

IN THE COURT OF APPEAL  
[On Appeal from the High Court]

CRIMINAL APPEAL NO. AAU0022 OF 2012  
(High Court Case No. HAC 34 of 2011S)

BETWEEN : POATE RAINIMA  
*Appellant*

AND : THE STATE  
*Respondent*

Coram : Goundar JA

Counsel : Mr. S. Sharma for the Appellant  
Mr. L. Fotofili for the Respondent

Date of Hearing : 24 June 2014

Date of Ruling : 22 July 2014

RULING

- [1] This is an application for leave to appeal against sentence pursuant to section 21(1)(c) of the Court of Appeal Act. The test for leave is whether there is an arguable error in the sentencing discretion of the trial judge.
- [2] The appellant was charged with two counts of rape, three counts of indecent assault and one count of sexual assault. On 8 March 2012, he pleaded guilty to all the charges in the High Court at Suva. On 15 March 2012, he was sentenced to a total term of 13 years' imprisonment with a non-parole period of 12 years. The appeal was timely filed.
- [3] The appellant advances the following grounds of appeal:

The learned trial judge erred in principle and also failed to take into account the following relevant considerations:

- a) Adding 7 years as aggravating factors to the starting point of 11 years after taking irrelevant matters into consideration;
- b) Remand period of 1 year and 1 month 15 days should have been deducted from the interim total as a separate factor;
- c) No indication that there was any discount given for pleading guilty which should have been shown as a separate factor;
- d) Not enough reduction given for the mitigating factors.

**Irrelevant aggravating factors**

[4] The trial judge picked 11 years imprisonment as a starting point and added 7 years to reflect the following aggravating factors identified at paragraph 18 of the sentencing remarks:

- “(i) You are 55 years old, married with no children;
- (ii) You reached Class 6 education;
- (iii) You have committed no offence in the last 10 years, and this is your first sexual offending;
- (iv) You pleaded guilty to the charges, although this was approximately 1 year 1 month, after the first call in the High Court. Consequently, you have saved the court’s time, and avoided the need for the complainant to relive her ordeal in the courtroom, by giving evidence”.

[5] The aggravating factors in this case were that the victim was a vulnerable person due to her young age, the sexual assaults were repeated over a period of 4 years and the appellant held a position of trust with the victim.

[6] The facts identified by the trial judge arguably did not aggravate the offences. On the other hand, if the trial judge had correctly identified the aggravating factors, the appellant’s sentence could have been increased by 2 years. However, it is not a matter for me at this stage to reach a definite conclusion on the merits of the alleged error in the sentencing discretion of the trial judge. I am satisfied the alleged error is arguable.

### Remand period

[7] The appellant's remand period was 1 year 1 month and 15 days. The trial judge subsumed this period in the mitigating factors and gave a total reduction of 5 years in the sentence. The appellant argues that since the length of the remand period was significant, a separate reduction should have been made to the total sentence. By subsuming the remand period in the mitigating factors, the appellant's total incarceration comes to 13 years, 1 month and 15 days before he is eligible for parole. It could be argued that the alleged error has resulted in an excessive sentence.

### Guilty plea

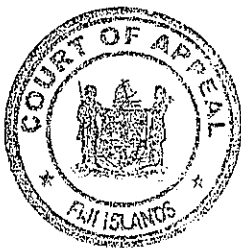
[8] The trial judge did not make any assessment whether the appellant's guilty plea were evidence of contrition or an acknowledgment of the strength of the prosecution's case against him. Contrition generally attracts more discount in sentence than if the offender pleads guilty to escape the obvious. The timing of the guilty plea is a relevant factor to determine whether the offender is contrite. In this case, no such assessment was made and the alleged error is arguable.

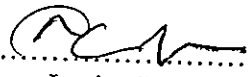
### Insufficient weight to mitigating factors

[9] This ground is a follow up of grounds (ii) and (iii). The appellant contends that if the trial judge would have given a separate consideration to the mitigating factors and the remand period, the sentence would have been less. This ground is arguable.

### Result

[10] Leave to appeal against sentence is granted.



  
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Hon. Justice D. Goundar  
**JUSTICE OF APPEAL**