IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT

CRIMINAL APPEAL NO. AAU 0051 of 2010
(High Court HAC 104 of 2009)

BETWEEN	:	NAIVALURUA KOROITAVALENA *Appellant*
AND	:	THE STATE *Respondent*
Coram	:	Calanchini P Chandra JA Waidyaratne JA
Counsel	:	Mr. S. Waqainabete for the Appellant Ms. P. Madanavosa for the Respondent
Date of Hearing	:	13 November 2014
Date of Judgment	:	5 December 2014

JUDGMENT

Calanchini P

[1] I have read in draft the judgment of Chandra JA and agree with the proposed orders.

Chandra JA

[2] The Appellant was charged with five counts of Incest contrary to Section 178(1) of the Penal Code (Cap.17).

[3] The Appellant was the father of the complainant. The complainant had been abused from the age of 18 years and it is after a period of about 20 years that she made a complaint to the Police. By that time she had borne 4 children as a result of the incestuous relationship.

[4] The Appellant pleaded guilty to the said counts on 25th June 2010 and was convicted. On 16th July 2010 the Appellant was sentenced to 8 years imprisonment on each count. The sentences on counts 1 to 4 were to be served concurrently and the sentence on count 5 was to be served consecutively to sentences to be served on the 1st four counts making up a total of 16 years with a non-parole period of 11years.

[5] The Appellant has appealed against the sentence on the following grounds:

(i) That the learned Judge erred in law and in fact when he did not make all the sentences concurrent to each other but made the fifth count of incest consecutive to the fourth count.

(ii) That the learned Judge erred in law and in principle when he did not separately deduct the period of remand from the total sentence.

Ground 1

[6] Counsel for the Appellant based his argument on section 22 of the Sentencing and Penalties Decree of 2009. Section 22(1) provides:

> *"Subject to sub-section (2) every term of imprisonment imposed on a person by a court, must unless otherwise directed by Court, be served concurrently with any uncompleted sentence or sentences of imprisonment."*

[7] According to Section 22(1) the sentencing Judge must give a reasoned justification if he is to make the sentences consecutive when imposing sentences on more than one count.

[8] In **AsaeliVukitoga v. The State** AAU 0049 of 2008 The Court of Appeal referring to the decision in **Joji Waqasaqa v. The State** Cr App No.CAV009 of 2005 stated:

> *"....If the Court said (and it did) that where the "default position" to depart from that position in making sentences concurrent, then a Court must now when the "default" position is concurrency makes a reasoned justification to depart from the "default" position in making sentences consecutive or partly consecutive."*

[9] In the present case the Appellant did not fall into any of the categories in Section 22(2) of the Sentencing & Penalties Decree.

[10] The learned trial Judge has not given any reasons to justify his decision to make the serving of the sentence of 8 years for the first four counts consecutive to the 8 years to be served for the first four counts and has erred in imposing the sentence in that manner.

[11] The tariff for incest has been considered in several decisions previously.

[12] In **Ram v. State** [2004] FJSC 470; HAA0023.2004L (1 October 2004) it was held by Justice Connors that:

> *"It would seem that this range should now be between 15 years and 9 years. If 15 years is taken as a starting point and one-third reduction is given for the early plea of guilty and the resultant sentence is 10 years. The aggravating factors including the period of time over which the offences were committed justify increasing the penalty to 12 years imprisonment. As the offences in counts 2 and 3 are part of an ongoing offence, it is appropriate that the sentences be concurrent, with a resultant sentence on counts 2 and 3 of 12 years.*
>
> *Whilst in The State v Viliame Tamani – HAC0007.2003S, it was suggested that the term of 6 years would be appropriate in these circumstances as I have said earlier, that decision does*

not take account of the increase in penalties by virtue of Act No. 7 of 2003 and therefore, I think penalties in the range of 10 to 14 years would now be appropriate."

[13] In England the guideline case on incest is **Attorney General's Reference No.1** of 1989 (1990) Crim. App. R 141. According to Lord Lane, *"it is stating the obvious to say that the gravity of the offence of incest varies greatly according, primarily, to the age of the victim and the related matter namely the degree of coercion or corruption".*

He divided the incest cases into three broad categories according to age of victims -

"(1) Where the girl is over 16.
Generally speaking a range from three years' imprisonment down to a nominal penalty will be appropriate depending in particular on the one hand on whether force was used, and upon the degree of harm, if any, to the girl, and on the other the desirability where it exists of keeping family disruption to a minimum. The older the girl the greater the possibility that she may have been willing or even the instigating party to the liaison, a factor which will be reflected in the sentence. In other words, the lower the degree of corruption, the lower the penalty.

(2) Where the girl is aged from 13 to 16.
Here a sentence between about five years and three years seems on the authorities to be appropriate. Much the same principles will apply as in the case of a girl over 16, though the likelihood of corruption increases in inverse proportion to the age of the girl. Nearly all the cases in this and in other categories have involved pleas of guilty and the sentences in this category seem to range between about two and four years, credit having been given for the plea.

(3) Where the girl is under 13.

It is here that the widest range of sentence is likely to be found. If one can properly describe any case of incest as the "ordinary" type of case, it will be one where the sexual relationship between husband and wife has broken down; the father has probably resorted to excessive drinking and the eldest daughter is gradually, by way of familiarities, indecent acts and suggestions made the object of the father's frustrated sexual inclinations. If the girl is not far short of her thirteenth birthday and there no particularly adverse or favourable features on a not guilty plea, a term of about six years on the authorities would seem to be appropriate. It scarcely needs to be stated that the younger the girl when the sexual approach is started,

the more likely it will be that the girl's will was overborne and accordingly the more serious would be the crime."

The aggravating features in a case like this are –

(a) any evidence of physical or psychological harm

(b) length of time over which the offence occurred

(c) any violence threatened or used

(d) any accompanying perversions

(e) any resulting pregnancy

The mitigating factors would be –

(a) plea of guilty

(b) was incest due to genuine affection or sexual gratification

(c) had the victim seduced the offender

(d) did the victim have previous sexual experience.

[14] In **Turogo v. The State** [2013] FJHC 33; HAC 40.2012 (1 February 2013) the High Court imposed a sentence of 11 years on the accused who was charged with three counts of incest.

[15] The starting point chosen by the learned trial Judge was 7 years and having considered the aggravating factors the sentence was increased to 11 years and downgraded the sentences to 8 years considering the mitigating factors.

[16] Taking into account the fact that the complainant was the Appellant's daughter, the period of time that she had been subjected to the incestuous relationship, the fact that she was unable to complain for a long period of time due to the threats by the Appellant, and the fact that she had borne four children out of the said relationship are factors which would have justified the commencement of the starting point of sentencing at a higher

point. Considering the tariff for incest, the starting point adopted by the learned trial Judge is low.

[17] Section 23(3) of the Court of Appeal Act (Cap.12) empowers the Court of Appeal to impose such sentence which the Court of Appeal thinks as the sentence that ought to have been imposed in substitution for the sentence imposed by the High Court.

Section 23 provides:

> *"On an appeal against sentence, the Court of Appeal shall, if they think that a different sentence should have been passed, quash the sentence passed at the trial, and pass such other sentence warranted by law by the verdict (whether more or less severe) in substitution therefore as they think ought to have been passed, or may dismiss the appeal or make such other order as they think just."*

[18] Acting in terms of the provisions of Section 23(3) we set aside the sentences imposed by the learned trial Judge and impose a sentence of 12 years on each count to be served concurrently having taken into account the objective seriousness of the offence, all the aggravating factors and mitigating factors.

Ground 2

[19] Counsel for the Appellant submitted that the learned trial Judge had not deducted the period of 9 months that the Appellant had been in remand when imposing the sentence as required by Section 24 of the Sentencing and Penalties Decree 2009.

Section 24 provides:

> *"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."*

[20] This section mandates the trial Judge to deduct the period that an accused is held in custody prior to the trial when imposing a sentence. However, if the trial Judge is of the view that such period should not be so deducted, he should give reasons for not doing so.

[21] It was argued by Counsel for the Respondent that the period of remand in the present case had been taken into account in considering the mitigating factors. It was further argued that if the time spent in custody is not substantial then there is no arguable error if it is subsumed in the mitigating factors.

[22] In **Kean v. The State** [2013] FJCA 14; AAU0018 of 2008 (8 March 2013) it was decided by the Court of Appeal that as a matter of sentencing principle, the sentencing court should make a downward adjustment to the sentence for a period that the accused spent in custody on remand before sentence and deducted the period that the Appellant had been in remand in that case.

[23] In **Josevata Tagicakibau & Another v. The State** Cr. App. No.AAU0056 of 2011 (9 September 2014) the Court of Appeal decided that an accused is entitled to a reduction of the period spent in remand according to Section 24 of the Sentencing and Penalties Decree.

[24] The period spent in remand before trial should be dealt with separately from the mitigating factors when imposing a sentence and cannot be subsumed in the mitigating factors as argued by the Respondent. The period being not substantial has no effect in giving effect to the provisions of section 24.

[25] In **Kean v. The State** (supra) a period of three months and in **Tagicakibau v. The State** (supra) a period of 5 months were deducted being period spent in remand before trial.

[26] In the present case the period spent in remand by the Appellant before trial was 9 months and no reasons have been given by the trial Judge for not deducting the said period when imposing the sentence.

[27] Therefore the Appellant is entitled to a reduction of nine months from his sentence. As the sentence has been varied as stated above in terms of Ground 1 of the Appeal and imposed a sentence of 12 years, the sentence imposed on the Appellant would be 11 years and 3 months.

[28] The sentence of 16 years imposed on the Appellant is quashed and substituted with a sentence of 11 years 3 months from 16th July 2010 with a non-parole period of 9 years.

Waidyaratne JA

[29] I also agree with the reasoning and conclusion arrived at by Chandra JA.

Order of the Court

The appeal of the Appellant is allowed to the extent that the sentence of 16 years imposed on him by the learned trial Judge is quashed and substituted with a sentence of 11 years 3 months with a non-parole period of 9 years.

Hon. Mr Justice Calanchini
PRESIDENT, COURT OF APPEAL

Hon. Mr Justice Chandra
JUSTICE OF APPEAL

Hon. Mr Justice Waidyaratne
JUSTICE OF APPEAL