IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT

CRIMINAL APPEAL NO: AAU0038 OF 2010
(High Court HAC 9 of 2010)

BETWEEN	**:**	**ANAND ABHAY RAJ**
		Appellant
AND	**:**	**THE STATE**
		Respondent
Coram	**:**	**Calanchini P** **Goundar JA** **Madigan JA**
Counsel	**:**	**Appellant in person.** **Ms P Madanavosa for the Respondent**
Date of Hearing	**:**	**10 February 2014**
Date of Judgment	**:**	**5 March 2014**

JUDGMENT

Calanchini P:

I have read his judgment of Madigan JA and agree for the reasons stated by him that the appeal against both conviction and sentence should be dismissed.

Goundar JA:

I agree the appeal against conviction and sentence should be dismissed for the reasons given by Madigan JA.

Madigan JA:

[1] The applicant seeks leave to appeal a conviction for rape entered by the High Court at Suva on the 7th June 2010. He also appeals his sentence of 16 years imprisonment with a minimum of 12 years.

[2] On the 2nd July 2012, the single Judge refused leave to appeal conviction on the applicant's grounds then advanced but granted him leave to appeal his sentence. The applicant seeks to renew his application for leave to appeal conviction by bringing three "amended grounds of appeal" before the Court, pursuant to S.35 (3) of the Court of Appeal Act, Cap 12.

[3] The applicant was tried in the High Court on an information dated 24 May 2010 which contained four representative counts of rape and one of indecent assault. The applicant had entered pleas of not guilty, but after trial he was found guilty of all five counts and convicted accordingly.

[4] The facts of the case were that the accused was the de-facto step father of the complainant, a girl of 10 years old at the time the offending started and only 12 years old when the offences were reported. The accused was 37 years old and apparently at home alone with the complainant on many occasions when the mother went out to work. The complainant said in her evidence that he would touch her all over the body and in Court using a body chart she pointed to genitals saying that he would insert his penis into her vagina and then threaten her that if she told anyone he would kill her.

Once when she wanted to tell her mother he hit her on the mouth causing her to bleed. Her mother asked her what had happened and she said nothing because the accused was present watching and she was scared. She told of repeated acts of rape in 2008 and 2009 and said she didn't like it and didn't want him to do it. She eventually told her cousin in Navua who told her own mother and the offences were thus revealed. The applicant had advanced three grounds of appeal against conviction before the single Judge and on the 2nd July 2012 he was refused leave on all three grounds. The applicant now seeks to renew his application before the Court on which he terms three "amended grounds" of appeal against conviction. Those grounds are:

1) That the offence of rape was made as exaggerated to the report of Indecent Assault to the Police by the complainant;
2) That the learned trial Judge erred in law by failed (sic) to direct the assessors the inconsistency in the statement on oath and evidence on oath of the victim PW Shayal Nikita Kumar;
3) That the learned trial Judge erred in law by failed (sic) to adequately direct the assessors on the contradictory and inconsistent statement on oath and evidence on oath by PW Prani Pradeep Singh.

[5] The applicant filed written submissions and addressed the Court in some rather confused detail on those submissions. The thrust of his submissions on the first ground appear to be that the complainant had originally only complained of indecent assault but she was then coached by the Police to extend her complaint to be rape. In aid of that ground he quoted from Willy's essay on "Principles of Circumstantial Evidence" (1902) and for historical interest the astonishing quote is "there is always

very great temptation to a woman to screen herself by making a false or exaggerated charge and supporting it with minute details of a kind which female mind seems particularly adapted to invent". No comment can glorify that opinion and now in 2014 it would seem to be rather a quaint perception which does not assist the applicant's ground.

He continued to argue support for this ground in the medical evidence of the doctor who examined the complainant and found there to be no hymen present which she stated to be consistent with the complaint made by the girl against the applicant. He seizes on the doctor's opinion that loss of a hymen can in some circumstances be attributable to other factors such as vigorous exercise or medical misadventure and submits that the doctor was unfairly relying on the sexual activity reason rather than the exercise or medical reason. He concluded that the doctor's evidence is unreliable and that the assessors should have been directed to discard the evidence.

The record of proceedings shows that the evidence of the doctor was given authoritively and professionally. In addition the statements of the child complainant allege both digital and penile invasion from the very start of the abuse and there can be no suggestion on the papers that the complaint was exaggerated by any third party.

Both limbs of this ground (coaching and misunderstood medical opinion) are unarguable and cannot be made out.

[6] The applicant's second ground is that the Judge failed to direct the assessors on the inconsistencies in the evidence of the complainant, inconsistencies he claims to arise from her evidence in Court, compared with her police statements. The inconsistencies

complained of are not really inconsistencies at all. He refers entirely to evidence in Court alone and points out passages where the child has seemingly contradicted herself but a careful analysis of the passages relied on shows a young and probably nervous witness giving embarrassing evidence and in doing so is giving evidence of the sexual assaults gradually and hesitatingly. Seizing on an admission by the complainant that she did not tell the Police about a threat the applicant had made to kill her, he submits that it is an inconsistency when it is nothing more than an example of her consummate fear of the man and her perceived fear of what he might do to her or to her mother. This ground too is unarguable.

The third ground relied on by the applicant in his request for leave to appeal is the failure he claims of the learned trial Judge to direct the assessors on the "contradictory and inconsistent statement on oath and evidence on oath of PW Prani Pradeep Singh.

[7] Prani Pradeep Singh was the next door neighbor of the applicant. On a day in June 2009 he was drinking beer on the applicant's porch with the applicant and another named Danny. After a while the applicant went into the house and Singh saw inside a room that the applicant was touching the complainant, touching her "private parts and breasts". The girl was very scared and helpless. She was "like trying to push him away". This abuse the witness said lasted for about 7 minutes.

[8] The inconsistency relied on by the applicant in his ground of appeal is that in a statement to the Police on 29 September 2009 Singh had said that when he had seen this abusive attack on the girl he had been standing up and leaning on a vehicle rather than sitting on the porch. The applicant claims that this inconsistency as to his *locus in quo* whilst observing destroys the total value of his evidence.

[9] The learned trial Judge had given a clear and accurate direction to the assessors about inconsistencies in the evidence. In any event, at trial Counsel for the applicant had put this inconsistency to the witness in cross-examination and it was adequately explained by the witness.

[10] In his oral submissions before us, the applicant appeared to be more concerned that the other party present at the beer drinking meeting, the one "Danny" would have given far more favourable evidence for him than the witness Singh did, because Singh had carried a grudge against him for some time.

[11] The inconsistency is a peripheral issue and as such it is not significant and cannot detract from the evidence given by Singh of what he saw. No matter what Danny might have said he wasn't called to say it and determination of the issue must be made on the evidence actually called (and cross=examined) at trial. This ground of appeal has no merit and is not even arguable.

[12] None of the "amended grounds of appeal" against conviction being arguable, leave to appeal is refused and the appeal against conviction is dismissed.

Appeal against Sentence:

[13 The learned trial Judge in sentencing after acknowledging that the maximum penalty for rape is life imprisonment, referred to the tariff of rape of a child being between 10 to 14 years and in so doing took a starting point for each of the four representative convictions of 12 years imprisonment. To this he added 7 years for the aggravating features of gross breach of trust the accused being "*in loco parentis*" as her de-facto

step father. In addition it was aggravating that she was continuously raped over a long period which would scar her for the rest of her life. The Judge considered the mitigation advanced on the accused's behalf (family circumstances and remorse) and deducted two years bringing the interim total for each count to 17 years. He deducted one further year for time spent in remand arriving at a final sentence of 16 years for each count which was the sentence he passed on the applicant. For an additional conviction for indecent assault he passed a sentence of 3 years imprisonment. He ordered all of the sentences passed to be served concurrently.

[14] The sole ground of appeal advanced by the appellant in respect of sentence, and the ground on which he was granted leave by the single Judge is that the sentence is harsh and excessive. The appellant filed no submissions on sentence and did not address us on this ground however he was at pains to point out that he was not afforded credit for the 10 months he had spent in remand prior to his trial. The State conceded that he had indeed spent 10 months in custody awaiting trial and that this period had not been provided for in the sentence; a concession that was clearly misplaced because 12 months for remand period had actually been allowed..

[15] Sadly there are now many cases of rape of children coming before the High Court and the sentences on conviction have conformed to an accepted range. Although rapes of children are bad enough but it is even more abhorrent that many of the perpetrators of these crimes are family members or other persons in a position of trust.

[16] As the Court said in **Drotini v State** AAU0001.2005 (24 March 2006) :

> *"There are few more serious aggravating circumstances than where the rape is committed on a juvenile girl by a family member or someone who is in a position of special trust. The seriousness of the offence is exaggerated by the fact that family loyalties and emotions all too often enable the offender or other family members to prevent a complaint going outside the family. If the child then remains in the family home, the rapist often has the opportunity to repeat the offence and to hope for the same protection from the rest of the family. Cases of rape by fathers or stepfathers appears (*sic*) before the Court in Fiji far too frequently and in such cases the starting point should be increased to ten years. Where there are further aggravating circumstances beyond those basic circumstances such as repeated sexual molestation of any nature, threat of violence or actual violence or evidence that the offender has attempted to persuade other family members to help cover up the offences a discourage complaint to the Police, there should be substantial increases above that starting point."*

[17] Whilst those dicta certainly remain valid it is most apparent now in 2014 that heavy sentences have not deterred would-be "family rapists" and there are more and more of these heinous crimes coming before the Courts.

[18] Rapes of juveniles (under the age of 18 years) must attract a sentence of at least 10 years and the accepted range of sentences is between 10 and 16 years. There can be no fault in the sentencing approach of the learned Judge referred to above (in para 13), save as to say we do not consider that allowance should have been made for family circumstances. To that extent the appellant was afforded leniency that he did not deserve.

[19] In appropriate cases consideration **must** be taken of S.4(3) of the Sentencing and Penalties Decree which sets out factors to be taken into account in the sentencing of rapes in a domestic violence context. These are often ignored by sentencing tribunals but they should not be because the Decree makes it mandatory, ("**must**") to consider.

[20] Legitimate aspects of mitigation will include a clear record, proven remorse, mental disorder but not family circumstances because the perpetrator has by his conviction for the crime done everything within his power to destroy the fabric of the family unit.

[21] His oral plea that his 10 months spent on remand was not allowed for is in fact incorrect. At the end of the sentencing exercise the learned Judge said "I further reduce 1 year on each count of rape considering the period of remand, making a final total of 16 years imprisonment on each count of rape."

[22] The sentence passed including the twelve years minimum is well within the range of acceptable sentences for these crimes and if anything erring on the lenient side.

[23] The appeal against sentence is dismissed.

……
HON. MR JUSTICE W. CALANCHINI
PRESIDENT, COURT OF APPEAL

……
HON. MR JUSTICE D. GOUNDAR
JUSTICE OF APPEAL

……
HON. MR JUSTICE P.K. MADIGAN
JUSTICE OF APPEAL