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

CRIMINAL APPEAL NO. AAU 0095 OF 2013
(High Court No. HAC 443 of 2012)

BETWEEN	:	**IOWANE ISIKELI SENILOLOKULA**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Gamalath, JA** **Prematilaka, JA** **Temo, JA**
Counsel	:	**Mr. T. Lee for the Appellant** **Ms. P. Madanavosa for the Respondent**
Date of Hearing	:	**23 August 2017**
Date of Judgment	:	**14 September 2017**

JUDGMENT

Gamalath, JA

[1] The appellant was charged in the High Court, Suva with one representative count of rape under Section 207(1) and (2)(a) of the Crimes Decree 44 of 2009 and the particulars of the offence are as follows:

> *"Statement of Offence*
>
> *Rape : Contrary to Section 207 (1) (2) (b) and (3) of the Crimes Decree No. 44 of 2009.*

Particulars of Offence

Iowane Isikeli Senilolokula, on the 1st day of April, 2011 and 30th day of June 2011 at the Gospel School for the Deaf, Suva in the Central Division had carnal knowledge of S. V. without her consent."

[2] On 31 July 2013, at the conclusion of the trial in which the appellant had elected to testify on his behalf, the assessors were unanimous in their opinion that the appellant was guilty as charged. Accordingly, the learned trial Judge convicted the appellant.

[3] On 31 July 2013, the learned trial judge sentenced the appellant to 16 years imprisonment with a non-parole period of 14 years.

[4] Initially, the appellant's only ground of appeal was against the said conviction. On 20 November 2014, the learned Single Judge decided correctly that the said application cannot be allowed for want of valid reasons.

[5] Nonetheless, acting "*ex mere motu*" the learned Single Judge ruled that there were erroneous considerations taken into account by the learned sentencing judge in the computation of the sentence of 16 years imprisonment. In his concluding remarks the learned Single Judge had stated that "arguably, the appellant was punished twice based on the same fact". In the circumstances, the Learned Single Judge determined that there is an arguable point with regard to the sentence of imprisonment.

The ground of appeal in the instant appeal

[6] Based on the outcome of the said ruling of the learned Single Judge the appellant has launched the present appeal to canvass the sentence of imprisonment on the basis that the learned trial judge had erred by allowing the extraneous factors to influence the final quantification of the sentence of imprisonment. Mr. Lee, learned counsel for the appellant, at the very outset of the hearing of this appeal submitted that the appellant does not wish to renew the ground of appeal against the conviction. Responding to the Court's query raised out of abundance of caution, the learned Counsel further consulted the appellant in open court and reassured that the only ground of appeal the

appellant wishes to pursue presently is the arguable complexion of the sentence of imprisonment, about which reference has already been made above.

A brief narration of facts relating to the appeal

[7] As far as the factual matrix of this case is concerned, it does not offer any contentious issue to be decided in this appeal. The learned trial judge had dealt with the facts correctly in the summing up. Stating succinctly, the victim was a differently able, deaf girl boarded at Harland Hostel, specially established to cater to the needs of the children with hearing impairment. There were about 12 girls residing in the hostel at the time relevant to this incident. The appellant and his wife were its wardens. The appellant's family also had living quarters in the hostel itself. In addition to his duties as the warden, the appellant was teaching the Bible to the inmates as well. The inmates addressed the appellant "daddy", a clear expression of their filial affection. However, as far as the victim was concerned, the appellant seemed to have taken the path leading into temptation. In order to ensure what was going on between the victim and himself shall remain a closely guarded secret, the appellant had taken all sorts of precautions. He made the victim believe that pre-marital sex with him would make her well versed in the art of making her prospective husband sexually gratified. According to the victim, the appellant had once even indulged in having sodomy with her in the school toilet.

As a result of the continuing saga even the victim's health had deteriorated .Her education also has got disrupted and she was unable to sit an examination. However, on one particular day whilst reading a verse in the Psalms in which it states that "Lord you have evaluated me and you know all about me" the victim became reflective of what was going on with the appellant. Hence the decision to report the matter to a member of the teaching staff. In turn the matter was reported to the police and thus began the legal proceedings against the appellant.

At the trial the appellant testified on his behalf. He showed no remorse over what had happened between him and the victim, save that his only regret was he committed adultery. These are the facts in brief in this appeal.

The impugned sentence of imprisonment

[8] In order to understand the basis of the ground of appeal, one need to examine closely the several factors upon which the Learned High Court Judge had placed reliance in calculating the final sentence of imprisonment. As can be understood, the trial judge's primary source of information had been the inferences drawn out of the evidence at the trial. In addition the learned trial judge had relied on the victim impact statement too in assessing the sentence. Referring to the victim impact statement it contains the victim's complaints about the bouts of depressions that she plunges into as a result of the bad memories of the sexual encounters with the appellant. Considering its relevancy to the appeal shall now enumerate the several distinct factors upon which the learned trial judge had relied in arriving at the final composite sentence.

The Starting Point

[9] The learned trial judge picked 8 years as the starting point; that is almost the lowest from the range of the tariff for rape. Compared with the gravity of the offence and the seriousness of the attendant circumstances surrounding this case, there can never be any complaint against this generous concession given in favor of the appellant.

The aggravating factors

(i) According to the learned trial Judge, the appellant's authoritative position in the hostel as its warden, the other one being his own wife, should be viewed with a degree of seriousness that it warrants. Besides, he was the Bible teacher and a member of the counseling team.

Based on these material the learned trial Judge concluded that the appellant had abused his power and authority over the victim to achieve his sexual gratification. Having considered it as an aggravating factor he added 3 years imprisonment to 8 years.

(ii) The learned trial Judge had made a distinction between the abuse of power by the appellant and the manner in which he resorted to contrivances to make the victim believe that he was genuinely interested in making the victim well-groomed to face the sexual challenges that may crop up with her prospective husband. In the opinion

of the learned trial Judge it was a distinct form of exerting his powers over the vulnerable victim. Thus the learned Judge attributes it to a form of cajoling. Here, what had been violated was the trust placed on him like a daughter towards the father. The learned trial Judge added another 3 years imprisonment to this factor.

(iii) Having done the calculation as described above the learned trial Judge had decided that the appellant had been opportunistic in his behavior towards the victim. In the opinion of the learned trial judge the disability of the victim coupled with the fact that she was naive and from a rural background had been taken advantage of by the appellant. For this fact the learned trial Judge added another 2 years.

(iv) The planning: - In addition to aforestated factors, the appellant had been crafty and his untoward sexual advancement had been carried out after meticulous planning. In another word, the sexual aggression was not something that had happened on the spur of the moment. The appellant had planned the scheme and persuaded the victim to submit herself for his sexual gratification. Considering this as another distinct aggravating factor, the learned trial Judge added another 1 year.

Showing lack of remorse

(v) According to his own evidence the appellant has had no qualms that his guilt was not about what had happened to the victim in his hands. He felt guilty for being an adulterer, an act of infidelity towards his spouse.

For the fact of showing no genuine remorse, the learned trial Judge had added another one year imprisonment.

Eventually when all the components are added together, the total period of imprisonment should have been 18 years. However, by mistake it was laid down as 19 years in the sentencing order of the learned trial Judge.

In mitigation

Considering the mitigating factors, the learned trial Judge reduced 3 years and finalized the sentence at the point of 15 years.

The legal approach to the sentencing process based on some decided cases;

In Fiji

[10] In **Kim Nam Bae v. The State**, Criminal Appeal AAU0015 of 1998S, High Court Criminal Case No. HAC 0002 of 1997L, it was decided that

> *"the task of sentencing is not an exact science which is capable of mathematical calculation. An appropriate sentence in any case is fixed by having regard to a variety of competing considerations. In order to arrive at the appropriate penalty for any case, the Court must have regard to sentences imposed by the High Court and the Court of Appeal for offences of the type in question to determine the appropriate range of sentence."*

[11] In the case of **House v. The King** (1936) 55 CLR 4991, an often used decision in our jurisdiction, one can find the guiding principles that should be adopted in deciding on an appropriate sentence by the learned sentencing judge;

> *"the appellant must demonstrate that the court below fell into error in exercising its sentencing discretion. If the trial Judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the fact, if he does not take into account some relevant considerations, then the Appellate Court may impose a different sentence. This error may be apparent from the reasons for sentence or it may be inferred from the length of the sentence itself."(added emphasis due to direct relevancy to the instant matter under consideration)*

[12] The above directions provide certain guiding principles to be borne in the mind of a judge who embarks on either sentencing a convict at the original court itself or reviewing the sentence in appeal.

[13] Another judgment that is worthy of citing is found in **Simeli Bili Naisua v. The State** Criminal Appeal. No. CAV 0010 of 2003;

> *"It is clear that the Court of Appeal will approach an appeal against sentencing using the principles set out in **House v. The King** (1936) 55 CLR 499 and adopted in **Kim Nam Bae v. The State**..."*

The four principles postulated in **Kim Nam Bae** provides clear criterion to be used to evaluate the legitimacy of the grounds of appeal against sentence. For the purpose of clarity and precision, I wish to reiterate them below;

Appellate Court will interfere with a sentence if it is demonstrated that the trial judge made one of the following errors;

1. that it acted upon a wrong principle;
2. that it allowed extraneous or irrelevant matters to guide or affect him;
3. that it mistook the facts;
4. that it failed to take into account some relevant consideration.

The Common Law Principles upon which court acts

[14] The available literature on the subject acknowledges this as a difficult area of law. Thus, in many jurisdictions courts are saddled with complex problems relating to the manner in which a court vested with appellate jurisdiction should interfere with a sentence. "With the growth in the number of sentencing cases being reported it is becoming increasingly difficult to be precise about the principles upon which the Court of Appeal acts." (2012) *Archbold* para 7-135, pg 1125.

In a broad sense, according to common law, there are clearly set out grounds under which an appellate court would interfere with a sentence; a broad brush presentation would show that an appellate court would interfere with a sentence under the following situations;

(a) that the sentence is not justified by law in which case it will interfere not as a matter of discretion but of law;
(b) that where sentence has been passed on the wrong factual basis;
(c) that where some matter has been improperly taken into account or there is some fresh matter to be taken into account.
(d) that where there has been a failure to honor a legitimate expectation; or
(e) that where the sentence was wrong in principle or manifestly excessive.

(i) Where the sentence was not justified by law

The Court of Appeal will quash any sentence if the lower court, in imposing it, has exceeded the power conferred on it by Parliament and will do so even there may be a statutory prohibition on appeals against such a "sentence."

R v. Cain [1985] AC 46, HL

R v. Wehner 65 Cr. App. R.

Thus, a sentence may be quashed because it exceeds the prescribed maximum, because there was no power to impose it in the particular circumstances or because some procedural requirement has not been complied with – **R v. Marquis**, 59 Cr. App. R. 228.

(ii) ***Sentence upon wrong factual basis***

Where the evidence would justify only one view of the facts but the sentence is passed on a basis which is mere supposition, the sentence will be quashed. (2012) *Archbold* para 7-136 p. 1126

See: R v. Reeves [1983] Crim. LR. 826

"In many cases however, a verdict or plea of guilty admits two or more possible views of the facts. In such cases, the Court of Appeal will intervene if it concludes that the sentencing authority has made the wrong decision or has adopted the wrong procedure for determining the issue."

See: R v. Ayensu & Ayensu, 4 Cr. App. R. (S) 248

R v. Newton, 77 Cr. App. R. 13;

R v. McGrash and Casey, 5 Cr. App. R. (S) 460;

R v. Courtie [1984] AC 463 HL

R v. Solomon & Triumph, 6 Cr. App. R. (S) 120

(iii) ***Matters improperly taken into account or fresh matters to be taken into account***

(a) The Court of Appeal will interfere with a sentence where there had been an error by the Judge in appreciating the material laid before him relating to the appellant's history.

R v. Wilson 70 Cr. App. R. 219

(b) It will also intervene where the sentence has been or may have been affected by inadmissible evidence relating to the defendant's character or by some irrelevant consideration, such as the nature of his defense.

(iv) ***Failure to honor legitimate expectation***

R v. Gibson [2004] 2 Cr App R (5) 84, CA

R v. Turner [2006] 1 Cr App R (5) 95

R v. McDough [2006] 1 Cr App R (5) 111

If the sentence imposed was manifestly excessive or wrong in principle, the Court of Appeal will intervene.

(v) ***Sentence manifesting excessive or wrong principle***

"These are not distinct grounds of appeal; the Court will conclude that if the sentence is manifestly excessive there must have been an error in principle. Where the approach is adopted, the Court will not interfere with the discretion of the sentencing court merely on the ground that it might have passed a somewhat different sentence."

R v.Gumbs, 19 Cr App R 74, (2012) *Archbold*, para 7-141 pg. 1127

R v. Ball, 35 Cr. App. R. 164 CA.

In an interesting judgment on the need to observe uniformity in sentencing it was decided that

"The Court of Appeal aims not at uniformity of sentence but at uniformity of approach"; **R v. Bibi** 71 Cr. App. R. 360

The sentence in the instant appeal

[15] I have given careful consideration to the principles of law that should be considered at the appeal stage in dealing with a sentence of imprisonment imposed in a lower court, in this case the High Court. The Judgments cited above both from Fiji jurisdiction as well as common law principles do shine a light on the relevant principles to be adopted *vis-a-vis* the facts of the case.

[16] The main thrust of the contention of the appellant against the sentence is that it is excessive, for the learned High Court Judge had erred by resorting to "double counting" on aggravating factors.

[17] In this regard, I am quite mindful of the fact that the learned High Court Judge had been operating within the correct principles of law in assessing the sentence and he had used the decision in **State v. Marawa** (2004) FJHC 339, as his conceptual base in developing the process involved in quantifying the final sentence.

[18] As already stated, one cannot take umbrage at the starting point of 8 years that the learned High Court Judge had picked in this case and as already said it is quite concessionary.

[19] Applying the yardsticks clearly laid down by the authorities already cited, and with special emphasis being attached to the decision in **Kim Nam Bae**, vis-à-vis the factual matrix in this case, there is one matter on which I entertain a certain degree of doubt, namely, has the learned judge erred in enumerating aggravating circumstances? In the sense is there a possibility of falling in to the error of doubt counting? Simply, has he counted some of the aggravating factors twice over by becoming fastidious and at the same time was he oblivious to the fact that the distinctions amongst already cited aggravating factors are hair splitting? In my opinion in situations of such nature the benefit must be enured by the appellant and the sentence must be altered accordingly.

[20] The legal principle to be adopted in deciding on a ground of this nature is referable to the principle that "the decision of the sentencing judge had been based on a factually wrong premise".

[21] As it is surfacing from the evidence of this case, I have no doubt about the fact that there is clear evidence pointing to the direction that the appellant had abused the authority and breached the trust as the warden of the hostel. Besides, the targeted victim was a particularly vulnerable person with an innate physical disability.

[22] The learned High Court Judge, having imposed 3 years imprisonment to the appellant's abuse of authority (see para 11 of sentencing remarks) added another 3 years imprisonment for the breach of trust (para 12) and yet another 2 years imprisonment for being opportunistic (para. 13).

[23] Herein I am finding it difficult to comprehend as to the correct means through which a clear distinction can be made between the two overlapping factors namely "position of authority" and "the breach of trust". Their subtle nuances apart, I perceive them to be inseparably interconnected and in the circumstances, a valid doubt can be entertained with regard to the maintainability of both aggravating factors, side by side, parallel to each other.

[24] I wish to resolve this doubt in favor of the appellant. Avoiding the perceived double counting, the two segments of the aggravating factors should be rolled up together to be read as one. In the circumstances the aggravating factors of abuse of position of authority and the breach of trust should attract only 3 years composite imprisonment.

[25] This brings me to another factor that the State has raised in his submissions. The State has correctly pointed out the error in the calculation of the sentence and concluded that the final sentence of imprisonment should have been not 16 years, but 15 years. I agree with this submission.

[26] The State submits further, that this Court should exercise our powers vested under Section 23(3) of the Court of Appeal Act and pass such other sentence warranted by law.

[27] Taking into account of every aspect of the appeal, it is my conclusion that the reviewed sentence should now be not 15 years imprisonment but 12 years imprisonment and this is in my view will serve the ends of justice.

Prematilaka, JA

[28] I agree.

Temo, JA

[29] I agree.

Orders of the Court

1. *Appeal against the sentence allowed.*

2. *Sentence imposed in the High Court is set aside and substituted with a sentence of 12 years imprisonment with a non parole period of 11 years effective from 31st July 2013.*

Hon. Justice S. Gamalath
JUSTICE OF APPEAL

Hon. Justice C. Prematilaka
JUSTICE OF APPEAL

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Hon. Mr. Justice S. Temo
JUSTICE OF APPEAL