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

CRIMINAL APPEAL AAU 0034 OF 2014
(High Court HAC 30 of 2014 Lautoka)

BETWEEN : **MOHAMMED AZIM**

Appellant

AND : **THE STATE**

Respondent

Coram : **Calanchini P**
Bandara JA
Goundar JA

Counsel : **Mr M Fesaitu with Ms S Prakash for the Appellant**
Ms P Madanavosa for the Respondent

Date of Hearing : **10 May 2018**

Date of Judgment : **1 June 2018**

JUDGMENT

Calanchini P

[1] I agree that the renewed application for leave to appeal conviction should be refused. The appeal against sentence should be allowed and the sentence imposed by the High Court set

aside. I agree that the appellant should be sentenced to 16 years imprisonment with a non-parole term of 14 years.

Bandara JA

[2] The appellant was charged with the following two counts before the High Court at Lautoka.

> *"Count One – Rape contrary to section 207(1)(2) (b) of the Crimes Decree No.44 of 2009, for penetrating the vagina of Azeerat Azeema with his finger without her consent.*
>
> *Count two – Rape contrary to section 207(1((2)(a) of the Crimes Decree NO.44 of 2009 for penetrating the vagina of Azeerat Azeema without her consent."*

There were two offences which took place between 1st of September 2010 and 30th September 2010. The information classified the counts as representative. But the evidence given by the complainant was to the effect that there were only two occurrances of rape.

[3] The victim was the biological daughter of the appellant and was 6 years and 10 months old at the time the offences were committed. Hence in terms of Section 207(3) of the Crimes Act 2009, element of her consent for sexual intercourse is immaterial.

[4] Upon the appellant pleading not guilty to the charges the matter proceeded to trial, and at the conclusion the assessors returned unanimous opinions of guilty on both counts and the learned High Court Judge concurred.

[5] On 16th of May 2013 the Appellant was sentenced on both counts of rape to 20 years imprisonment with a non- parole period of 18 years imprisonment.

Facts of the case briefly

[6] The complainant was the biological daughter of the accused. At the time of the incident she was 6 years and 10 months old. At the time of giving evidence before the High Court (in 2013) she had been studying in grade 4.

[7] The complainant's mother had committed suicide in the year 2010 by setting fire to herself. She and her two younger sisters were living with their father, uncle and paternal grandmother. She testified that her father in September 2010 on one occasion inserted his finger into her vagina, and on another, penetrated her vagina with his penis. Consequent to the incident her family life spent along with her two siblings was shattered and at the time of the High Court trial proceedings she had been staying at Treasure House Children's Home. She had been a studious girl, her favorite subject being English. She had liked schooling and her Grandmother giving evidence had stated (page 218), that *"she went to school every day. She never misses school. If you ask her to miss school, she would cry"*. All in all, the traumatic experience of incest undoubtedly would have had a serious impact on her. In the course of the evidence in chief when her father's name was mentioned the reaction made by her and her conduct after the lunch adjournment bears testimony to that. (Page 192 and 195 of the trial proceedings)

"State counsel – What is the name of your father
PW1 Mohammed Azim (seems shocked and frightened to say that)

After lunch
The witness started crying and said she is tired and she wants to go home.
Case adjourned to tomorrow"

Single judge ruling of the court of Appeal on the application for leave to appeal against conviction and sentence

[8] In terms of Section 35(1) (a) of the Court of Appeal Act 1949, a judge of the Court may exercise the powers of the court to give leave to appeal to the Court of Appeal.

[9] On 7th October 2015 an application was filed on behalf of the Appellant in the Court of Appeal seeking leave to appeal against conviction and sentence wherein five grounds of appeal against the conviction and one ground against sentence were mentioned.

[10] Accordingly the said application for leave has been taken up before a single judge of the Court of Appeal for hearing on 16 February 2016.

[11] **Grounds of Appeal against the conviction as set out in the leave to appeal application are as follows**:

> *"1. The Learned Trial Judge erred in law and in fact when he did not held a voir dire inquiry when there was a challenge by the Appellant to his confession in the caution interview statement.*
>
> *2. The Learned Trial Judge erred in law and in fact when he failed to direct the assessor (sic) on how to approach the evidence contained in the caution interview and weight to be attached to the disputed confession.*
>
> *3. The Learned Trial Judge erred in law and in fact when he failed to direct the Assessors that the Appellant had no burden to prove his innocence and that the standard of prove (sic) does not apply to the defence case.*
>
> *4. The Learned Trial Judge erred in law and in fact when he failed to remind the complainant of the importance of telling the truth.*
>
> *5. The Learned Trial Judge erred in law and in fact when he convicted the Appellants on defective statement of the offence and particulars of offence in the amended information filed by the Director of Public Prosecutions."*

[12] **Ground of appeal against sentence is as follows:**

> *"1. That the sentence was manifestly harsh and excessive and wrong in all the circumstances of the case."*

[13] Exercising power under section 35(1) (a) of the Court of Appeal Act, a single judge of the Court of Appeal gave a ruling on 1st March 2016, refusing leave against conviction and granted leave to appeal against sentence.

[14] The remedy available to an appellant when such application is refused is set out in Section 35(3) of the Court of Appeal Act and Rules which is to the effect that:

> *"If the judge refuses an application on the part of the appellant to exercise a power under sub section (1) in the appellant's favour, the appellant may have the application determined by the court as duly constituted for the hearing and determining of appeals under this Act."*

[15] As per the minutes of the court record, on 27th day of March 2018, on the application of the appellant, Hon Justice Calanchini, President Court of Appeal had granted leave, to file notice of renewal of application for leave to appeal against conviction, within 7 days. However a renewal notice of appeal against conviction, containing one ground of appeal, was on 13 April 2018, nine days after the deadline was given.

[16] At the appeal hearing the Court ruled that it would not entertain the renewal notice of appeal against conviction on the basis of the failure of the appellant to file the same in time. The learned counsel for the appellant did not press for leave to entertain the said application for obvious reasons.

[17] The renewal application had been filed initially more than two years after original refusal. In **Barat Kumar v. The Attorney-General of Fiji and Sheik Shah** [2012] 1 Fiji LR 403 Calanchini AP has held that:

> *"Where there is a short delay in making an application and where that short delay is fully and satisfactorily explained, then the court's discretion is unlikely to be exercised on the side of refusing an extension of time, unless an extreme lack of merit justifies such a refusal. However where the delay is much longer and the explanation is not wholly excusable, the application would need to establish much more merit for the court to exercise the discretionary balance in his favour."*

[18] In the circumstances this court is now only left with the determination of whether the sentence of 20 years of imprisonment imposed by the High Court is legal and just in the circumstances of the case.

Appeal Against Sentence

[19] The grievance of the appellant against the sentence is that it is "manifestly harsh and excessive and wrong in all the circumstances of the case." In their written submissions, the State concedes in the following terms:

> *"19.We submit that the learned trial judge did not give any reasons for arriving at a final term of imprisonment which was outside the sentencing rape for a child which was 10 years to 16 years."*

[20] Despite the fact that the offence of rape carries a maximum penalty of life imprisonment, the courts in Fiji have agreed upon the sentencing tariff for the offence, and this is well settled in the jurisdiction of Fiji.

[21] The Supreme Court in **Anand Abhay Raj v State [2014] FJSC 12; CAV 3 of 2014 (20th August 2014)** confirming that the tariff for rape of a child is between 10 years to 16 years endorsed the Court of Appeal's following remarks:

> *"[8] The learned sentencing judge was correct in his approach. The Court of Appeal in its judgment at paragaph18 said;*
>
> *"Rape of juveniles (under age of 18 years) must attract a sentence of at least 10 years and that 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.*
> *We endorse those remarks."*

[22] In terms of the principle laid down in **Anand Abhay Raj v State** I hold that the term of 20 years imprisonment in the instant case was clearly outside the established tariff of 10 –

16 years imprisonment for rape of a child. The tariff was lower when these offences were committed. Though the appellant was sentenced before **Anand Abhay Raj** case was decided, the rule set out therein must be applied in favour of the accused.

[23] In the instant case whilst imposing the sentence the learned High Court judge has taken 16 years as the starting point.

[24] Further the learned High Court Judge has failed to disclose as to why such a high point was taken as the starting point.

[25] The learned High Court Judge has taken the following as aggravating factors and increased the sentence by another 6 years.

(a) The victim is the biological daughter of the accused.
(b) Victims age which was 6 years and 10 months at the time of the offence.
(c) Consequent to the incident the complainant had to be sent to an orphanage.
(d) Breach of trust the complainant placed on him as her father.
(e) Psychological traumatization, the complainant was made to undergo.

[26] The addition of 6 years on aggravating factors increased the sentence to 22 years, out of which 2 years were reduced taking into consideration, the following mitigating circumstances.

(a) The accused being the sole breadwinner
(b) Period of remand
(c) The fact that the family depend on the accused
(d) Accused's claim that he was a first offender.

[27] Having regard to the above, the learned High Court judge has sentenced the accused to a total period of 20 years.

[28] It is also noteworthy that the aggravating factors and the mitigating circumstance the learned High Court judge took into consideration, in the sentencing process bears some degree of double counting.

The learned High Court Judge has failed to disclose, as to why such a high point was taken as the starting point and the process of reasoning that led to the length of the sentence imposed.

[29] The sentencing process adopted by the learned High Court is in violation of the following rules set out in **Naisua v State** [2013]FJSC 14; CAV0010.2013(20 November 2013)

[19] it is clear that the Court of Appeal will approach an appeal against sentence using the principles set out in House v The King [1936 HCA 40 ; 55 CLR 499 and adopted in Kim Nam Bae v The State Criminal Appeal No. AAU 0015 at [2]. Appellante courts will interfere with a sentence if it is demonstrated that the trial judge made one of the following errors:

(i) acted upon a wrong principle;

(ii) Allowed extraneous or irrelevant matters to guide of affect him;

(iii) Mistook the facts;

(iv) Failed to take into account some relevant consideration.

[30] In the circumstances I hold that the 20 years imprisonment passed on the appellant is clearly outside the established tariff for rape of a child.

[31] Having regard to the sentencing guidelines set out in Section 4 of the Sentencing and Penalties Act, and having regard to the aggravating and mitigating factors and other circumstances mentioned above, I am of the view that imposition of a sentence of a total term of 16 years on the appellant with a non-parole period of 14 years would meet ends of justice. Accordingly I quash the sentence imposed by the learned High Court judge.

[32] Considering the above facts I would allow the appeal on the sentence and quash the sentence imposed by the High Court. I would impose a sentence of 16 years on the appellant on the two counts of rape with a non-parole period of 14 years.

Goundar JA

[33] I agree.

Orders:

1. *Renewed application for leave to appeal conviction is refused.*
2. *Appeal against sentence is allowed.*
3. *Sentence passed in the Court below is set aside.*
4. *Appellant is sentenced to 16 years imprisonment with a non-parole term of 14 years.*

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

Hon. Justice W Bandara
JUSTICE OF APPEAL

Hon. Justice D Goundar
JUSTICE OF APPEAL