IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court of Fiji]

CRIMINAL APPEAL NO. AAU0085 of 2014
[High Court Case No. HAC 252 of 2012]

BETWEEN	:	**SAVENACA TURAGAKECE**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Calanchini P** **Chandra JA** **Goundar JA**
Counsel	:	**Mr M Fesaitu for the Appellant** **Mr L J Burney & Ms S Tivao for the Respondent**
Date of Hearing	:	**4 July 2018**
Date of Judgment	:	**4 October 2018**

JUDGMENT

Calanachini P

[1] I have read the judgment of Goundar JA in draft form and agree with his conclusions that the appeals against conviction and sentence should both be dismissed.

Chandra JA

[2] I agree with the reasons and conclusions contained in the judgment of Goundar JA.

Goundar JA

[3] The appellant was charged with numerous sexual offences against his stepdaughter which he allegedly committed between 2004 and 2011 on the island of Kadavu. At the commencement of the trial, he pleaded guilty to the two charges of indecent assault (counts 1 and 6) and not guilty to the remaining one charge of unnatural offence (count 4) and four charges of rape (counts 2, 3, 5, 7 & 8). Of the five counts of rape, count 5 was a representative count.

[4] After the close of the case for the prosecution, the appellant was acquitted of the charge of unnatural offence. The learned trial judge summed up the case to the assessors after the close of the case for the defence. All three assessors found the appellant guilty of rape on counts 2, 3, 5 and 8. The majority found the appellant guilt of rape on count 7. The learned trial judge agreed and convicted the appellant of all five counts of rape.

[5] On 9 June 2014, the appellant was sentenced to 2 years' imprisonment on each count of indecent assault to which he had earlier pleaded guilty and 14 years' imprisonment on each count of rape, to be served concurrently. The total effective sentence was 14 years' imprisonment with a non-parole period of 13 years.

[6] On 10 August 2015, the appellant was granted leave to appeal both his conviction and sentence on the following grounds:

1. *The learned trial judge erred in law and in fact when he failed to direct and guide the assessors on how to approach the evidence contained in the caution interview and the weight to be attached to the disputed confession and admission.*

2. *The learned trial judge erred in principle and also erred in exercising his sentencing discretion to the extent that the non-parole period is too close to the head sentence resulting in much more severe punishment.*

[7] At the trial, the appellant admitted that in 2004, he fondled the complainant's breasts and also touched her private parts. He accepted that the complainant was scared because he was her stepfather. The complainant was 11 years old and a primary school student at the time of this offending. This incident was subject of the indecent assault charge in (count 1).

[8] The appellant also admitted that in 2009 he removed the complainant's clothes and inserted his fingers into her vagina. This incident was subject of the second indecent assault charge in (count 6). The complainant was about 15 years old at the time of this offending.

[9] By the time the trial commenced in 2014, the victim was 20 years old. She gave evidence of incidents of sexual assaults and rape. Apart from verbal threats to inflict physical violence, there were incidents of the use of weapons such as a knife and a spear to get the complainant to submit to sexual intercourse. The appellant also made a verbal threat to kill the complainant if she reported the abuse to anyone. She was scared to report the abuse. The last incident of rape occurred at a motel in Suva in 2011 when the appellant accompanied her to Suva for a school excursion. When she returned home after the excursion, the complainant reported the sexual abuse to her mother.

[10] The complainant's mother gave evidence that when she learnt about the sexual abuse, she confronted the appellant with the allegation. He cried and admitted the allegation. He asked for her forgiveness. She forgave him and reconciled.

[11] The prosecution also led evidence of the caution statement of the appellant. The admissibility of the caution statement was not in dispute at the trial. The caution statement was recorded in *iTaukei* language and translated in English. Both the original *iTaukei* and the English translated versions were led in evidence. In the caution statement, the appellant admitted having consensual sex with the complainant but denied raping her.

[12] The appellant's evidence at the trial was that in his caution interview he only admitted to indecent assaults and not to rape. Although he did not expressly state that the police had fabricated parts of his statement that included admissions to sex, he suggested that that was the case.

[13] In paragraph 22 of the summing up, the learned trial judge reminded the assessors that the appellant's evidence was that he did not have sexual intercourse with the complainant but he admitted fondling her breasts and kissing her at times. In the same paragraph, the learned trial judge also reminded the assessors that in his caution interview the appellant admitted to sexual intercourse with the complainant on numerous occasions but his case was that his admissions were fabricated by the police. Apart from summarizing the evidence of the admissions made by the appellant in his caution interview, the learned trial judge gave no direction to the assessors as to how they should consider the admissions contained in the appellant's caution interview, which he said was fabricated by the police. Counsel for the appellant submits that the learned trial judge made an error of law by not directing the assessors to consider the weight or truth of the appellant's confession or admission.

[14] It is settled law that the weight or truth of a confession or an admission is ultimately a matter for the assessors and the trial judge to decide in determining the guilt of an accused. In ***Chand v Reginam*** [1968] FJLawRp 14; [1968] 14 FLR 73 (6 May 1968) this Court held that:

> *Where a confession has been admitted in evidence the sole question for the assessors is its probative value or effect, though in considering that question every matter of fact that might be relevant to the judge's decision on admissibility is relevant for consideration by the assessors: it is proper for the judge to direct the assessors that if they think that a confession was obtained through some threat or promise, its value will be enormously weakened.*

[15] Similarly, in ***Vakacereivalu v State*** [2015] FJCA 25; AAU116.2011 (27 February 2015), this Court said at [8]:

> *It is settled law that the admissibility of a confession has to be decided by a trial judge having satisfied himself on its voluntariness. Thereafter, it is for the assessors to consider whether such confessions were in fact made by the accused and whether they are true.*

[16] In the present case, the truth of the admission that the appellant had sex with his stepdaughter on numerous occasions was not an issue. The issue was whether the appellant had in fact made the admission. His evidence was that he did not make the admission and therefore he suggested that the admission was fabricated. Although the learned trial judge did not direct the assessors as to how they should consider the admission made by the appellant that he had sex with the complainant on numerous occasions, the omission did not prejudice the appellant.

[17] The appellant's caution interview contained a mixed statement. He qualified his admission that he had sex with the complainant on numerous occasions by saying that the complainant had agreed to it. The learned trial judge quite correctly allowed the whole

statement to be admitted in evidence. Once the whole statement was allowed in evidence, it was a matter for the assessors and the trial judge to accept whether they believed the appellant's evidence that he only sexually assaulted his juvenile stepdaughter and that he did not rape her. At the end of the day, the appellant's caution statement alone was insufficient to convict him of rape. The appellant was convicted of rape based upon the evidence of the complainant. That is how the learned trial judge summed up the case to assessors in paragraph 40:

> *You must now consider all the evidence together. You have observed and listened to all the prosecution's and defence's witnesses in the courtroom. You have watched them give evidence in the courtroom. The two main witnesses in this trial are the complainant and the accused. Who of these two were the more credible witness to you? Who was more forthright as a witness to you? Who was the more evasive of the two? Who appeared to be hiding something from you? Who from your point of view was telling the truth? If you find the complainant to be a credible witness, out of the two, you must find the accused guilty as charged on all counts i.e. Count no. 2, 3, 5, 7 and 8. If you think the complainant was not a credible witness, then you must find the accused not guilty as charged, on the above counts. It is a matter entirely for you.*

[18] The assessors and the trial judge obviously believed the complainant's evidence that the appellant had sexual intercourse with her without her consent. They rejected the evidence of the appellant that he only indecently assaulted his juvenile stepdaughter over a period of seven years but did not rape her. It was open on the evidence for the assessors and the trial judge to convict the appellant of rape as alleged on the five counts. I am satisfied that there is no error of law giving rise to a miscarriage of justice as a result of the lack of direction to the assessors that they had to be satisfied that the appellant did in fact make the disputed caution statement and that the statement was true.

[19] For the reasons given above, I would affirm the rape convictions and dismiss the appeal.

[20] The only complaint against sentence is that the non-parole period of 13 years is too close to the head sentence of 14 year's imprisonment. This is no longer considered a valid ground of appeal against sentence. As Justice Keith said in ***Naitini v State*** [2016] FJSC 6; CAV0034.2015 (21 April 2016) at [17]:

> *I do not think that the fixing of a non-parole period amounts to punishment. The punishment which Naitini got were the two head sentences. The fixing of the non-parole period did not increase those sentences. It only affected when he might be eligible for release by the operation of the current practice relating to remission prior to the expiry of the head sentences, but that did not make the fixing of the non-parole period punishment. That is what the Supreme Court must have had in mind in* ***Maya*** *when it said that the fixing of the non-parole period "was the court's attempt to ensure that Maya would not be released from prison earlier than the court thought appropriate". In any event, even if the fixing of the non-parole period could be said to amount to punishment, it is not punishment under either the Crimes Decree or the Penal Code, let alone under both of them. It is punishment provided for by the Sentencing and Penalties Decree.*

[21] The head sentence of 14 years' imprisonment is within the tariff for rape of a child by a family member (***Raj v State*** [2014] FJSC 12; CAV0003.2014 (20 August 2014)). There is very little evidence of genuine remorse on behalf of the appellant apart from his pleas of guilty to the indecent assault charges. The victim was continuously raped over a period of six years (2005-2011). Weapons were used to threaten the victim to submit to sexual intercourse. She was a child and the appellant was an authority figure over her. The breach of trust was gross. The appellant is fortunate that his sentence is 14 years' imprisonment with a non-parole period of 13 years in a contested case of rape of a child by a family member. For these reasons, I would dismiss the appeal against sentence.

Order of the Court:

Appeal dismissed.

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Hon. Justice W. D. Calanchini
PRESIDENT, COURT OF APPEAL

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Hon. Justice Suresh Chandra
JUSTICE OF APPEAL

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Hon. Justice Daniel Goundar
JUSTICE OF APPEAL

Solicitors:

Office of the Legal Aid Commission for the Appellant

Office of the Director of Public Prosecutions for the Respondent