IN THE COURT OF APPEAL
[On Appeal From The High Court]

CRIMINAL APPEAL NO: AAU105 OF 2011
(High Court Case No. HAC001 of 2011)

BETWEEN	:	**ALFAZ KHAN**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	Goundar JA
Counsel	:	Ms T. Leweni for the Appellant Mr. L. Fotofili for the Respondent
Date of Hearing	:	22 May 2014
Date of Ruling	:	2 June 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.

[2] The appellant was convicted and sentenced to total term of 10 years' imprisonment after he pleaded guilty to four counts of sexual assault and one count of rape in the High Court at Suva. The victims were three young boys aged 7, 8 and 11 years. They lived in the same neighbourhood as the appellant. The facts were that the appellant invited the victims to his house, and after committing the alleged sexual assaults, gave them a small token of money to keep them quiet. The sexual acts included kissing the victims and lying on top of them. The rape victim was the youngest. After penetrating the victim's mouth with his penis, the appellant performed oral sex on the victim.

[3] On each count of sexual assault, the learned judge imposed a sentence of 4 years' imprisonment after citing the tariff to be between 2 to 4 years' imprisonment as established by ***Rokota v State*** *Criminal Appeal No. HAA0068 of 2002.* The learned judge did not refer to any specific range of sentences for rape of a child, but used 12 years' imprisonment as a starting point after citing three High Court cases that were considered under the repealed Penal Code. The learned judge added two years after identifying the following aggravating factors at paragraph 27 of his sentencing remarks:

> (i) Age of the victims ranging from 7 years to 11 years.
>
> (ii) You have repeated your sexual activities on 5 children." (I take the reference to 5 children is a typographical error as the facts adopted by the learned trial judge correctly identified 3 victims).

[4] The sentence was then reduced by four years for the following mitigating factors at paragraph 28 of the sentencing remarks:

> (i) You were 29 years unmarried.
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> (ii) You are remorseful.
>
> (iii) You have pleaded guilty.
>
> (iv) Your period in remand.
>
> (v) You were subjected to abuse when you were a small child.

[5] The learned judge then imposed a sentence of 10 years for rape and 4 years for each count of sexual assault, to be served concurrently. The total sentence was 10 years' imprisonment with a non-parole period of 8 years.

[6] The grounds of appeal against sentence are:

> (1) The learned Judge erred in fact and in law when he failed to take into account the period that the Appellant was in remand before sentence and failed to award an appropriate discount or deduction for such time already spent in remand;

(2) The learned Judge erred in law and in fact when he failed to give a separate discount to the Appellant for his guilty plea;

(3) The learned Judge erred in law and fact when he took the starting point of 12 years for sentence as he should have started at the lower end of the scale given the circumstances of the case;

(4) The learned Judge erred in fact and law when he failed to properly take into account the mitigating factors provided by the Appellant.

[7] The test for leave to appeal against sentence is that the appellant must demonstrate the sentencing judge has arguably acted upon a wrong principle, mistook the facts, failed to take into account some relevant considerations, or took into account irrelevant matters in sentencing.

Ground 1 – Remand Period

[8] Remand period was subsumed in the deduction made for the mitigating factors. The remand period was one month. Since the length of the remand period was not substantial, no arguable error can arise from the manner in which the learned judge deducted the remand period by subsuming it under the mitigating factors. This ground is not arguable.

Ground 2 – Guilty Plea

[9] There is no hard and fast rule regarding the weight to be given to a guilty plea. Generally a generous discount is given for guilty pleas in rape cases because the victims are relieved from giving evidence in court that is of sexual nature. Timing of the guilty plea is also relevant in assessing the weight to be given to the guilty plea. Counsel for the appellant cites the case of ***Naikelekelevesi v State*** *Criminal Appeal No. AAU0001 of 2007* for the proposition that a guilty plea should be discounted separately from the mitigating factors. ***Naikelekelevesi's*** case was considered before the Sentencing and Penalties Decree came into effect in 2010. The Sentencing and Penalties Decree has not endorsed the ***Naikelekelevesi*** principle. Instead the Sentencing and Penalties Decree has left it to the discretion of the sentencing court to give an appropriate weight to a guilty plea when

sentencing an offender. In the present case, the appellant was given a generous discount of 4 years for all the mitigating factors including his guilty pleas.

[10] A separate discount for the guilty pleas may not have resulted in the same reduction that was given for the mitigating factors. Initially the appellant pleaded guilty but then withdrew his guilty pleas. He changed his pleas to guilty only after he was found to be mentally stable at the time of the offending by a psychiatrist. In my judgment, the guilty pleas by the appellant were not evidence of contrition, but an acknowledgement of the strength of evidence against him on charges that could have attracted harsher sentences than what was imposed on him after he pleaded guilty. This ground is not arguable.

Ground 3 - Starting Point

[11] As a matter of practice, the starting point is selected from an objective seriousness of the offence or offences without consideration of the mitigating and aggravating factors. There is no fixed rule regarding the selection of a starting point. The main principle is that the final sentence should reflect the criminality involved. In the present case, the learned judge used a head starting point of 12 years for both rape and sexual assaults and then made all the sentences concurrent. The effect of this approach is that the appellant received one punishment for four separate sexual offences against three victims. Ten years' imprisonment clearly reflects the criminality involved. This ground is not arguable.

Ground 4 – Co-operation with Police and previous good character

[12] Under this ground, the appellant submits that the learned High Court judge failed to take into account the appellant's co-operation with Police and previous good character. As a matter of principle, co-operation and assistance rendered by an accused to Police in the course of a criminal investigation that leads to an arrest and prosecution of other suspects attract some discount in sentence for the accused who offered the relevant information. In this case, there was no evidence that the appellant assisted Police investigation. Under caution, the appellant denied the allegations. Denial of allegations is not tantamount to co-operation.

[13] However, the appellant was a first time offender. Counsel appearing for the appellant in the High Court informed the learned judge that the appellant was a first time offender. In sentencing the appellant, the learned judge failed to take into account that the appellant was a first time offender. Previous good character no doubt is a mitigating factor and the appellant was entitled to some reduction in sentence for that fact. This ground is arguable.

Result

[14] Leave granted on the failure of the trial judge to take into account the appellant's previous good character in sentence under ground 4. Leave refused on the remaining grounds.

COURT OF APPEAL FIJI ISLANDS

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Hon. Justice D. Goundar
JUSTICE OF APPEAL