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

Criminal Appeal No: AAU 0047 of 2012
(Lautoka High Court Case No: HAC 0087/2011)

BETWEEN	:	**AKUILA VAKANITOGA**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Basnayake, JA** **Gamalath, JA** **Fernando, JA**
Counsel	:	**Mr. M. Yunus for the Appellant** **Mr. L. J. Burney for the Respondent**
Date of Hearing	:	**10 May 2016**
Date of Judgment	:	**27 May 2016**

JUDGMENT

Basnayake JA

[1] This is a renewed application for leave to appeal against the conviction and sentence of the appellant and to adduce fresh evidence. The appellant was charged in the High Court of Lautoka for indecent assault contrary to Section 154 (1) and rape contrary to sections 149 and 150 of the Penal Code (Cap 17) (pg. 105 of the Record of the High Court (RHC). After trial before three Assessors, the learned High Court Judge found the appellant guilty on counts 1, 2 on indecent assault and 3 and 4 on rape as charged. On count five the appellant was convicted for the offence of indecent assault. The appellant was sentenced to 18 years imprisonment with a period of non-parole for 15 years.

[2] The appellant appealed against the conviction and the sentence (pgs. 29, 33). On 16 May 2014 a motion was filed on behalf of the appellant (pg. 20) by counsel together with an affidavit of the appellant (pg. 15) to lead fresh evidence. A single Judge of the Court of Appeal having inquired into the above applications refused leave to appeal (on 24 July 2014 at pg. 3). However the learned Judge allowed the appellant to make a renewed application and to call over for listing the application for fresh evidence. On 14 April 2016 the learned counsel for the appellant filed a renewed application.

[3] In the renewed application the appellant relied on the following grounds against the conviction, namely:

A. That the learned Judge had erred in law and denied the appellant a fair hearing, because of non-disclosure before or during trial of a letter dated 9 November 2011 purporting the allegation against the appellant to be false and fabricated.

B. That the learned Judge had erred in law and in fact when he failed to direct the assessors how to approach the expert opinion evidence.

C. That the learned Judge had erred in law and in fact when he failed to give a fair and balanced summing up.

Against the sentence

[4] The following grounds were urged as against the sentence, namely:

A. That the learned Judge had erred in law and in fact when he failed to separately discount the 9 months the appellant had spent in remand.

B. That the learned trial Judge had erred in law when he subsumed the element of the offence as an aggravating feature.

C. That the sentence was in breach of section 14 (2) (n) of the Constitution of the Republic of Fiji Islands.

To lead fresh evidence

[5] "*In order to justify the reception of fresh evidence it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial*" (Lord Denning in **Ladd v Marshall** [1954] 3 All ER 754). This is one of the well established principles of law to qualify the allowance of fresh evidence. At the outset of the submissions, counsel for the appellant withdrew the application to lead fresh evidence for the reason that the appellant was aware of the document well before the commencement of the trial that he intended to lead in fresh evidence. Ground A on the convictions too was withdrawn for the reason that this question is based on the document intended to be led in fresh evidence. The learned counsel for the appellant confined his appeal to grounds B & C on the conviction and grounds A, B & C on the sentence.

Evidence

[6] The prosecution case consists of evidence of the victim (pgs. 129-40), Dr. Hanif (141-2), Ms. Malimali, grandmother of the victim and mother- in- law of the appellant (143-146) and the Investigating Officer D/C. Kumar (146-147). The appellant did not give evidence and did not call any witnesses but rather exercised his right to remain silent.

Evidence of the victim

[7] At the time of giving evidence in 2012 the victim was 14 years of age. The charges span from the year 2006 to 2010. The appellant is the father of the victim. The victim was living with her mother, father (appellant), two brothers and a younger sister. She described the incidents from 2006. The victim had been used to sleeping in her room. In 2006 the appellant had called her to his room to sleep beside him. That night she said that she felt her father touching her body. The shoulders, breasts and the stomach were caressed. In 2007 when she was attending class 3 in school, the appellant had got down the victim to sleep beside him. This time the appellant had removed her top and kissed her cheek. She was told not to tell anyone. Again in 2008 she recollected that her mother

was doing the night shift. The appellant had got her to sleep with him. Her younger brother Ben too had slept next to the appellant. In the night the appellant had inserted his penis into her vagina and had sex with her for a few minutes. She was told to keep it a secret which she says she did.

[8] Again in 2009 she remembered spending time at her uncle's with her sister and two brothers. The appellant brought them back to the house. That night the appellant had got her and her younger brother to sleep with him. Whilst she was sleeping the appellant had started touching her shoulders and breasts. When her mother returned home the appellant had not opened the door for her. When she knocked again, the appellant had got Ben to open the door. After that her parents had had a fight and the appellant had slept with Ben in the sitting room. The appellant having called her several times to come to the sitting room to sleep, she had gone and slept in the sitting room. In the night the appellant had again taken her clothes off and put his penis into her vagina. While he was doing this the mother had come and put the lights on and said in Fijian, the translation of which is that "Akuila (appellant) see what you have done to this child, filthy". The mother had wanted to go to the police. The appellant did not allow her. In the morning the mother had asked the appellant to buy some biscuits from the shop. While the appellant was away the mother had inquired about the happenings and she had revealed everything to her.

[9] Again in 2010 while her mother was away the appellant had started to touch her body. The appellant had told the victim that his wife is refusing to have sex with him and that that is the reason for behaving in this manner. She also said that the appellant had given her $5 to keep her mouth shut. She said that in April 2011 (referred to as last year while giving evidence in 2012) she had told about this to her grandmother. Referring to the time she said that, that was the day her grandmother came to take away the brush cutter. That time she had taken the two granddaughters with her. It was on the following day that this was revealed to the grandmother in her house. On the same day they had gone to the

police. After going to the police station, the grandmother had lodged a complaint. Later the victim was examined by a lady doctor.

[10] In the evening the victim's mother and the appellant had come to the grandmother's house and started a fight. Answering the question in cross-examination "what you have told the court that your father had sex with you is a false story she said "no it is a true story" (pg. 135). When it was suggested to her that nothing had happened in the sitting room between her and her father in 2009, she accepted it. She denied it when she was told that in 2008 nothing had happened between her and her father. She categorically said that in 2008 she had sexual intercourse with her father (136). Again when she was asked as to what she had told the police regarding 2008 she said, "I told them that father and I had sexual intercourse".

[11] At page 138 she said that it was in 2009 that her mother saw father having sex with her. She also denied when it was suggested to her that she lied to court about touching her. "I put it to you, you lied to court about touching you". "No I did not lie". Again she answered as follows to a question suggesting that she was lying. "I am putting it to you that you lied to court about your father touching you". She said, "I am not lying. I am telling the truth". She also denied when it was suggested to her that her grandmother coached her to make a false allegation against the appellant (pg 139). Q. Is it true you have been coached by your grandmother to make a false allegation against your father? A. No, that is not true. However the last question by the learned counsel for the defence is as follows. Q. Do you agree the complaint of rape is false? A. Yes (pg. 140). It is to be noted that the questions prior to that are questions to which the answer had to be yes. As to this answer the learned counsel for the prosecution and the learned trial Judge got no clarification. Considering the manner of answering questions in relation to rape, it appears that this answer alone would not negate her previous position that she was raped.

Medical evidence

[12] Dr. Hanif has obtained her MBBS from the Fiji School of Medicine in 2009. She had been working at the Namaka Health Centre. While she was working at the Nadi Hospital in their General Outpatient Department she had dealt with 5 to 10 cases of sexual abuse. The victim was examined by her on 26 April 2011 at 11 a.m. She was told by the victim that she was sexually assaulted by her father on several occasions. She has recorded this as the history of the victim. On examination she had found that her hymen was not intact. The reason may be vaginal penetration. Under cross-examination she admitted that the reason for the absence of the hymen could be due to vigorous sports activity and also congenital absence of it. In this case however there is no evidence of the victim having engaged in any kind of sports activities.

The Grandmother's Evidence

[13] She has 9 children and 18 grand children. She remembered the date 22 April 2011. On that day she had gone to her daughter Livia to collect her brush-cutter. That day she had taken her two granddaughters to her house. It was on the following day that the victim had told her that she was raped by the appellant. She had related all happenings from 2006 onward. In 2008 she had told that she was raped three times. It had occurred on two occasions while her mother was away from home at work doing night shifts. In 2009 the appellant had raped her in a hotel in Suva. The same year the appellant had got caught to his wife while having sex with the victim.

[14] After this revelation she had gone to the police and lodged a complaint. The victim too had made a statement. After that they had gone to the hospital. The hospital was found closed. That day the appellant had come to her house with his wife Livia. Livia is her daughter. Livia had cried and said that the appellant would have to spend about 15 to 18 years in prison. She had also told the witness not to treat her as her daughter and told the

daughters not to treat her as their mother as everything had been told to the grandmother. The witness said that her relationship with the appellant had previously been very good. That was one reason for giving them her grass cutter to be used. Her relationship with her daughter Livia too was very good. Whenever Livia's two daughters fell ill the witness took them with her to look after. Prior to 2011, Livia had worked in a hotel. Even after this incident her relationship with the appellant was good. The appellant had asked this witness to pray for him and inquired whether this case could be closed. In cross-examination she said that she used to go to the victim's house on many occasions and had also taken the victim and her sister to her place many a time. She used to talk to them. She said she used to give them money and buy food and do shopping with them.

The grounds of appeal under conviction

Ground A was withdrawn.

Ground B -Expert opinion

[15] The learned counsel for the appellant submitted that the learned trial judge whilst explaining evidence of Dr. Mrs. Hanif had failed to direct the Assessors on how to deal with expert evidence. The impugned decision is in paragraph 22 of the summing up (pg. 57) which is as follows:

> *"The witness called was Dr. Mrs. Salma Hanif. She gave evidence and produced the Medical Report which she prepared after examining the virtual complainant. She said she had examined the virtual complainant on the 26.4.2011 at the General Outpatients Department of Nadi Hospital. She didn't find any external injuries on the virtual complainant; at vaginal examination she had found that the hymen was not intact. She is of the view that there was vaginal penetration. She also told court that the hymen can be damaged due to vigorous exercise and sports activities. It is also possible with congenital absence".*

[16] The learned counsel submitted that the trial judge should have directed the Assessors that the doctor was giving opinion evidence which the Assessors are not bound to follow and the weight to be attached to it is a matter for them to decide. In **R. v Stockwell** (1993) 97 Cr. App R at 266 the court said, "*It is for you to evaluate that evidence along with all other evidence in the case. You decide whether or not to accept and to agree with his evidence as a whole or in fact, or to reject it altogether*".

[17] The learned counsel further submitted that the examination was done by the doctor 5 years after the first incident and 4 months after the last incident. The learned counsel further submitted that the opinion of the doctor that the hymen was not intact and that there was vaginal penetration failed to expressly implicate the appellant as the perpetrator. As such, the failure to adequately direct the Assessors that they are not bound by the expert opinion and the weight to be attached to it has caused substantial prejudice to the appellant.

Argument of the learned counsel for the respondent on ground B

[18] The learned counsel for the respondent submitted that the learned judge did not err and also that there has been no occurrence of a miscarriage of justice. The learned counsel submitted that the learned trial judge has made it amply clear in paragraphs 2, 30 and 33 (pgs. 54, 59 and 60) of his summing up that it was a matter for the fact finders what to make of the evidence. The learned counsel submitted strenuously that expert evidence does not fall into a special category which a trial judge is required as a matter of law to give specific directions in relation to such evidence.

[19] The medical evidence is unchallenged. That evidence is that the hymen of the victim is not intact. At the time of giving evidence the victim was 14 years of age. There is no evidence of the victim associating with any males. The only man with whom she had had

sex with was her own father. The medical opinion for the hymen not to be intact is due to vaginal penetration. That is due to having had sex with someone. The doctor cannot say who that someone is. The victim's evidence is that it is the father. Although it was suggested to the doctor that a girl of the age of the victim can lose the hymen due to vigorous sports activity, there is no such evidence. It is true that the learned Judge had failed to analyse the evidence and explain that the Assessors are not bound by the opinion of the doctor that the losing of the hymen was due to vaginal penetration. The learned Judge said to the Assessors that they are Judges of facts. He also said that if an opinion had been expressed by him with regard to facts, that the Assessors are not obliged to accept it. The Assessors were told that they have to consider all the evidence and decide. It appears that there is no strict rule to say that the trial Judge is bound to tell the Assessors that they are not bound to follow the opinion of the doctor. It was held in **Fitz Patrick** [1999] Crim. L.R. 832 that a failure slavishly to follow this formula does not automatically render a conviction unsafe. In this case I am of the view that it would have been better if the Judge said to the Assessors that they are not bound by the opinion expressed by the doctor that the reason for the hymen not to be intact is due to vaginal penetration. In addition to the opinion expressed by the doctor the vaginal penetration has been established through the evidence of the victim and the grandmother. Therefore not giving a warning that the Assessors are not bound to follow the opinion of the doctor cannot be considered as fatal. However by considering the fact that the evidence led was short and it not being a complex case, no prejudice was caused and no miscarriage of justice has occurred.

Ground C

[20] This ground is that the learned judge has erred in law and in fact when he failed to give a fair and balanced summing up. The learned counsel for the appellant submitted that in cross examination when the defence counsel suggested the proposition to the victim that the complaint of rape was false, her answer was "yes" (pg. 140). The prosecution however failed to clarify on this issue and therefore this piece of evidence was unchallenged and could have caused a reasonable doubt in the evidence of the victim and

her credibility. The learned counsel submitted that the unchallenged evidence that `the allegation of rape was false was enough for the Assessors to draw an inference that the victim of the crime was not a credible witness and that there was a serious doubt whether the alleged offence actually happened or not. It was necessary for the trial judge to put before the Assessors clearly and fairly this argument in the summing up. The Court of Appeal held in **Tamaibeka v State** [1999] FJCA 1: AAU 0015u.97s (8 January 1999) that, "The duty of a judge in any criminal trial...is adequately and properly performed...if he puts before the jury, clearly and fairly, the contentions of either side, omitting nothing from this charge, so far as the defence is concerned, of the real matters upon which the defence, but that does not mean to say he is to paint in the details or to comment on every argument which has been used or to remind them of the whole of the evidence..."

[21] The learned counsel for the appellant submitted that the error is substantial and has caused the trial to miscarry. The unchallenged admission by the victim of crime that the allegation of rape was false clearly indicates that the appellant is innocent and hence the learned counsel for the appellant moved that the conviction be quashed.

Submission by the learned counsel for the respondent

[22] The learned counsel for the respondent submitted that the victim had already repeatedly denied the allegation that she was lying. The trial judge refers to this in paragraph 21 of the summing up as follows: "You heard the defence counsel suggest to the virtual complainant that these incidents never happened and she is lying in court. The complainant had rejected these suggestions. I request you to consider the suggestions made by the counsel for the accused in the light of all the evidence before the court. The defence counsel also submits that the virtual complainant had contradicted herself with her own evidence and the evidence of other witnesses. It is up to you to decide whether the virtual complainant is making mistakes or deliberately lying in court".

[23] The learned counsel for the respondent submitted that notwithstanding this answer, it was clearly open to the Assessors and the judge to find the appellant guilty on the totality of the evidence.

[24] I have reproduced the related questions and answers in paragraphs 10 and 11 of this judgment. It is unfortunate for both the prosecuting counsel as well as the learned judge to overlook the answer given by the victim to a question that was put to her. Having considered all the questions and answers given I am of the view that the answer given as "yes" would have been nothing but a slip. The learned counsel for the respondent submitted that the failure of the learned counsel for the accused to address this issue in his address to the Assessors shows that this answer "yes" did not mean a denial of the incident. Omitting to refer to this solitary answer by the learned judge itself did not cause a miscarriage of justice.

Grounds on Sentence

Ground A

[25] The learned counsel for the appellant submitted that the period of remand should have been discounted separately after computing the sentence. Section 24 of the Sentencing and Penalties Decree 2009 provides that, "*If an offender is sentenced to a term of imprisonment, any period of time during which the offender was held in custody prior to the trial of the matter or matters shall, unless a court otherwise orders, be regarded by the court as a period of imprisonment already served by the offender*".

[26] The learned counsel for the appellant submitted that the learned trial judge, prior to the passing of 18 years imprisonment had considered the 9 months period the appellant had spent in remand. This was considered as a mitigating factor. The complaint of the learned counsel is the timing of the consideration of the period spent in remand. The learned

counsel for the respondent submitted that a departure from the best practice does not render the sentence wrong in principle. The learned counsel further submitted that the trial judge has been too lenient in allowing a total deduction of 5 years.

[27] Section 24 requires any period the offender had spent in custody to be considered as part of the term of imprisonment served. In this case the period spent in custody is 9 months. The sentence is 18 years. The following factors have been considered in mitigation, namely;

a) Having five more children.

b) Being a first offender.

c) Nine months period spent in remand.

d) A letter from the wife requesting that the appellant be given a second chance in life.

e) Wife claiming that she needs the support of the husband.

For the above mitigating factors the learned Judge has deducted 5 years.

[28] It appears that the above items (d) and (e) do not qualify to be as mitigatory factors. Obviously the huge reduction is after considering the 9 month period of incarceration. Although this 9 month period should have been reduced after passing the sentence, considering the huge reduction already given, I find that no prejudice has been caused to the appellant. Therefore this ground is without merit.

Ground B

[29] The learned counsel for the appellant submitted that the trial Judge had erred in law when he subsumed the element of the offence as an aggravating feature. The learned counsel complains that the learned Judge had erred in law when he considered the fact of having sexual intercourse on many occasions as an aggravating factor. The learned counsel for the respondent submitted that the

impugned comment relates to the fact that this is not a single offence. That is an aggravating factor distinct from the element of the offence.

[30] It is an accepted principle that no person should be sentenced for offences not charged. When a person is charged on the basis of a representative count the number of incidents of the offences covered in that count should not be taken as an aggravating factor. On each representative count the victim testified on one incident of rape/indecent assault. Therefore within each count repetitive offending cannot be taken as an aggravating factor. However I find that the learned trial Judge has considered the totality principle in sentencing when he considered the repetitive sexual acts in all five counts. The learned Judge has not considered repetitive acts within each count, but in all five counts. Therefore a Judge is entitled to apply the principle of totality and use them as aggravating factors. This principle was recently enunciated in **Raj v State** [2014] FJSC 12; CAV 0003.2014 (20 August 2014). Gates CJ held that,

> *"The high level of the sentence had its origin in the seriously aggravating factors which were identified by the Judge in his sentencing remarks. They were: i. The petitioner was the complainant's stepfather who should have protected her. Instead he breached the trust expected of him, and the breach was gross. ii. The rape offence took place continuously over a long period of time. Such an experience "will surely scar her for the rest of her life". iii. She was a child 10 years. The age of the child, if very young, could yet be an aggravating factor."*

[31] Therefore I am of the view that the learned Judge has correctly considered the continuous sexual acts as aggravating factors.

Ground C

[32] The learned counsel for appellant submits that the sentence is in breach of section 14 (2) (n) of the Constitution of the Republic of Fiji Islands. The section is as follows, "*Every*

person charged with an offence has the right to the benefit of the least severe of the prescribed punishment if the prescribed punishment for the offence has changed between the time the offence was committed and the time of sentencing; and...". The learned counsel for the appellant submitted that fixing the starting point at 15 years offends section 14 (2) (n) of the Constitution. To conform to the provisions of the Constitution the starting point should have been 10 years.

[33] The learned counsel for the respondent submitted that section 14 (2) (n) has no application as the punishment for the offence of rape (life imprisonment) has not changed between the time the offence was committed and the time of imposing the sentence. I too agree that section 14 (2) (n) has no application and this ground too is without merit.

[34] In the circumstances I am of the view that ground B on conviction and ground A on the sentence are arguable and hence leave is granted only on those two grounds and refused on the rest of the grounds. However for the reasons adumbrated the appeal is dismissed.

Gamalath JA

[35] I agree with the reasoning and the conclusions of Basnayake JA.

Fernando JA

[36] I too agree with the reasoning and the conclusions of Basnayake JA.

The Orders of the Court are:

1. *Leave granted on ground B on the conviction and ground A on the sentence. Leave refused on the rest of the grounds.*
2. *Appeal is dismissed.*

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Hon. Mr. Justice E. Basnayake
JUSTICE OF APPEAL

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Hon. Mr. Justice S. Gamalath
JUSTICE OF APPEAL

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Hon. Mr. Justice P. Fernando
JUSTICE OF APPEAL