficient evidence to corroborate the victim's evidence and John Davis's evidence on all four counts against the petitioner. Furthermore it can be seen from the child-victim's evidence that that evidence supports the evidence of John Davis. John Davis in his testimony at page 141 of the High Court record, said that *‘They were in the kitchen. It was Munar's kitchen. This is after school's over. At first time I was standing about 25 feet He was not wearing any T-shirt. The girl was wearing her school uniform..’*

37. The question that the petitioner has raised on this ground appeal is that from the victim's evidence she does not speak of the allegation in respect of the anal penetration as charged in the fourth count. It is to be noted that both the single Judge and the Full Court of Appeal were in agreement that John Davis's evidence was not circumstantial but direct evidence. John Davis was an eye-witness to the incident in relation to count four. This piece of evidence of John was very powerful and convincing for the prosecution. The petitioner, however, in his written submissions at paragraph 7.3 has conceded that John Davis's evidence is direct evidence and not circumstantial evidence.

I would reproduce what the single Judge of the Court of Appeal and Full Court observed in regard to John Davis's evidence in the trial court.

In Paragraph 10 of the Ruling of the single Judge dated 12 august 2016 it is stated that “in a trial where the prosecution relied on direct evidence as was in this case

and where that direct evidence is sufficient for the learned Judge to convict , then the failure to direct on the circumstantial evidence that may have been adduced , does not constitute a miscarriage of justice. (emphasis is mine)

The paragraph 44 of the Court of Appeal Judgment refers to the complaint on circumstantial evidence by the petitioner and observed that;

“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 4th count....”

38. At page 144 of the High Court record the victim had testified as follows:

“Q 31: This bad thing painful: yes.

Q 36: Who removed sutana: Alfaaz

Q 38: This bad thing was done was it done by any part of Alfaaz's body: Tongue.

Q39: Where did his use his tongue : down.

Q40: did he use another part of his body. Down

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

Q 42: Where did Alfaaz use his panu: down.

Q 43: What is down: pussy vagina.

Q44: Did Alfaaz use panu anywhere else : Bump (backside)

Q45: Did Alfaaz use his panu anywhere else: no.

Q46: After Alfaaz did this thing did he tell you anything: yes not to tell anyone..

Under cross-examination

Q 47: I put it to you Alfaaz never put his penis into your vagina.: he did.

Q 49: I put it to you Alfaaz never put his tongue into your vagina. He did lick my vagina.

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

Q 52: I put it to you It was not Mr Alfaaz who raped you ? He did that.

The above evidence of the victim is supported by the caution interview evidence of the petitioner. There is no apparent reason for the child-victim to have falsely implicated the petitioner for having committed sexual assault and rape on her.

39. In **Rajinder Raju v State** of H.P. Crim. App.No. 670 of 2003 decided on 07.07.2009, R.M.Lodha J while speaking on behalf of the Supreme Court of India said as follows:

“ 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.”

40. It appears from the caution interview evidence the petitioner refers to a Fijian boy who saw petitioner and identified him as Alfaaz in the kitchen and that Fijian boy was John Davis who testified in court for the prosecution. And therefore the evidence of the caution interview of the petitioner, the evidence of child-victim and John Davis's evidence were sufficient and strong evidence to convict the petitioner of all four counts as charged. In **Kean v State** Crim. App. No. AAU 95 of 2008: 13 November 2013 [2013] FJCA 117 the court observed that in Fiji, under section 129 of the Criminal Procedure Act 2009, a trial Judge is no longer required to give a standard warning to the assessors where the evidence of a complainant in a trial for an offence of a sexual nature is not corroborated . The Supreme Court of India in **Bharwada Bhoginbhai Hirjibhai v State of Gujarat** (1983) AIR 753, 1983 SCR (3) 280 observed that “ *Corroboration is not a sine qua non for a conviction in a rape case.*”

41. In **Hassan v Reginam**; Criminal App. No. 57 of 1997: 28 July 1978 [1978] FJCA 18 made the following observation.

“ It is well established law that man may be convicted , even of murder, solely upon his confession. R v Sykes [1913] 8 Crim. App. P 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).

42. I would now refer to a subsequently decided case in **Khan v State**; Crim. App. No. AAU 0069 of 2007 wherein a similar view was expressed and observed that :

“ It is well established law that the accused may be convicted of any crime upon his own confession alone.”

43. In the backdrop of the legal position stated above and having considered the evidence of the victim, John Davis and caution interview of the petitioner and the medical evidence I find that the unanimous opinion of the assessors and the trial Judge’s judgment in convicting the petitioner of all four counts is reasonable and correct in law.

44. In view of the above there is no reason for disturbing the decision of the Court of Appeal. I agree with the decision of the Court of Appeal in dismissing the appeal of the petitioner against conviction. This ground of appeal has no merit and should fail. This ground of appeal should be dismissed.

Ground of Appeal against the Sentence

45. The petitioner’s next complaint is that the petitioner was punished twice by the trial Judge when sentencing him .The petitioner alleges that the Court Appeal in its judgment at paragraph 51 found that the trial Judge had fallen into error in double counting the aggravating factors but nonetheless court found that the sentence

imposed on the petitioner to be justifiable. He also complains that the Court of Appeal could have looked into the rehabilitation aspect when sentencing.

46. It is pertinent to state at the outset of dealing with this ground of appeal against the sentence that the petitioner has failed to demonstrate that the sentence imposed on him by the trial Judge was manifestly excessive or wrong. The petitioner was sentenced to 13 years 7 months and 15 days imprisonment by the High Court with a non-parole period of 12 years.
47. The learned trial Judge has considered the mitigating factors on petitioner's age and that he was a first offender and the petitioner earned one year discount from the total sentence of 16 years. The period the petitioner spent in remand was also deducted.
48. It is necessary to state briefly that this is a case where the victim was 7 years old at the time of the incident. The victim was the petitioner's elder brother's daughter. On 17th September 2012 the petitioner lured the victim who was returning home from the school into a kitchen in a nearby house. At that place the petitioner sexually abused and raped her. The petitioner was found guilty of all four counts as charged by a unanimous decision of the assessors and was convicted accordingly.
49. According to the Crimes Decree (Act) 2009 the maximum penalty for rape is life imprisonment in Fiji. The maximum penalty for sexual assault is 14 years. The petitioner was sentenced to 13 years 7 months and 15 days each in respect of counts 2, 3 and 4 and he was sentenced to 8 years for count one.
50. The tariff for rape of an adult is 7 years to 10 years imprisonment. In **Mohamed Kasim v State**; [1994] FJCA 25; AAU 00221J.93 (27 May 1994)
In this case the Court of Appeal observed that "*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 more clearly reflect understandable public outrage. We must stress however, that the particular circumstances of a case will mean that here are cases where the proper sentence may be substantially higher or substantially lower than that starting point."

51. In **Raj v State** [2014] FJSC 12 Crim. App. CAV0003 of 2014, 20 August 2014. The Supreme Court observed that
"Rape is the most serious form of sexual assault... Society cannot condone any form of sexual assault on children... Sexual offenders must be deterred from committing this kind of offences." In paragraph 58 of the Judgment The Judge has correctly identified the tariff for rape of a child as between 10- 16 years imprisonment.
52. The petitioner in this case complains that when adding aggravating factors the High Court Judge fell into error of 'double counting'. The Court of Appeal in paragraph 51 has agreed with the submission of the petitioner that the trial Judge appears to have fallen into error. The Court of Appeal observed that though there was an error on the part of the trial Judge for double counting nonetheless the court found the totality of sentences imposed on the petitioner to be justifiable on the basis of the gravity and brutality of the offences and was well within the tariff.
53. The Court of Appeal considered carefully whether the errors committed by the trial Judge in arriving at the sentence should disturb the ultimate sentences by referring to the relevant observations made by the Supreme Court in **Koroicakavu v The State**; Crim. App.CAV0006U, 2005S 04 May 2006 [2006] FJSC 5 wherein the Court said that :
"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 recognizing 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 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 and 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).

The answer to the issue on errors by the trial Judge if any, is given in the above case. It is finally the ultimate sentence that is material and not the step in the reasoning process.

54. It is useful to refer to the observations expressed by the Fiji Court of Appeal in **Matasavui v State**; Crim. App. No. AAU 0036 of 2013: 30 September [2016] FJCA 118 wherein court said that “*No society can afford to tolerate an innermost feeling among the people that offenders of sexual 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.*” The Court of Appeal referred to the same judgment in paragraph 60 of the judgment which is being canvassed before this court having taken into consideration the gravity and cruelty of the case before court and observed that highest possible punishment should be given to the prospective offenders of sexual assault on children who are vulnerable to fall prey to the offenders. I agree with the observations expressed by the Court of Appeal in this regard and would not hesitate to add further that the Court of Appeal had been lenient not to enhance the sentences on the petitioner in view of the aggravating factors in this case.
55. It is very useful to refer to the judgment of Madigan J in **State v Mario Tauvoli** High Court of Fiji at Lautoka Crim Case No. HAC 027 of 2011 decided on 18 April 2011 wherein the court said “*Rape of children is a very serious offence indeed and it seems to be very prevalent in Fiji at the time. The legislation has dictated*

harsh penalties and courts are imposing those penalties in order to reflect society's abhorrence for such crimes. Our nation's children must be protected and they must be allowed to develop to sexual maturity unmolested. Psychologists tell us that the effect of sexual abuse on children in their later development is profound."

The Court further went on to observe that in paragraph 6 "*It is now well settled that sentences for rape of children should be within the range of ten to fifteen years. This court in **State v M.D.** (HAC 129 of 2010 L) took a starting point of 15 years for a stepfather who raped his 13 year old stepdaughter."*

56. The learned High Court Judge in that case took a term of 12 years as his starting point for the offence of rape. In that case the accused was the stepfather who was in a position of trust in the care and protection of the child and had breached the trust. The victim was the stepdaughter who was 14 years old. Therefore the Judge had added four years as aggravating factors. The facts of the above case of **Mario Tauvoli** (supra) were similar to the present case before this court.
57. The learned State Counsel submitted that rehabilitation was one of the key considerations in sentencing but it has to be weighed against the other circumstances that are present in the case. In the present case the petitioner was a grown adult with responsibilities to look after the child victim who was in his custody when returning from the school. She was in his care and protection. The petitioner forcefully took her to a kitchen in a nearby house and abused and raped her committing several unlawful and immoral sexual acts knowing that the child-victim was of tender years. At the time of committing the sexual acts the victim cried out but the petitioner continued to keep on committing the offence plundering the victim's very childhood.
58. The State counsel further submitted that rape and sexual statistics of Fiji disclose equally worrying social malaise and further submitted that the statistics released by the Director Of Public Prosecutions reveals that, between January and July 2018, out of 123 cases of rape and sexual violence filed in 78 cases the victims were children

and out of 78 cases 26 victims were aged 10 years and below. State counsel further submitted that the sentence of 13 years 7 months and 15 days is commensurate with the serious offence he committed and moved for dismissal of the petitioner's appeal. I agree with her submission that the sentence of 13 years 7 months and 15 days is commensurate with the serious offence of rape the petitioner committed.

59. It is relevant at this juncture to refer to the observations expressed by his Lordship the Chief Justice Anthony Gates in **Ram v State**; [2015] FJSC 26; CAV12.2015 (23 October 2015)

“The maximum penalty for rape is life imprisonment and the Courts have recently been handing down very heavy sentences on offenders against children. Sexual offending against children in this country has become far too prevalent and it is the hope that harsh sentences will send out a clear message to would be perpetrators that our children are to be protected from such unrestrained immorality.”

60. According to the statistics released by the Director of Public prosecutions Office it appears that a number of rape victims as well as victims under the age of 18 years and victims in domestic relationships or relatives were also victims of other serious sexual offences. The rape of children is a very serious offence and it is very frequent and prevalent in Fiji. The courts must impose harsh penalties dictated by the legislation. The courts should not leniently look at this kind of serious cases of rape of children of tender years when punishing the offenders.

61. In view of the seriousness, gravity and cruelty involved in this case when committing the offence of rape of the victim-child of 7 years the sentence imposed by the High Court is justifiable and commensurate with the offence. In fact the petitioner is fortunate that he was not sentenced to a more harsh term of imprisonment in terms of sentencing practice of our courts.

62. We do not find any reasons to observe that the Court of Appeal has fallen into error when it reached its conclusion to dismiss the petitioner's appeal.

Conclusion

63. In the backdrop of the legal position stated above it is clear that the petitioner has not been able to establish any ground of appeal before this court. The prosecution in the trial court relied not only on the caution interview statement of the petitioner but also on the victim's evidence, John Davis's evidence and medical evidence. Therefore the petitioner's application for leave should fail. The petitioner has failed to satisfy any of the threshold criteria enumerated in section 7 (2) of the Supreme Court Act of 1998.
64. Therefore for the reasons set out above, the petitioner's application for leave to appeal should be refused and We dismiss the said application.
65. **Orders of the Court:**
- (1) The petitioner's application for leave to appeal is refused.
 - (2) The Judgment of the Court of Appeal dated 8th March 2018 is affirmed.



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.....
Hon. Chief Justice Anthony Gates
President of the Supreme Court.

A handwritten signature in blue ink, appearing to be "S. Marsoof", written over a dotted line.

.....
Hon. Mr. Justice Saleem Marsoof
Judge of the Supreme Court

A handwritten signature in blue ink, appearing to be "S. Hettige", written over a dotted line.

.....
Hon. Mr. Justice Sathya Hettige
Judge of the Supreme Court.

Solicitors:

Mr. M. Fesaitu for Petitioner

Office of the Director of Public Prosecutions for Respondent.