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

CRIMINAL APPEAL NO. AAU 0039 OF 2013
(High Court HAC 42 of 2013)

BETWEEN	:	**APOLOSI DOMONA**
		Appellant
AND	:	**THE STATE**
		Respondent

Coram	:	**Calanchini P** **Waidyaratne JA** **Rajasinghe JA**
Counsel	:	**Mr. S. Waqainabete for the Appellant** **Mr. S. Babitu for the Respondent**
Date of Hearing	:	**12 September, 2016**
Date of Judgment	:	**30 September, 2016**

JUDGMENT

Calanchini P

[1] I agree that the appeal against conviction should be dismissed and that the appeal against sentence be allowed in terms proposed by Waidyaratne JA.

Waidyaratne JA

[2] This is an appeal against the conviction and sentence.

[3] The Appellant was charged before the Magistrate Court at Tavua for committing an offence of rape contrary to Section 149 and 150 of the Penal Code Cap. 17.

[4] The particulars of offence were that the Appellant on the 25th of September 2006, at Tavua in the Western Division; committed the offence of rape on Sovaia Tei.

[5] On the 18th April 2012, the Appellant was found guilty and convicted as charged on the count of rape.

[6] Thereafter the Learned Magistrate transferred the case for sentencing to the Lautoka High Court.

[7] On the 19th March 2013 the Appellant was sentenced by the Lautoka High Court to a term of 18 years imprisonment with a non parole period of 16 years.

[8] The Appellant made an application for leave to appeal against the conviction and sentence.

[9] On the 12th March 2015, the Appellant filed amended grounds of appeal against conviction and sentence which raised three main grounds of appeal.

The grounds of appeal are as follows:

1) that the Learned Magistrate erred in law and fact when he did not consider in his judgment the serious doubt that arose from the admission of the complainant under cross examination of State witness relating to this allegation.

2) the Learned Sentencing Judge erred in law when he gave a sentence that was outside of the accepted tariff.

3) the Learned Sentencing Judge erred in law when he did not separately deduct the 3 months remand period from the total sentence after considering the aggravating and mitigating factors.

When this matter was taken up for argument on the 12th March 2015, the counsel for the Appellant in his submissions raised two additional grounds of appeal:

a) That the evidence of the complainant under cross-examination suggested that there was only an attempt to rape and that it was only in re-examination that she had stated that the Appellant had intercourse with her without her consent.
b) That the medical evidence led in this case raised doubts as to whether there was recent penetration at the time the complainant was medically examined.

[10] On the 1st May 2015, a Single Judge of the Court of Appeal granted leave to appeal on the above grounds raised by the Appellant.

[11] The evidence at the trial was summarized in the Judgment dated 18th April 2012 as:

The Appellant was the father of the complainant.

The complainant was born on the 18th April 1992 and was 14 years old at the time the alleged offence of rape was committed. The complainant stated in her evidence that she was a resident at Nabuna, Tavua and lived with her parents. She attended school at Tavua and that she stopped schooling due to the alleged incident involving her father.

She said on a day in September 2006, the Loloma festival was held at the town park in Tavua which is not far from Nabuna. She was to be accompanied by her aunt named Lavinia who was her neighbor, with some of her children. However, she has met the Appellant at the bus stop and has been asked to go back home. Her mother was not at home as she had left for Lautoka on the previous day after an argument she had with the Appellant.

The complainant in her evidence stated that after she prepared dinner, she went to sleep in her room. Suddenly she has sensed and seen the Appellant lying on top of her. Describing the act of the Appellant, the complainant stated that she felt the Appellant inserting his male organ into her vagina. Then the complainant pushed the Appellant and managed to get away from him. Thereafter, the complainant has cried and went into another room to lie down. She revealed the incident to Lavinia on the following morning upon being questioned by her. The complainant further stated that the Appellant was in the habit of touching her private parts since 2004 when she was in class 7.

[12] In cross examination, the complainant testified that the Appellant was at home in September 2006 and stated that the complaint was lodged by her on the 4th October 2006. She admitted that she was accompanied to the hospital by her aunt Lavinia.

[13] Under cross examination the complainant refuted the suggestion that her aunt inserted her fingers into her vagina. At the conclusion of cross examination she stated that the Appellant was trying to insert his penis into her vagina. However when it was suggested to her by the defence she admitted that the Appellant did not rape her on the day in question.

[14] In re examination the complainant stated that she was raped by the Appellant and what she meant by the word 'rape' as stated in the history recorded in the Medical Evidence Form in paragraph 12, was that they 'were together intimating'.

Further the complainant stated that the Appellant had intercourse with her and the act was committed by the Appellant without her consent.

At the conclusion of her re examination, explaining the different versions given by her in examination- in-chief and in cross-examination, the complainant stated that the correct position is that she was raped by the Appellant that day.

[15] Prosecution witness - Dr. Janice Brown in her evidence stated that she has a MBBS degree with 6 years experience. She has examined the witness on the 4th October 2006 at the Tavua hospital. According to her report, marked and produced as exhibit 4, she has observed that the patient was withdrawn and was afraid of her father whom she thought might physically harm her if she reported him to the police.

[16] Further, the doctor (in the history given by the complainant) has observed that the patient was having social problems and somewhere in 2004 the mother had left home. Since then the Appellant has forcibly had sexual intercourse with the patient namely Sovaia Tei on number of occasions. According to the report, the doctor has observed her hymen was absent and has opined that it may have happened due to recent vaginal penetration or by insertion of two fingers. There was no evidence of any scarring, due to the absence of any recent lacerations.

[17] According to Prosecution witness Lavinia Tinai, in 2006 she was an immediate neighbour of the complainant. She has been living in Nabuna village for almost two decades. She confirmed that on the 25th September 2006, she went to the Loloma festival with her children and the children of the Appellant. At the bus stand they have met the Appellant and the complainant has returned home with him. The next morning she has seen the complainant crying and upon being questioned she has revealed that the Appellant had sexual intercourse with her in the previous night. Having reported the matter to the village committee, the witness has taken the complainant to the police station.

[18] In cross examination she admitted that she was the village traditional nurse but denied performing any traditional medicinal ritual on the complainant . She also denied that she had any animosity towards the Appellant.

[19] The caution statement of the Appellant was marked and produced as evidence before court consequent to a *voire dire* inquiry, which held that the caution statement was made voluntarily.

[20] Testifying under oath, the Appellant stated that he was residing in Vatukoula in September 2006, due to ill health. He further stated that his sister took him to Vatukoula and he was at her house. He also stated that he returned only on the 4th October 2006 and then only he was made aware of the alleged complaint by the Nabuna village committee members. He alleged that they came to his house accompanied by the complainant. Thereafter, he has gone to the police station with his wife. Further, the Appellant in his evidence stated that the aunt of the complainant namely Lavinia gave false evidence in court. The Appellant also alleged that Lavinia was not on good terms with him. The Appellant completely denied the allegation made against him by his daughter.

[21] The Appellant in his evidence also stated that his admission of guilt to the allegation of rape in his charge statement was due to his sickness, as he was suffering from a liver ailment at that time.

Ground 1

'The learned Magistrate erred in law and fact when he did not consider in his judgment the 'Serious doubt' that arose from the admission of the complaint under cross-examination of state witness relating to the allegation.'

[22] It is clear from the judgment that the learned Magistrate has set out the evidence presented at the trial. In this endeavor, the learned Magistrate has referred to the evidence of both the prosecution and the defence. In the judgment he has narrated the

evidence of the complainant that was elicited in examination-in-chief and in cross-examination. The learned Magistrate has referred to the contradictory positions taken up by the complainant in answer to the suggestion that she was not raped by the Appellant. Further, the learned Magistrate has also considered the evidence of the complainant given in re-examination, where she categorically stated that the Appellant raped her. The contention of the defence is that the complainant admitted in cross examination when it was suggested to her that she was not raped by the Appellant. However, in re-examination the complainant has corrected her position stating that the Appellant tried to put his private part into her private part and has categorically stated that the Appellant raped her without her consent.

[23] I observe that the learned Magistrate has also questioned the witness regarding the alleged conduct of the Appellant pertaining to the above position. The complainant in answer to Court has given a specific answer in the affirmative and has categorically stated that the Appellant raped her. Therefore, I see no merit in the above ground of appeal which alleged that there was a 'serious doubt' in the evidence of the complainant.
The Appellant took up the position that the medical evidence created a doubt as to whether there was recent penetration and that the evidence of the complainant only suggests an attempt to rape. Hence, I wish to consider the following evidence.

[24] Dr. Janice Brown, who examined the victim on the 4th October 2006, is an independent witness. She has observed that the complainant's hymen was not intact and she has observed that it has ruptured some time ago. The Doctor was not definite in her opinion as to how it could have happened. She also stated that she did not observe any lacerations suggestive of any injuries. Therefore, the Doctor has come to the conclusion that there was no recent intercourse. However, when she was asked in cross-examination whether there was evidence of any forcible intercourse, the doctor has answered in the negative and stated that the complainant may have succumbed.

[25] Expressing her opinion, the doctor has stated that she did not observe any evidence suggestive of any recent penetration. The reason given by her was the absence of signs of

any healing of the skin. Nevertheless she has stated that she cannot rule out any recent sexual intercourse.

[26] As per the prosecution exhibit 4 – the medical report, and the evidence of Dr. Janice Brown the complainant's hymen was not intact and there was no evidence suggestive of recent lacerations or signs of forced entry. According to paragraph 14 of the medical report, under the heading of diagnosis, the examination had indicated that the hymen was not intact for some time and it may be consistent with the insertion of a finger. Further, the report indicates that the complainant has had sexual intercourse without any lacerations being caused.

[27] Therefore, in view of the evidence of the complainant and the doctor, there is no merit in the ground of appeal which alleges that available medical evidence creates a doubt and there was only an attempt to rape.

[28] In the case of **Spooner v. R** [2004] EWCA Crim. 1320 Eng. Court of Appeal, it was held that it is not necessary for the complaint to describe "the full extent of the unlawful sexual conduct."

[29] Considering the evidence of the complainant which had been subjected to lengthy cross-examination and despite various suggestions put to her, there are no contradictions or major infirmities other than the ground of appeal raised above. The different positions that were taken up by the complainant too were convincingly explained by the complainant in her evidence.

[30] Therefore, I am satisfied that there are no serious infirmities in the evidence of the complainant and in the prosecution case as a whole. Further, it is correct to state that the learned Magistrate would have observed the demeanour and the deportment of the witnesses who testified before court. The learned Magistrate also had an opportunity to observe the demeanour of the Appellant who testified under oath. Therefore, undoubtedly

he was in a better position to adjudicate on the evidence led before him, especially to arrive at a decision that the evidence of the complainant was credible and cogent.

[31] Therefore, I am of the view that the learned Magistrate had the priceless advantage of observing the witnesses before arriving at a final conclusion in this matter.

[32] In his judgment, the learned Magistrate has concluded that the evidence of the complainant is credible and forthcoming. Further, he has also taken the evidence of Dr Janice Brown into consideration, who is an independent witness for the prosecution, along with the evidence of Lavinia Tinai, who corroborated the evidence of the complainant on material points such as the prompt complaint and the presence of the Appellant in the area at or about the time the alleged offence was committed. The above evidence in my view has strengthened the prosecution case.

[33] Having considered the evidence of the Appellant and his defence of alibi the learned Magistrate has rejected the defence evidence in toto.

[34] It has been held by the learned Magistrate that the available evidence lends credence to the evidence of the complainant and has proceeded to reject the evidence of the Appellant who took up a total denial. Thus this confirms that the learned Magistrate held that the complainant was a credible witness. In the circumstances, I hold that the learned Magistrate was correct in concluding that the Appellant was guilty as charged. Therefore, I find no merit in this ground of appeal raised by the defence and dismiss the appeal against the conviction.

Appeal against Sentence

[35] The Appellant raised two grounds of appeal against sentence.

(a) That the learned Sentencing Judge erred in law when he imposed a sentence outside of the accepted tariff.

(b) That the learned Sentencing Judge erred in law when he did not separately deduct the 3 months remand period from the total sentence after considering the aggravating and mitigating factors.

[36] At the hearing, the Respondent conceded both these grounds.

[37] Section 23(3) of the Court of Appeal Act 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."*

[38] Accordingly, I now proceed to consider the above grounds raised against the sentence.

[39] The learned Sentencing Judge having considered the transfer and the conviction by the learned Magistrate, has considered Section 150 of the Penal Code (Cap. 17) which prescribes imprisonment of life as maximum sentence.

[40] Referring to **State v. AV** [2009] FJHC 24; HAC 192. 2008, 21st February 2009, the learned Sentencing Judge has correctly identified the tariff for rape of a child as a term between 10 – 16 years of imprisonment.

[41] Given the nature of the offence the learned Sentencing Judge has held that it is a case of incestral rape. He has further stated that the Appellant being the biological father of the complainant had ruined her life which is unacceptable. Therefore, the learned Sentencing Judge has commenced the sentence at 16 years which is at the highest end of the tariff.

[42] Then the learned Sentencing Judge considering the following aggravating factors has increased the sentence by 4 years.

(a) the Appellant was the biological father;
(b) complete breach of trust of father daughter relationship;
(c) you were 48 years and she was 14 years old child;
(d) the Appellant made the child to feel her life is totally wasted and her loss of dignity.

The total sentence is 20 years of imprisonment.

[43] Having considered the mitigating circumstances and the 3 months spent in remand, the learned trial judge has deducted two years and handed down 18 years of imprisonment.

[44] Given the nature of the relationship existed between the complainant and the offender – (father and daughter), the learned trial judge, acting under Section 18(1) of the Sentencing and Penalties Decree, has imposed 16 years of imprisonment as a non parole period.

[45] In the case of **Koroivuki v. State** [2013] FJCA 15; AAU0018.10 (5 March 2013) Goundar JA held:

> *"The purpose of tariff in sentencing is to maintain uniformity in sentences. Uniformity in sentences is a reflection of equality before the law. Offender committing similar offences should know that punishments are even-handedly given in similar cases. When punishments are even-handedly given to the offenders, the public's confidence in the criminal justice system is maintained.*
>
> *In selecting a starting point, the court must have regard to an objective seriousness of the offence. No reference should be made to the mitigating and aggravating factors at this stage. As a matter of good practice, the starting point should be picked from the lower or middle range of the tariff. After adjusting for the mitigating and aggravating factors, the final term should fall within the tariff. If the final term falls either below or higher than the tariff, then the sentencing court should provide reasons why the sentence is outside the range."*

[46] In view of the material placed above, I am of the view that the learned trial judge has exceeded the accepted tariff in this kind of an offence. The Court does not for a moment condone the act of rape committed on a child. However, I am of the view that it would be appropriate to select a lower starting point.

[47] Further, I consider that the learned Sentencing Judge has erred in repeating the two aggravating factors at paragraph 42(a) and (d).

[48] When considering the mitigating factors, the learned trial judge has taken the 3 months spent in remand as one such ground. Thereafter he has proceeded to deduct 2 years from the total period of imprisonment.

[49] Section 24 of the Sentencing and Penalties Decree 2009 reads as follows:

> *"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 matters shall, unless a court otherwise orders, be regarded by the court as a period of imprisonment already served by the offender."*

[50] In a recent judgment of the Supreme Court in **Apakuki Sowane** CAV 0038/2015 it was held that the law required a separate deduction of the period spent on remand from the head sentence but not as part of mitigating factors, unless otherwise ordered by the Court.

[51] In view of the principle laid down in the above judgment, I am of the view that in future the time spent in remand must not be considered as a mitigating factor and it should be considered separately as stipulated by law. In the instant case the Appellant has spent 3 months in remand.

[52] The appropriate sentence in this case is a term of 13 years imprisonment.

[53] Section 18 of the Sentence and Penalties Decree 2009, gives discretion to Court to fix a non parole period. Considering the matters referred to by the learned Sentencing Judge

and the final sentence pronounced by this Court, I am of the view that ends of justice would be met by imposing a 12 years non parole period.

Rajasinghe JA

[54] I agree and concur with Waidyaratne JA's findings and conclusion.

Orders of the Court

1. *The appeal against the conviction is dismissed.*
2. *The appeal against the sentence is allowed.*
3. *The Appellant is sentenced to a term of 13 years imprisonment with a non-parole period being 12 years.*

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

Hon. Mr. Justice K. Waidyaratne
JUSTICE OF APPEAL

Hon. Mr. Justice T. Rajasinghe
JUSTICE OF APPEAL