

**IN THE SUPREME COURT OF FIJI**  
**[CRIMINAL APPELLATE JURISDICTION]**

**CRIMINAL PETITION No: CAV 0012.2018**  
**(On Appeal from Court of Appeal No: AAU 0066.2015)**

**BETWEEN** : **GORDON AITCHESON**

**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. Madam Justice Chandra Ekanayake, Judge of the Supreme Court

**Counsel** : Ms. S. Nasedra for the Petitioner  
Ms. S. Alagendra for the Respondent

**Date of Hearing:** 17 October 2018

**Date of Judgment:** 2 November 2018

**JUDGMENT**

**Gates, P**

- [1] At the outset of the hearing the Petitioner's counsel was put on notice by the court that the court was considering enhancing sentence. Such a warning has long been considered a fair procedure. It allows the appellant or petitioner an opportunity to make representations: **Ram Chandra Naidu v R** [1974] Fiji LR 63; **Christine Doreen Skipper v R** Court of Appeal, Cr. App. 70/1978; **Tevita Poese v The State** Court of Appeal Crim. App. No. AAU0010.2005S, 25<sup>th</sup> November 2005.

- [2] Petitioner's counsel took instructions and asked the court to permit withdrawal of the petition. This was refused. The court was seized of the appeal and a careful perusal of the papers suggested that this was an extremely disquieting case requiring our further consideration.
- [3] I have read in draft the judgment of Ekanayake J. I am in full agreement with it, though I would like to add some further comment.
- [4] The petition is against sentence only. On 1<sup>st</sup> June 2015 the Petitioner was sentenced in the High Court for offences of rape to concurrent terms of 16 years imprisonment, with 4 years concurrent for the indecent assault. There was a non-parole period of 15 years. He appealed to the Court of Appeal which reduced the imprisonment on the rape offences to 13 years with a non-parole period of 11 years, and to 3 years imprisonment on the indecent assault offence. In its reasons for the reduction the Court had referred to inadequate discount for early guilty plea and a failure to give credit for time spent on remand.
- [5] The facts are set out in Ekanayake J's judgment. A father preyed on his two biological daughters in their home. The facts and features of the case are very disturbing. The father used and abused them, without regard to their childhood. It started when one of the daughters was only 6 years old, and later he moved on to the next child.
- [6] What were the aggravating circumstances here? They were:
- (i) This was a serious and abhorrent series of crimes.
  - (ii) There had been prolonged sexual abuse of children, a campaign of unstoppable rape on the vulnerable.
  - (iii) It was a gross abuse of trust.
  - (iv) He had tried to get one of the victims to take marijuana at the time of the rape.

- (v) Both victims were his biological daughters.
- (vi) Actual physical violence was used – punching – and pain was inflicted by these penetrations which did not make him desist.
- (vii) There were threats to kill the mother if she interfered. She was borne down by his threats.
- (viii) On one occasion he used one of the girls to keep lookout at the bedroom door whilst he raped the other girl in the bedroom.
- (ix) The reports indicating the two victims were not doing well and were deeply marked by the traumas they had suffered.

#### **Discount for Time spent on remand**

- [7] The sentencing judge had stated in his sentencing judgment, “I consider the time you have spent in remand prior to this sentencing in favour of you.” He did not say what discount he had given and where in the methodology, in arriving at the discount, the discount was contained.
- [8] The actual time spent on remand was 87 days. The Court of Appeal had this to say:
- “[19] It must be acknowledged that the offending was extremely serious. The victims were the appellant’s biological daughters. Rape of young daughters by fathers must attract a punishment that reflects the gross breach of trust arising from the father-daughter relationship. However there are some compelling mitigating factors like the early guilty plea, remorse and the time spent in remand. These factors are not adequately reflected in the appellant’s total sentence of 16 years imprisonment with a non-parole period of 15 years.”
- [9] The Supreme Court has favoured the approach to granting the discount to be that the remand time is to be dealt with last. Once the term and non-parole period is arrived at, then the court will set out a suitable discount.
- [10] In **Sowane** [2016] FJSC 8 CAV0038/2015 21<sup>st</sup> April 2016 the final orders were as follows:

- “(a) The sentence imposed by the Court of Appeal for manslaughter of 12 years with a non-parole period of 10 years is confirmed.
- (b) Considering the time spent in custody awaiting trial, the remaining period to be served is to be:

Head Sentence	:	10 years 8 months
Non-parole period	:	8 years 8 months.”

- [11] In this way it is transparently clear, not least to the petitioner but also to the Corrections Department, what has to be served.

### **Discount for early plea**

- [12] This issue formed the grounds before us in the Supreme Court. The Court of Appeal referred to section 4(2)(f) of the Sentencing and Penalties Act 2009. The sentencing court was to have regard to:

“whether the offender pleaded guilty to the offences, and if so, the stage in the proceedings at which the offender did so or indicated an intention to do so.”

- [13] It was accepted that the Petitioner had tendered the guilty plea at the earliest opportunity when he was charged in the High Court.

- [14] The Court of Appeal considered only 9 months discount could be attributed to the early guilty plea in the judge’s sentencing remarks. The court referred to discussions in two earlier Court of Appeal decisions:

“In **Rainima –v- The State** [2015] FJCA 17; AAU 22 of 2012 (27 February 2015) Madigan JA observed:

*“Discount for a plea of guilty should be the last component of a sentence after additions and deductions are made for aggravating and mitigating circumstances respectively. It has always been accepted (though not by authoritative judgment) that the “high water mark” of discount is one third for a plea willingly made at the earliest opportunity.*

*This court now adopts that principle to be valid and to be applied in all future proceeding at first instance."*

In **Mataunitoga –v- The State** [2015] FJCA 70; AAU125 of 2013 (28 May 2015) Goundar JA adopted a similar but more flexible approach to this issue:

*"In considering the weight of a guilty plea, sentencing courts are encouraged to give a separate consideration and qualification to the guilty plea (as a matter of practice and not principle) and assess the effect of the plea on the accused by taking into account all the relevant matters such as remorse, witness vulnerability and utilitarian value. The timing of the plea, of course, will play an important role when making that assessment".*"

- [15] The principle in **Rainima** must be considered with more flexibility as **Mataunitoga** indicates. The overall gravity of the offence, and the need for the hardening of hearts for prevalence, may shorten the discount to be given. A careful appraisal of all factors as Goundar J has cautioned is the correct approach. The one third discount approach may apply in less serious cases. In cases of abhorrence, or of many aggravating factors the discount must reduce, and in the worst cases shorten considerably.

#### **Assessment of Remorse**

- [16] The Court of Appeal referred to remorse. The evidence for that factor did not appear in the appeal papers. Appellant's counsel did not submit it as a separate consideration in concluding his submissions to the Court of Appeal. Earlier he had submitted the early guilty plea alone indicated "the accused is generally remorseful for his conduct."
- [17] It might be viewed differently however. He had maintained his conduct with the daughters, and his threats to kill his wife (and mother of 7 children) up to when the mother summoned up enough courage to escape with her daughters. Only then did the truth emerge, and the dynamics of his power over them change.



- [18] The issue is remorse that is genuinely feeling sorry for what the offender has done. Accepting the inevitable of proof of the offender's deeds and therefore pleading guilty is not the same thing. An early guilty plea could form part of that process but courts must assess the early guilty plea along with other factors before arriving at a conclusion that genuine regret, sometimes accompanied (particularly in property offences) by apology and restitution: State v Deo Cr. App. No. HAA008 of 2005S 23<sup>rd</sup> March 2005 Shameem J.
- [19] Recognising the inevitable, namely conviction, will not count as remorse: Netani Domonibitu CAV0004 of 2018 24<sup>th</sup> August 2018. Nor would negotiations for reduction of the charge be suitable evidence of the same (see Court of Appeal AAU129 of 2013).
- [20] The sentencing judge had not expressly treated the guilty plea as acceptable remorse or as part of the mitigation. That assessment is very much a role for the trial judge, which I do not believe this court should usurp. The judge before whom the plea is tendered, the summary of facts is read, and the mitigation is urged in the presence of the Accused, is in a much stronger position to assess remorse and whether it is sincere and acceptable.

### **Additional Matters**

- [21] Counsel for the State urges us to enhance sentence. She has prepared voluminous materials of case law and writings on the subject of increased prevalence of child rape and on abuse cases generally. She has put material before us of the menace such criminality is in our society as indeed elsewhere in the world. We are grateful for the scope of that research and for the statistics provided.
- [22] We accept there is a serious problem which needs the co-operation of the courts to stem. I reproduce the DPP's published statistics:

ODPP Sexual Offences Statistics (Victims) – 2015 – 2018					
Year	Total Victims	Victims U18	Victims U13	Victims U8	Victims U5
2018 (Jan-Sep)	185	111	65	27	11
2017	444	130	72	27	16
2016	228	150	70	20	12
2015	138	87	40	19	8
TOTAL	995	478	247	93	47
Source: ODPP Fiji					

- [23] The increases are obvious. Even this court now has many more of such cases coming before it. This sittings is also remarkable for the number of such cases listed for consideration.
- [24] The increasing prevalence of these crimes, crimes characterised by disturbing aggravating circumstances, means the court must consider widening the tariff for rape against children. It will be for judges to exercise their discretion taking into account the age group of these child victims. I do not for myself believe that that judicial discretion should be shackled. But it is obvious to state that crimes like these on the youngest children are the most abhorrent.
- [25] The tariff previously set in Raj v The State [2014] FJSC 12 CAV0003.2014 (20<sup>th</sup> August 2014) should now be between 11-20 years imprisonment. Much will depend upon the aggravating and mitigating circumstances, considerations of remorse, early pleas, and finally time spent on remand awaiting trial for the final sentence outcome. The increased tariff represents the denunciation of the courts in the strongest terms.

- [26] It is entirely possible that the sentencing judge when confronted with a particularly heinous rape as in State v Isoa Rainima Crim. Case HAC 064 of 2017S 25<sup>th</sup> October 2018 may exceed the tariff when assessing all of the factors. That was a case committed against an adult victim. The total sentence came to 23 years imprisonment with a non-parole period of 20 years.

### **Conclusion**

- [27] In the instant case the starting point should have been 14 years imprisonment. For the aggravating factors a further 6 years should be added. From the total of 20 years, 2 years discount will be allowed for the early plea, bringing the total down to 18 years.
- [28] For the 3 months the Petitioner spent on remand 3 months discount will be given giving a new total of 17 years 9 months.
- [29] Leave to appeal is granted. The sentence of the court below is set aside. In its place there will be, for the rape convictions:
- (i) A Head Sentence of 17 years 9 months imprisonment;
  - (ii) With a non-parole period of 16 years.

and for the single offence of indecent assault the sentence of the court below is set aside and the sentence of the High Court restored, namely a sentence of 4 years imprisonment with a non-parole period of 3 years.



**Marsoof, J**

- [30] I have had the advantage of perusing in draft the judgments of His Lordship the Chief Justice, Gates P and that of Madam Justice Ekanayake, and I agree with the reasons and conclusions in the said judgments, and in particular I agree that the tariff for rape of children should now be raised to a range of between 11 and 20 years of imprisonment. I also agree with the orders proposed.

**Ekanayake, J**

- [31] I am in full agreement with the above reasoning and conclusions of His Lordship the Chief Justice, Gates P.

**Introduction**

- [32] The Petitioner, Gordon Aitcheson, by his document dated 11/6/2018 addressed to the Supreme Court of Fiji (which appears to have been received by the Registry on 14/6/2018) has appealed against the sentence imposed on him by the Court of Appeal by its judgment dated 01/06/2018. This leave to appeal application has been lodged within the time frame of 42 days stipulated in Rule 5(a) of the Supreme Court Rules 2016. Thus it is a timely application. The Court of Appeal by the aforementioned judgment had quashed the sentence imposed by the High Court and substituted a term of 13 years imprisonment for each count of rape and 3 years imprisonment for indecent assault to be served concurrently effective from 1/6/2015. The total sentence was 13 years imprisonment with a non-parole term of 11 years.
- [33] The Petitioner has submitted the following two (2) grounds of appeal for the consideration of this court. Those are reproduced below:-

“1. *Did the FCA adhere to the Sentencing principles in Section 4(2) (f) of the Sentencing and Penalties Act, inquiring regards to the stage of the proceedings in which the petitioner has pleaded guilty?*

2. *Did the FCA err by failing to give discount of one third to the Petitioner's early guilty plea as enunciated in Rainima v The State; FJCA 17; AAU 22 of 2012?"*

- [34] The Petitioner was the biological father of the 1<sup>st</sup> victim – ZA and the 2<sup>nd</sup> victim – EA (names are suppressed). 1 to 4 counts were in respect of the offences committed on the 1<sup>st</sup> victim - ZA, and 5 to 7 counts were in respect of the 2<sup>nd</sup> victim – EA.
- [35] The Petitioner was charged in the High Court at Lautoka in Criminal Case No. HAC 38/2015 for;
- (i) Indecent assault contrary to section 154 (1) and (2) of the Penal Code Cap 17 – Unlawfully and indecently assaulting a female - ZA;
  - (ii) Rape contrary to Section 149 and 150 of the Penal Code, Cap 17 – having unlawful carnal knowledge of a girl namely ZA, without her consent;
  - (iii) Rape contrary to Section 207(1) (2) (a) and (3) of the Crimes Decree 2009 – having carnal knowledge of ZA, a girl under the age of 13 years.
  - (iv) Rape contrary to Section 207(1) and (2) (a) of the Crimes Decree 2009 – having carnal knowledge of ZA, without her consent.
  - (v) Rape contrary to section 207 (1), (2) (a) and (3) of the Crimes Decree 44 of 2009 – having carnal knowledge of EA, a girl of 11 years of age.
  - (vi) Rape contrary to Section 207(1) (2) (a) and (3) of the Crimes Decree 44 of 2009 – having carnal knowledge of EA, a girl of 11 years of age.
  - (vii) Rape contrary to Section 207(1), (2)(a) and (3) of the Crimes Decree 44 of 2009 – having carnal knowledge of EA, a girl of 11 years of age.
- [36] The learned Magistrate in Lautoka transferred the case to the High Court in Lautoka by its order dated 5/3/2015. In the High Court he was charged as above.
- [37] In the High Court the Petitioner having pleaded guilty to all the charges, was convicted of all the charges. He was sentenced by the sentencing order of 1<sup>st</sup> June 2015, as follows:-

1. Four years for the first count,
2. Sixteen years for the second count,
3. Sixteen years for the third count,
4. Sixteen years for the fourth count,
5. Sixteen years for the fifth count,
6. Sixteen years for the sixth count,
7. Sixteen years for the seventh count.

[38] Accordingly, he was sentenced to sixteen years imprisonment and all these sentences to run concurrently. It was further ordered that in pursuant to section 18(1) of the Sentencing and Penalties Decree, that he is not eligible for parole for a period of 15 years.

### **Special Leave to Appeal**

[39] The Supreme Court is the final appellate court and it derives exclusive jurisdiction to hear and determine appeals from all final judgments of the Court of Appeal - vide sub Sections 98 3(a) and (b) of the Constitution of the Republic of Fiji. Further in terms of Section 98(4) of the Constitution an appeal may not be brought to the Supreme Court from a final judgment of the Court of Appeal unless the Supreme Court grants leave to appeal.

Section 98(4) states that:-

*“An appeal may not be brought to the Supreme Court from a final judgment of the Court of Appeal unless the Supreme Court grants leave to appeal”.*

[40] Section 7 of the Supreme Court Act No.14 of 1998 also becomes relevant:-

Section 7(1). In exercising its jurisdiction under Section 98 [formerly section 122] of the Constitution with respect to special leave to appeal in any civil or criminal matter, the Supreme Court may, having regard to the circumstance of the case-

- (a) refuse to grant special leave to appeal;

- (b) grant special leave and dismiss the appeal or instead of dismissing the appeal make such orders as the circumstances of the case require; or
- (c) grant special leave and allow the appeal and make such other orders as the circumstances of the case require.

Section 7(2). In relation to a criminal matter, the Supreme Court must not grant special leave to appeal unless-

- (a) a question of general legal importance is involved;
- (b) a substantial question of principle affecting the administration of criminal justice is involved; or
- (c) substantial and grave injustice may otherwise occur.

The above Section 7(2) which relates to criminal matters would show that the Supreme Court must not grant special leave to appeal in a criminal matter unless the court is satisfied that a question of general legal importance is involved, or a substantial question of principle affecting the administration of criminal justice is involved or substantial and grave injustice may otherwise occur.

- [41] Further in Aminiasi Katonivualiku v State (2003) FJSC Crim. App. No.CAV 0001/1999 (17<sup>th</sup> 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”.*

### **In the Court of Appeal**

- [42] Being aggrieved by the above sentence imposed by the learned High Court Judge, the Petitioner filed a timely notice of appeal against the sentence in the Court of Appeal. By the ruling delivered on 24/1/2017, a single Judge of the Court of Appeal had granted

leave to appeal against sentence. The following were the three (3) grounds of Appeal submitted in the Court of Appeal:

1. That the learned High Court Judge did not give proper consideration to the remand period.
2. That the learned High Court Judge did not give proper consideration to the guilty plea.
3. That the learned High Court Judge did not consider the appellant's previous good character.

[43] The learned High Court Judge had picked 13 years as the starting point for each of the 6 counts of rape. Having considered the aggravating factors, 4 years had been added and then it came to 17 years. A reduction of 1 year was given for the mitigating factors he had discussed in paragraph 17 of his judgment making the head sentence to 16 years for each count of rape.

[44] For the 1<sup>st</sup> count of indecent assault he had picked a starting point of 5 years. Having considered the mitigating factors spelt out in the said paragraph 17 of his Order 1 year was deducted making the head sentence to 4 years. All sentences to be served concurrently and not eligible for parole for a period of 15 years.

[45] In the Court of Appeal, sentences imposed by the High Court was quashed and following sentence was substituted; *"A term of 13 years imprisonment for each count of rape and 3 years imprisonment for indecent assault (1<sup>st</sup> count), to be served concurrently effective from 1/6/2015"*. The total sentence was then 13 years imprisonment with a non-parole term of 11 years. Further it was stated that in arriving at the head sentence and the non-parole term, consideration was given to the remand period of about 3 months.

[46] In paragraphs 19 & 20 of the Court of Appeal judgment their Lordships have dealt with the above issue. The aforesaid two paragraphs are reproduced below:-



*"[19] It must be acknowledged that the offending was extremely serious. The victims were the appellant's biological daughters. Rape of young daughters by fathers must attract a punishment that reflects the gross breach of trust arising from the father – daughter relationship. However there are some compelling mitigating factors like the early guilty plea, remorse and the time spent in remand. These factors are not adequately reflected in the appellant's total sentence of 16 years imprisonment with a non-parole period of 15 years.*

*[20] I would quash the sentences imposed by the High Court and substitute a term of 13 years imprisonment for each count of rape and 3 years imprisonment for indecent assault to be served concurrently effective from 1 June 2015. The total sentence is now 13 years imprisonment with a non-parole term of 11 years. In arriving at the head sentence and the non-parole term, I have considered the appellant's remand period of about 3 months."*

[47] It appears from the above reasoning what led the Court of Appeal to quash the earlier sentence and substitute a term of 13 years was that the aggravating and mitigating factors spelt out in paragraph 19 of the Court of Appeal judgment were not adequately reflected in the Petitioner's total sentence of 16 years with a non-parole of 15 years imposed by the High Court Judge. In my view that conclusion lacks sufficient reasoning.

#### **Grounds of Appeal Against Sentence submitted to this Court**

[48] The Petitioner has submitted two grounds of appeal for the consideration of this court.

##### **The First Ground of Appeal**

Did the FCA adhere to the Sentencing principles in Section 4(2) (f) of the Sentencing and Penalties Act, inquiring regards to the stage of the proceedings in which the petitioner has pleaded guilty?

##### **The Second Ground of Appeal**

[49] Did the FCA err by failing to give discount of one third to the Petitioner's early guilty plea as enunciated in **Rainima v The State**; FJCA 17; AAU 22 of 2012?

[50] Since it appears both grounds of appeal revolve round the early guilty plea, I proceed to consider both grounds together.

[51] When considering this, section 4(2) (f) of the Sentencing and Penalties Decree 2009 would become relevant. In sentencing offenders, the Court must have regard to:-

“(a)...

(b)...

(c)...

(d)...

(e)...

*(f) whether the offender pleaded guilty to the offences, and if so, the stage in the proceedings at which the offender did so or indicated an intention to do so;”*

[52] In the Supreme Court decision of **Chand v State** [2012] FJSC 6; CAV 0014.2010 (9 May 2012); it was held that in terms of Section 14 of the Supreme Court Act 1998 this Court is vested with inherent power to make any order that is conducive to the achievement of the ends of justice. It was to the following effect:-

“... in terms of Section 14 of the Supreme Court Act No. 14 of 1988, this Court is possessed of all powers vested in the Court of Appeal, and as the apex court of Fiji Islands, it has the inherent power to make any order that is conducive to the achievement of the ends of justice.”

It is noted that the Petitioner had tendered the guilty plea at the earliest opportunity when he was charged in the High Court.

[53] The Court of Appeal in the impugned judgment in paragraphs 16 and 17, when dealing with the discount that should be given to the early guilty plea, had referred to **Rainima v State** [2015] FJCA 17; AAU 22 of 2012 (27/2/2015) and **Mataunitoga v The State** [2015]. His Lordships the Chief Justice whilst referring to both aforesaid cases, has favoured the view adopted by Goundar J in Mataunitoga’s case. In paragraphs 15 of his

comments, His Lordship has expressed the view that the correct approach was the Goundar J's approach in Mataunitoga's. Hence in para 15 of his comments, he has inclined to the view that one third discount may apply in less serious offences. Further, in cases of abhorrence, or many aggravating factors, the discount must reduce, and in the worst cases shortened considerably.

- [54] In Rainima's case, (vide paragraph 47 of the judgment) it was concluded that "a plea of guilty before trial must be afforded some discount given that the cost of trial (including time and cost of assessors) is saved."

### **Enhancement of the Sentence**

- [55] What should be considered here is whether the sentence substituted by the Court of Appeal is adequate for the charges of rape and for the charge of indecent assault – count 1. The facts and circumstances under which the campaigns of rape were committed on the two victims by their biological father would shock the consciences of any court.

- [56] Section 98(5) of the Constitution would also become relevant. Section 98(5) thus reads as follows:-

*"98. (5) In the exercise of its appellate jurisdiction, the Supreme Court may—  
(a) review, vary, set aside or affirm decisions or orders of the Court of Appeal;  
or  
(b) make any other order necessary for the administration of justice, including an order for a new trial or an order awarding costs".*

- [57] In terms of the above, Supreme Court derives powers to review, vary, set aside or affirm decisions or orders of the Court of Appeal or to make any other order necessary for the due administration of justice. Further it is also noted that under section 7(1)(b) of the Supreme Court Act No.14 of 1998 (which is reproduced in above paragraph 40), after granting special leave, the Supreme Court is empowered to make such orders as the circumstances of the case require, instead of dismissing the appeal.



- [58] The two victims were vulnerable; the offences took place in their own home, where they were entitled to feel safe. Now the safest place has been converted to the most deadly place in this world. The Petitioner being their biological father had disregarded his moral responsibilities attached to fatherhood. Prior to the incident that took place on 22/2/15 with regard to the 2<sup>nd</sup> victim, the Petitioner had been exploiting the two victims to make them smoke marijuana. But they had refused. The petitioner had traumatised the lives of the victims. As the father instead of protecting the victims had totally breached the trust bestowed on him by the two victims.
- [59] This court being the final appellate court, special leave to appeal should be granted in cases which crosses the threshold contemplated in Section 7(2) of the Supreme Court Act of 1998. Having considered above, I am satisfied that a question of general legal importance is involved here. Thus leave to appeal is granted.
- [60] Campaigns of rape commenced on the 1<sup>st</sup> victim at the age of 6 years when she was in class 2 and on the 2<sup>nd</sup> victim when she was 11 years of age. The victim's mother was driven to leave the matrimonial home with the two victims to escape from the petitioner. The continuous offending stopped not because of anything else, but due to the mother fleeing their home with the two victims.
- [61] At the hearing of the appeal when it was indicated to the petitioner's counsel by the Court that the court was considering an enhancement of sentence in this matter, an application was made forthwith to withdraw the appeal. However, court was not inclined to allow the same at that stage and also especially taking into account the existence of aggravating circumstances of exceptionally high degree. Whether to allow an application for withdrawal of appeal or not is a matter ultimately vested in the discretion of the Court.
- [62] It is noteworthy that the Sentencing Judge in paragraph 11 of his sentencing order has stressed upon the seriousness and the gravity of this series of offences committed, in the following manner:-

*"...Parents are the only trusted and dependable persons that a child has in her growing tender years. Turning that trusted dependable person into a monstrous demon who penetrated in to the innocent childhood of the child and destroy it with his own lustful sexual satisfaction, would undoubtedly jeopardise the child's entire future life. Therefore, incest is a rape by extortion, in which a child's very childhood becomes a weapon used to control her".*

[63] The petitioner's callousness and the horrific manner in which the offences were committed and the abuse 2 victims were subjected to was amply demonstrated by his cautioned interview which he admitted that he made it at his own free will. With regard to the 1<sup>st</sup> victim – ZA, (at pp 75 – 76) of the Cautioned Interview:-

“Q32. It is alleged that when ZA was in class two, one day she came home and was laying with her younger sister in the sitting room and then you took ZA to your room, what do you have to say in regards to this?

A. Yes it is true.

Q33. What happened in the room?

A. I removed all my clothes and also removed my daughters clothes then went on top of my daughter and then inserted my finger into her vagina.

Q34. Did you inserted your pennies into ZA's vagina?

A. No, I tried but was unable to and then inserted my finger.

Q35. What happened after that?

A. I saw that her urinating part was bleeding and so used the bed sheet to wipe the blood and left the bed sheet in the wash tub.

Q36. Did you wife see the bed sheet in the wash tub on that day?

A. Yes.

Q37. What happened as she saw the bed sheet?



- A. *My wife asked me if anyone was injured as she saw the bed sheet in the wash tub and then ZA told her everything as to what all I had done with her, then my wife asked me about it and then I told her that I will cut her if she reports the matter.*
- Q38. *After this did you at any other time sexually abused ZA in any way?*
- A. *For some time I didn't do anything and after some time I took ZA to my bedroom after school and removed her clothes as well as mine and then inserted my erected pennies into her vagina.*
- Q39. *When you were doing all these with ZA what she did?*
- A. *She screamed and I covered her mouth with my hands.*
- Q40. *Can you tell as to for how long have you been doing this to ZA?*
- A. *For many years now and the last time I had sex with her was last month this year".*

Further in his interview from pp 78 to 81 he has described how offences of rape were committed on the 2<sup>nd</sup> victim on the dates relevant to counts 5 to 7.

[64] The account of those factual episodes listed by the Sentencing Judge in Paragraphs 3 to 8 of his sentencing order too would be of importance. Same is reproduced below:-

*"3. It was revealed in the summery of fact, which you admitted in open court, that you have committed these crimes during the period from 1st of January 2006 to 22nd of February 2015. The first victim is your elder daughter and the second victim is your younger daughter. In the year 2006, when the first victim was in class one; you took here in to the bed room after she came home from school. You then removed her under garment and inserted your finger into her vagina. You had been doing this to her since then. She was just 6 years old at that time.*

*4. In the year 2007, you tried to forcefully insert your penis into the vagina of the first victim. She started to cry in pain. You tried it for a while and found that blood came out from her vagina. You then got angry and forcefully inserted your finger into her vagina while she continuously cried. When your wife confronted about these incidents,*

*you threatened her that you will kill her, if she reported the matter to police.*

- 5. You started having penile penetration of her vagina after that incident and had been continuously doing this in every afternoon since the year 2007 until on 13th of February 2015. The first victim was helpless as you fought with your wife whenever she confronted you on this issue, making her surrender to your monstrous and shameful act.*
- 6. In December 2014, you took both victims to the bush to collect mangoes. You then deceitfully asked the first victim to stay away and took the second victim further into the bush, where you penetrated your penis into the vagina of the second victim and had sexual intercourse with her.*
- 7. You once again had sexual intercourse with the second victim on 17th of February 2014. You came to her while she was sleeping on the floor of her mother's bedroom. You took her on your shoulder to your room when she pretended that she was sleeping, knowing it was you calling. You then removed her cloths and had sexual intercourse with her.*
- 8. Once again on 22nd of February 2015, you asked the second victim to remove her cloths and have sexual intercourse with you. At that time the first and second victims were folding cloths in your room. You asked the first victim to guard the door while you were having this forceful sexual intercourse with the second victim. At all material time, both victims did not consent for what you did to them. They were forced to have sex with you”.*

[65] The Court of Appeal of Fiji has approved the principles of punishment laid down in the case of **R v Radich** [1954] NZLR 86 wherein it was concluded that :-

*“...one of the main purposes of punishment...is to protect the public from the commission of such crimes by making it clear to the offender and to other persons with similar impulses that, if they yield to them, they will meet with severe punishment.”*

*“If a Court is weakly merciful, and does not impose a sentence commensurate with the seriousness of the crime, it fails in its duty to see that the sentences are*

*such as to operate as a powerful factor to prevent the commission of such offences."*

- [66] At this juncture, it would be pertinent to cite the principle of law enunciated by Justice Gates (as he then was) in **State v Marawa** [2004] FJHC 338, having cited with approval **Mohammed Kasim v State; Roberts and Roberts** (1992) 4 Crim.App. (s) 8, **State v Turagabeci** (1996) FJHC 173 and **Koroi v State** [2002] FJHC 152 at 10-11:-

*"Parliament has prescribed the sentence of life imprisonment for rape. Rape is the most serious sexual offence. The courts have reflected increasing public intolerance for this crime by hardening their hearts to offenders and by meting out harsh sentences".*

- [67] In **State v Anthony** [2012] FJHC 1013; HAC151.2010 (12 April 2012), the sentencing Judge noted an important issue with regard to rape of small children in the following manner:-

*"The accused's engagement in his unilateral sexual activity with a little girl who was insensitive to such activity is most abhorrent. This kind of immoral act on a little girl of MB's standing is bound to yield adverse results and psychological trauma, the effect of which is indeed difficult to foresee and assess even by psychologists or sociologists. The depravity of the accused in committing the offence should be denounced to save little children for their own future; and, the men of the accused's calibre should not be allowed to deny the children of their legitimate place in the community. In passing down the sentence in a case of this nature, deterrence is, therefore, of paramount importance".*

- [68] I am convinced that there is another factor which enhanced the gravity of offending. That is by moving on to the 2<sup>nd</sup> victim – EA, he did not give up committing the offences on the 1<sup>st</sup> victim – ZA. This is amply demonstrated by his guilty plea to counts 4 and 5. Count

4 on victim 1 – ZA, relevant period was between 17/5/2013 and 13/2/2015. Count 5 – on victim 2 – EA, relevant period was 1/12/2014 and 31/12/2014.

[69] In my view this court is entitled to impose a harsh sentence for the serious offence of rape of children, to reflect the overall criminality of the petitioner's conduct especially in a case of this calibre which falls into a category of involving campaigns of rape by the biological father on two of his daughters. The degree of the aggravating circumstances under which the offences were committed could be properly described as 'exceptionally high'.

[70] It is now necessary to consider Section 4(1) of the Sentencing and Penalties Decree which states as follows:-

- “4. — (1) The only purposes for which sentencing may be imposed by a court are
- (a) to punish offenders to an extent and in a manner which is just in all the circumstances;
  - (b) to protect the community from offenders;
  - (c) to deter offenders or other persons from committing offences of the same or similar nature;
  - (d) to establish conditions so that rehabilitation of offenders may be promoted or facilitated;
  - (e) to signify that the court and the community denounce the commission of such offences; or
  - (f) any combination of these purposes”.

[71] In **Raj v State** [2014] FJSC 12; CAV0003.2014 (20 August 2014) the Supreme Court observed in paragraphs 57 to 59 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).*

*[59] His Lordship took his starting point as 12 years and added 7 years for the aggravating factors. No criticism can be made of the starting point selected. It was within the tariff”.*

Further it was correctly identified that tariff for rape of a child is between 10 – 16 years.

- [72] Undoubtedly it has been accepted by the society that rape is the most serious sexual offence that could be committed on a woman. Further it is said that; “A murderer destroys the physical body of his victim; a rapist degrades the very soul of a helpless female.”
- [73] One of the main purposes for which sentencing may be imposed by a court is to protect the community from offenders – section 4(1) (b) of the Sentencing and Penalties Decree In view of the foregoing analysis I am satisfied that this case demands an enhancement of sentence for counts of rape to deter offenders or other persons from committing offences of the same or similar nature and to signify that the court and community denounce the commission of such offences.
- [74] I am mindful of the observations made in the case of R v Andrew Randall [2007] EWCA Crim. 2257; [2008] 1 Cr. App. R. (S.) 93 to the following effect at page 557:-
- “...It was plain from those observations that each case must be fitted into the correct place in the hierarchy of starting points by reference to a careful consideration of all the factors of the case in order to reflect the seriousness of the offence...”*
- [75] The learned High Court Judge in paragraph 16 of this sentencing judgment has laid down the factors he had considered to be the aggravating factors in this case. Above paragraph is reproduced below:-



*"16. The two victims are your own biological daughters. You abused the trust and confident they have for you as their father. You started doing this horrific crime on the first victim when she was just 6 years old. That is the age, a child look for the parent for everything in their life. Instead of cuddle her, protect her with love and affection, you used her vulnerability in her childhood as a weapon to satisfy your reprehensible lust of sexual gratification. You dined both of victims, their childhood, and natural growth with the nature by committing this crime. You deceitfully plot this crime on them by using your position in the family. While doing such, you have threatened your wife not to report this shameful act to the police, making her helpless against this act. They had no escape, but to surrender to your monstrous and devilish act. You had raped and sexually assaulted the first victim over last 8 years. She was a 6 years old child as that time, and now is a 14 years old teenager. You did the same for the second victim over a period of one year. You used violence against them, when they refused or avoided your lustful demands. The most outrageous incident out of the series of shameful incidents in this crime is that you asked the first victim to guard the door, while you were raping her younger sister, the second victim inside the bed room. I consider these reasons as aggravating factors of this offence".*

[76] In addition to the above, I find that the following aggravating factors too existed and those also should be considered:-

- a) A significant degree of planning was involved with regard to several incidents of rape;
- b) The fact that the two victims were vulnerable because of their age;
- c) Campaigns of rape started on the 2<sup>nd</sup> victim – EA when she was 11 years of age;
- d) Having exploited both victims by forcing them to take marijuana prior to one incident of rape on the 2<sup>nd</sup> victim;

- e) By moving to the 2<sup>nd</sup> victim – EA, the commission of the offence of rape on the 1<sup>st</sup> victim – ZA, did not end.
- f) The effect of the psychological trauma that is bound to yield in the two victims of tender ages.

[77] Leave to appeal has been already granted as per paragraph 59 above.

[78] As per paragraph [25] of His Lordship's comments I agree that the tariff laid down in **Rai v State** [20140FJSC 12 CAV 0003, 2014 (20<sup>th</sup> August 2014)] should now be 11-20 years imprisonment.

[79] I have already concluded in paragraph 47 above, the conclusion of the Court of Appeal lacks sufficient reasoning. I proceed to quash the sentences substituted by the Court of Appeal for all counts.

[80] I follow the approach developed in paragraph [9] of His Lordship's comments that discount for the remand period to be dealt with last, after fixing the term of imprisonment and non-parole period.

[81] As spelt out in paragraph 27 of His Lordships comments, I agree that the starting point in the case at hand should be 14 years imprisonment. Having considered all the aggravating factors outlined in my judgment and of His Lordship's comments, 6 years should be added making a total of 20 years imprisonment. From a total of 20 years a discount of 2 years is given for the early guilty plea making it 18 years. A non-parole term of 16 years is fixed.

[82] By pleading guilty at the first available opportunity in the High Court, the petitioner has saved the time and resources of the court. More importantly by doing that, victims were saved from undergoing psychological trauma by recalling the memories of the incidents during course of the hearing.


- [83] However, in mitigating submissions the Petitioner had submitted that his good character also has to be considered. In terms of the criminal history sheet filed in the High Court Record, he has had eleven previous convictions although no similar offence is disclosed. Thus, I conclude that the Petitioner is not entitled to be regarded as a person of good character.
- [84] We are in agreement that the sentencing judge had not expressly treated the guilty plea as acceptable remorse or as part of mitigation. In any event this assessment is definitely a role for the trial judge. I agree with His Lordship's observation in this regard appearing in paragraph [20] of his comments to the effect that he does not believe that this court should usurp that.
- [85] For the Petitioner's remand period of 2 months and 21 days, 3 months discount is given. New total is 17 years and 9 months.
- [86] The sentence substituted by the Court of Appeal, is quashed. In its place, for the rape convictions (2 to 7 counts) there will be following sentence:-
- i) A head sentence of 17 years and 9 months imprisonment;
  - ii) With a non-parole term of 16 years.
- [87] For the 1<sup>st</sup> count of indecent assault the sentence of the High Court is restored, namely a sentence of 4 years imprisonment with a non – parole period of 3 years.
- [88] In applying the totality principle, all the sentences imposed by this Court shall be served concurrently effective from 1<sup>st</sup> June 2015 – (date of sentencing).


### **The Orders of the Court:**


In the result the orders of the court are as follows:-

1. Leave to appeal is granted.
2. Sentences substituted by the Court of Appeal for all the counts are quashed. In its place following are substituted :-
  - i) For each count of rape - A Head Sentence of 17 years and 9 months imprisonment with a non – parole term of 16 years;
  - ii) For the single offence of indecent assault (count 1) the sentence of the High Court is restored, namely a sentence of 4 years imprisonment with a non-parole period of 3 years.
3. All the sentences to be served concurrently with effect from 1<sup>st</sup> June 2015, with a non-parole term of 16 years.



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

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

  
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**Hon. Madam Justice Chandra Ekanayake**  
**Judge of the Supreme Court**

### **Solicitors:**

Office of the Legal Aid Commission for the Petitioner

Office of the Director of Public Prosecutions for the Respondent.