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

Criminal Appeal No: MISC.0028 of 2011
(High Court Case No: 43 of 2010L)

BETWEEN : **MAHENDRA KUMAR**

Appellant

AND : **THE STATE**

Respondent

Coram : **Basnayake, JA**
Jayamanne, JA
P. Fernando, JA

Counsel : **Mr. J. Singh & Ms M. Singh for the Appellant**
Mr. L. Fotofili for the Respondent

Date of Hearing : **5 May 2016**

Date of Judgment : **27 May 2016**

JUDGMENT

Basnayake JA

[1] I agree with the reasoning and the conclusion of Jayamanne JA.

Jayamanne JA

Charges and outcome of the trial

[2] The appellant was charged in the High Court for having committed rape on Nitasha Poonam between 1st September 2010 and 31st October 2010 contrary to sections 207(1) and 207(2) of the Crimes Decree No. 44 of 2009. After trial, the assessors unanimously expressed an opinion of guilty.

[3] The learned trial judge, having concurred with the said opinion, convicted the accused. On 6 May 2011, a sentence of 13 years imprisonment was imposed with non- parole period of 9 years. During the trial, the appellant defended himself after having waived his right to counsel.

Ruling of the Single judge

[4] The appellant filed an appeal on 14 August 2011 which was 56 days out of time. A counsel having filed an amended appeal appeared on behalf of the appellant at the hearing of the leave to appeal application. A single judge granted leave for the appeal having acted under section 35(1) (a) of the Court of Appeal Act.

[5] Though several ground of appeal were raised, the single judge granted leave only for two grounds of appeal which are as follows:

I. The summing up was unbalanced and therefore unduly prejudiced. This ground was based on the premise that the learned trial judge used the word 'forcefully' six times in describing the evidence of rape when in the evidence the word 'forcefully' was used only once.

II. That the sentence was harsh and excessive in all the circumstances of the case.

Prosecution case

[6] In September 2010, the victim Nitasha Singh aged 18 years was studying at form 7 at Labasa College. She was suffering from constant severe headaches and yellow fever, and the parents were looking for assistance to cure her.

[7] The appellant posed off as a 'pundit' or a priest from India and told the parents of the victim that he can heal her sickness with the help of prayers. Having deposed trust, the parents invited the appellant home to pray. On 21.9.2010 the appellant visited victim's home and performed a session of prayers. Similar prayers were conducted for several days. As the appellant promised to cure her, the parents did not take the victim to a hospital. The parents were agitated with the appellant as there was no improvement her sickness. Then the appellant got angry and threatened them that he would not heal the victim and left the house.

[8] On the following day, i.e 23rd September 2010, the condition of the victim became worse in school. The father of the victim then took her from the school and send her to her aunt's place. As the headache persisted, parents called the appellant and asked for forgiveness. They pleaded with him to cure her. The father gave the mobile number of the appellant to the victim and asked her to contact the appellant and see him. When the victim gave a call, the appellant was in town with his mother. The appellant asked the victim to come to his house to cure her.

[9] Having realised that the appellant was with his mother, the victim phoned her father who gave permission to the victim to go to the house of the appellant. This was due to the trust he had towards the appellant. The victim considered the appellant as a religious person. He was like a father to her.

[10] When the victim went into the appellant's house, the appellant started to frighten the victim saying that he is not a priest but a person doing 'black magic.' He told her that

he would do 'black magic' on her family and in fact she saw a book on 'black magic' at the appellant's house. The victim believed that the appellant could perform 'black magic.' If the victim leaves him (appellant) he had threatened her that he would kill the victim, and her father, and do something that her mother and sister would elope with Fijians. The victim stated to court that *"the way he was acting made me frightened'* (page 132). The victim claimed that while at appellant's place, the victim had to do all the 'house-work' like cooking, sweeping, washing and other domestic work. She could not escape from the place as the mother of the appellant was guarding her.

[11] On 24th September 2010, the victim went to the room of the sister of the appellant to rest. Sometime later, the appellant also entered the room and wanted to have sex with her. The victim refused as she was brought there to heal her by the appellant who was said to be a priest. When the victim refused and started crying, the appellant got angry and left the room. Five minutes later he came back and raped the victim although she did not give consent.

[12] Under cross examination, the victim confirmed that at the time of the incident only the appellant was with her. His parents were in the field and the other family members were away. In the following two weeks, she was repeatedly raped during the day time when other inmates of the house were absent. Even the mother of the appellant told the victim that she was going to get married to the appellant and therefore she had to sleep with the appellant.

[13] The victim categorically stated to court that she went to the house thinking that the appellant would heal her. She stated that she was just a school girl and that the appellant was too old for her. She said that she would have found a better person if she needed one. She wanted to pursue her studies and did not want to get married to any person at that stage. There were no houses nearby as the house was located in an interior area.

[14] According to the prosecution case, the appellant raped her on 24 September 2010 and repeatedly raped her on the 25th, 26th and 27th September. For two weeks she had to

stay in the house of the appellant. The acts of rape continued until 11th October 2010. On this day when her parents came, she escaped. When she left the house, the appellant was not present. The victim told the parents that the appellant's family forcefully kept her and the appellant raped her. When the appellant came to know of the victim leaving the house, he lodged a complaint at the police saying the victim was taken away. Victim told her father that the appellant raped her. Subsequently her father took the victim to the police. Then the Police referred the victim to a doctor for examination. The doctor opined that the hymen of the victim was ruptured.

Defence Case

[14] The appellant, aged 29 years gave evidence at the trial and denied having any sexual contact with the victim. He told court that the victim had no illness and he never prayed for her. He only prayed for the family of the victim. He further said that the victim came to his house on her own accord. However during the prosecution case the position taken by the appellant was different. When the victim was giving evidence, the appellant asked questions on the basis that it was the victim who came to his room to have sex. (At page 135)

Question	:	*Did you always call me into the room for sex?*
Answer	:	*Never*
Question	:	*First, you came to me and told me to have sex with me?*
Answer	:	*No*
Question	:	*After that you were having sex with me and that you started sleeping with me?*
Answer	:	*We had sex but I did not consent*

Analysis and consideration of ground one of the appeal

[15] Ground one of the appeal is in relation to the learned judge's direction with regard to act of rape. Therefore, it is necessary to refer to the impugned direction at para 22 of the summing up(page 45) which reads as follows:

"On the one hand , the complainant said, the accused on 24th september2010, forcefully took off her clothes, forcefully held her hands ,forcefully kissed her and

sucked her breasts, forcefully separated her legs, forcefully inserted his penis into her vagina and forcefully had sex with her for 5 minutes without her consent and well knew she was not consenting to sex, at the time. According to the complainant, the accused repeated the above on 25th,26th,27th September 2010 and in the daytime until 11th October 2010."

[16] The issue is whether the learned trial judge's' direction at para 22 is misleading and if so whether it has caused any prejudice to the appellant. Further we have to examine whether there is any substantial miscarriage of justice, if it was held to be a mis-direction.

[17] In order to address the issue, I need, at the very outset, to examine the structuring of the summing up. The trial judge has meticulously divided his summing up into different categories. Under the category of "THE PROSECUTION'S CASE" he has given a succinct summary of the prosecution case between paragraphs 13 to 18 of the summing up. In those paragraphs, he has referred to the summary of evidence of the prosecution witnesses in particular to that of the victim. The appellant never made any allegation in the appeal that the narration found between paragraphs 13 to 18 was misleading or faulty. I find that the trial judge referred to the salient aspects of the evidence of the victim, the way she gave evidence in court, although evidence relating to intimidation, fear and threats were not sufficiently and fully not placed before the assessors. Especially, in paragraph 17 the judge narrated the victim's evidence as to the circumstances under which the act of rape took place on the 1st day. In the said paragraph the judge referred to the word 'forcefully' only twice in the following manner:

> *"The accused came into the room and asked for sex. She refused and swore at him. The accused later threatened to kill her, and then her family. He forcefully took off the complaint's clothes, and then his clothes. He forcefully held the complainant's and, sucked her breasts, separated her legs, and then inserted his penis into her vagina. He had sex with her for 5 minutes. Afterwards, the accused told the complainants not to tell anyone, or he will kill her."* (emphasis added)

[18] This was followed by the category of 'THE ACCUSED CASE.', in which the learned trial judge brought to the attention of the assessors of the evidence of the appellant. Then, the learned trial judge commenced analysing the evidence of the prosecution and

defence, under the category of 'ANALYSIS OF THE EVIDENCE' which is found in paragraphs 22 to paragraphs 28.

[19] It appears that the objective of paragraphs 22 to 28 was to holistically look at the prosecution and defence case, arguments of the parties and possible inferences so that the assessors could have a clear understanding as to how the facts of the case would synchronize with the issues of law. The learned trial judge stressed that it was up to the assessors to decide the credibility and it was emphatically told them that if the evidence of the victims was not believed beyond reasonable doubt, they must find the accused 'not guilty.' Since the facts had already been discussed in paragraph 17, it seems the intention of the judge was not to repeat them again in detail. In an analysis, a judge is not expected to merely repeat the evidence but show the assessors various views, interpretations and inferences that can be drawn. But those must be compatible with the entirety of the evidence and must be reasonable as well. When a judge shows such inferences, he must consider whether arriving at such interpretations are justified and it was open for him to do so having regard to the totality of evidence.

[20] An important pronouncement on the issue of directions in a jury case has been made in **R v Lawrance** [1981] 1 ALL ER 974 at 977 by Lord Hailsham where he said:

> *"... A direction to the jury should be custom-built to make the jury understand their task in relation to a particular case. Of course it must include references to the burden of proof and the respective roles of jury and judge. But it should also include a succinct but accurate summary of issues of fact as to which a decision is required, a correct but concise summary of the evidence and arguments on both sides, and a correct statement of the inferences which the jury are entitled to draw from their particular conclusions about the primary facts..."* (emphasis added)

[21] These principles are equally applicable to assessors in courts of Fiji. However, in Fiji the appellant has another advantage. That is that in the event of assessors arriving at a verdict not in compatible with the facts of the case, the High Court Judge is entitled to alter the verdict. However, in the present case, the learned judge having directed himself on the evidence, concurred with the opinions of the verdict of guilty against the accused.

[22] The purpose of paragraph 22 of the summing up was to refresh the mind of assessors to the element of consent and its connection to the evidence. It seems, the learned trial judge was mindful of the section 206(2) of the Crimes Decree 2009. In paragraph 22, the learned trial judge had referred to previous paragraphs 9, 10, 11 and 12. Paragraph 12 especifically dealt with the meaning of consent. He said to the assessors that:

> *"i. Consent is to agree freely and voluntarily and out of free will;*
>
> *ii. If consent was obtained by force, threat, intimidation or fear of bodily harm to herself or others, that consent is deemed to be no consent".*

[23] In the said context, it is incumbent upon the trial judge to guide on the potential interpretation, and inferences that assessors may draw. It was reasonable for him to comment that the act of rape may have taken place under circumstances of force, fear or threat. Would any reasonable panel of assessors think that there was no force and the victim gave the consent voluntarily? The answer should clearly be in the negative. When any reasonable person listening to the evidence of the victim, the only conclusion that could have arrived, was that the victim was subjected to force. Finally, at paragraph 28 under 'Analysis of evidence,' the learned trial judge had invited the assessors to use their life experience and common sense to decide the credibility of the witnesses.

[24] It appears that the trial judge in paragraph 22 of the summing up was attempting to give the spirit of the victim's evidence which is found in pages 132 to 134 of the transcript. It is true, that when one examines the relevant pages of the evidence of the victim it does not show that the victim used the word 'forcefully' six times in one particular paragraph. However it is my duty to scrutinize the pages holistically to see whether in fact the judge using the word 'forcefully' several times in the summing up was justified or not. Therefore, now I shall refer to pages 132, 133 and 134.

[25] In order to respond to ground number one, it is relevant to examine as to what transpired inside the room at the material time. Her evidence is found at page 132 which is as follows:

"After 5 minutes, he came back, I was crying. He told me, If I hesitate, he will kill me. He said, he will kill my father and family. He threatened me. He forcefully removed my clothes. I was wearing a blue skirt with white flowers. I had a top. It is the Labasa College physical education uniform and 'Labasa College' was written on it.
He held my hands and he removed my clothes. I tried to push him. He was very heavy and stronger than me. He actually raped me. He held my hands, kissed me, he sucked my breasts, he separated my legs and he pushed his penis into my vagina. He stopped after five minutes (Prosecution witness crying).He told me, if I tell anyone, he will kill me. I couldn't find anyone close to me in his house. Accused's house was far away from the main road and there was no neighbour close by." (emphasis added)

[26] Under cross examination she reiterated her position which is at page 133 and 134:

- *"I never love accused. He was a priest....(page 133)*
- *"I did not escape because he threatened to kill me. I am afraid of him if I see him alone" (page 133)*
- *" On 23rd and 24th September 2010 and the 2 weeks I spent at his house, he threatened me" (Pages 133,134)*
- *"His mother used to guard me. When I went there, they took my phone and my file containing my curriculum vitae" (page 134)*
- *"After the 1st rape, his mother came to me and told me since I am going to marry him, I have to sleep with him." (page 134)*
- *"They were threatening me" (page 134)*

(emphasis added)

[27] When one reads the above extracts it appears clearly that just before the act of rape as to:

I. how the appellant threatened to kill the victim;
II. how the appellant by force held her hand and removed her clothes; and
III. how the victim tried to push the appellant and how heavy and stronger the appellant was.

[28] Similarly, the victim explained as to how the appellant threatened to kill her after the act of rape and her desperate situation. However, learned trial judge in his analysis of evidence in paragraph 22 of the summing up, has not brought the entirety of these factors to the notice of the assessors. Instead, he has given a gist as to how he perceived the circumstances surrounding the victim.

[29] One cannot determine the element of the absence or the presence of force and consent by merely referring to a few selected and isolated sentences of the evidence of the victim and portions of the summing up. The entirety of the evidence and summing up must be considered in arriving at a conclusion. Certainly those issues cannot be decided according to a mathematical formula by merely referring to the number of times the word 'forcefully' was used in one part of the summing up. If we were to follow such a mathematical formula, great injustice would be caused. In fact, one can claim that some injustice has been caused to the prosecution. For example, the victim referred to the words 'threat' and 'threatened to kill' six times but the trial judge did not refer to at least in a single occasion to these words in his analysis. Even in his summary of evidence he used these words only twice (paragraph 17). The victim referred to the words 'frighten' and 'afraid' once respectively. But the trial judge never referred such words in his analysis. Even in his summary of facts, he only referred to the word 'frighten'. Therefore, if we were to apply the criteria suggested by the appellant, one would see that injustice has been caused to the prosecution. The evidence has to be evaluated on the entirety of the evidence of victim and not on the frequencies of the words that judge or witness used.

[30] The main question that has to be resolved is, having regard to the totality of the evidence of the victim, whether the learned trial judge has fairly and succinctly placed the situation of the victim to the assessors in a reasonable manner. What the prosecution has to prove is that the victim has not given her consent and the appellant knew it. It is not necessary to exert violence or physical force always in a case where a victim is detained at a lonely house in a rural area far away from her parents. A physical confinement followed by continued threats and situation of incommunicado with her parents are either similar to or worse than exerting physical force or violence. Once the victim was made defenceless and helpless whatever happened thereafter should be regarded as happened under force.

[31] On a perusal of her evidence, the force used on her becomes very obvious to anyone listening to her evidence, although she may not have said that each and every sexual act, he:

(i) forcefully kissed her,

(ii) forcefully sucked her breast,

(iii) forcefully separated her legs,

(iv) forcefully inserted his penis into her vagina,

(v) forcefully had sex with her.

[32] In the leave to appeal judgement the single Judge at paragraph 20 stated that:

> *'the judge has used the word forcefully six times in describing the evidence of the rape when in the actual record of the complainant's evidence the word 'forcefully' was not used once. The judge's version of the evidence is unfortunately weighted to the prejudice of the accused. He is emphasising the exercise of power over the victim in all his deeds when this degree of power was not reflected in the complainant's viva voce evidence'.*

[33] It appears that it was not properly brought to the notice of the single judge by the appellant or his counsel as to how the appellant forcefully removed the clothes. In addition, the evidence of victim relating to the conduct of the appellant just prior to the act of rape and after the rape was not adequately brought before the single judge. The detail of this evidence is found in pages 132 to 134 of the transcript. If force was used to remove clothes it is not comprehensible to think that thereafter she gave consent.

[34] On the other hand, this is not a case where the appellant has taken up a defence of consent. Whilst giving evidence, he denied having any kind of sexual relationship with the appellant. Further, he raised an alibi with regard to two days out of 18 days the victim had been detained. The victim was confined to the house of the appellant from 24th September 2010 to 11th October 2010. The victim stated that she was continuously raped during the said period. The charge relates to representative counts spanning over a two month period commencing from 1st September, 2010. Although the appellant took up a denial whilst giving evidence, his position during the cross examination was that sexual act was done with the consent of the victim. Having realised that it was a mistake in admitting sexual intercourse, the appellant shifted his defence to denial and an alibi. He never put his alibi defence to the victim when she gave evidence.

[35] A close scrutiny of evidence shows that the parents and the victim honestly believed and trusted that the appellant was a genuine person who had some spiritual powers to heal the recurring sickness of the victim. The parents sought divine intervention through the appellant. The evidence suggests that the appellant was crafty and manipulative in deceiving the victim and the parents. He told them that it was not necessary to go to a hospital as he could heal her. When the father did not see any result and showed his frustration, the appellant abandoned praying and predicted misery.

[36] On the following day, when the victim's sickness became worsen, the father became desperate and pleaded with the appellant to forgive and to resume the healing process. It appears that the appellant realized that the victim and her parents got caught to the trap he has laid. He saw an opportunity to exploit the situation and make the victim his wife by forcefully having sex with her. Being an opportunist, he boldly asked the victim to stay in his house. He showed that the victim would be accompanied and protected by his mother. The victim having obtained permission of her parents went to the house of the appellant. This is the context that the 18 years old school girl was lured to go to the house of the appellant. It is certainly not a case that the victim went to the appellant to live as husband and wife. Father never allowed the victim to live as husband and wife with a person whom they believed a priest. When the father of the victim testified, the appellant never questioned or suggested to him that the victim was sent there to live as husband and wife.

[37] With the denial of sexual relationship, a question arises as to why the victim was allowed to remain in his house. No questions were asked from her during cross examination in this regard to elicit any material favourable to the appellant. The failure to challenge the evidence of the victim on this front made her evidence convincing and infallible.

[38] In view of the above analysis and reasons, I am of the view that there was no mis-direction having regard to the totality of evidence. Even for the sake of argument if we were to assume that there was a misdirection, it has not caused up a substantial miscarriage of justice. Even without reference to paragraph 22 of the summing up any

assessor would have opined the guilt of the appellant. The assessors brought their opinions three days after the victim gave evidence. It would have been very much fresh in their minds. Whether the judge used the word 'forcefully' several times or not, the assessors would have remembered the victim's evidence relating to fear, threat, confinement, other circumstances and victim's demeanour before deciding on the element of consent.

[39] It is appropriate to refer to **Singh v Reginam** [1980] FJCA; Criminal Appeal No.46 of 1979 (30th June 1980) page 16 which reads as follows:

> *"It has been said time and again that a summing up must be read as a whole and it is quite wrong to take one or two phrases in isolation and examine them away from their context."*

[40] Similar sentiments were pronounced in *Bullard v R.* (1957) A.C. 635 at 645:

> *"But there is no magic formula and provided that on a reading of the summing up as a whole the jury are left in no doubt where the onus lies no complaint can properly be made."*

[41] Therefore I hold that paragraph 22 is not unbalanced or not prejudicial. Even if we assume the existence of unbalance, there had been no substantial miscarriage of justice caused.

[42] In light of the above analysis I hold that ground one of the appeal has not been established.

Ground of Appeal Number Two: Sentence

[43] Counsel for the appellant submitted that learned trial judge selected the starting point as 7 years, which is at the lowest end of tariff and therefore trial judge may have thought that the incident was not of 'worst kind' of rape and not a serious one.

[44] Although maximum sentence for adult rape is life imprisonment, several decided cases have fixed the tariff between 7 years to 15 years. In **Mohammed Kasim v State** AAU 21 of 1993 (27th may 1994) it was held that the starting point for sentencing an adult should be as 7 years imprisonment. The court further pronounced that:

> *"It must be recognized by the courts that the crimes of rape has become altogether too frequent and that the sentence imposed by the courts for that crime must more nearly reflect the public outrage. we must stress, however, that the particular circumstances of a case mean that there are cases where the proper sentence may be substantially higher or substantially lower than starting point."*

[45] Therefore, it appears the learned trial judge has given effect to the pronouncement made in Kasim's case in fixing the starting point. The learned trial judge was very fair, reasonable and respectful to the Kasim's judgment. Fixing the starting point at 7 years does not necessarily mean that the trial judge did not regard the offence was not a "worse kind." In the circumstances the learned trial judge fixing the starting point at 7 years is justified.

[46] Counsel for the appellant further argued that the learned trial judge has considered consent which was an element of the offence of rape as an aggravating factor (paragraph 8 of the sentencing judgement and page 36 of the transcript). Counsel, in particular, pointed out that considering the absence of consent in repeated incidents of rape, was faulty, irregular and illegal since the appellant was charged on the basis of representative count. His allegation was that since the rape count was on the basis of 'representative count', the alleged repeated offences committed during the same period cannot be used as aggravating factor.

[47] In **Pauliasi Mataunitoga v The State** AAU 125 of 2013 (28 May 2015) where the court of appeal, at paragraph 24, held that:

> *"The effect of a representative count is that the offender is convicted of only one incident of the alleged sexual act. In the appellant's case, he is convicted of one incident of rape (count 1) and one incident of indecent assault (count 2), and not multiple offences as disclosed in the facts. When sentencing on a representative count, the court is not entitled to impose a sentence in respect of uncharged crimes (R v Jones* [2004] VSCA 68 at [13]*). I apply this principle in the present case"*

[48] In view of the said judgment, it is my duty to closely examine the issue. Section 70(3) of the Criminal Procedure Decree of 43 of 2009 stipulates that:

> *"When a person is charged with any offence of a sexual nature and the evidence points to more than one separate acts of sexual misconduct, it shall be sufficient to specify the dates between which the acts occurred in one count and the prosecution must prove that between the specified dates at least one act of a sexual nature occurred. In such a case the charge must specify in the statement of offence that count is a representative count."*

[49] The said provision is a departure from the general principle relating to charges and sentencing. Generally, State is required to identify the date or approximate date of offence and it should be specified in the information. However, under the principle relating to the representative count, the general rule has been relaxed with regard to offences in sexual nature. The rationale, it appears to be, to protect the prosecution in sexual offences where there had been repeated cases where the victim cannot specify the date. In these offences, victims undergo psychological trauma and therefore may not be able to remember a specific date or dates. In those cases, under the principle of representative count, the State is at an advantaged position compared to other cases as the prosecution would be in a difficulty to provide the exact date of the offence. One can argue that the defence would be at a disadvantageous position. However, the primary concern of the society is to protect vulnerable victims from sexual offending.

[50] Nevertheless, at the sentencing stage the prosecution is not afforded with any advantageous position. At that stage the uncharged offences, even if evidence has transpired during the trial, is not allowed to be used as an aggravating factor. It appears that there is a balancing of rights between the prosecution and the defence. However, if the accused is charged on separate counts in the same information for repeated offences and convicted thereafter, the situation is different. Then the convicted repeated offence or offences can be used as an aggravating factor. This is generally referred to as principle of Totality. Adopting such principle is fair and justified.

[51] The said principle, was used in the case of **Raj v The State** CAV 0003 of 2014 [FJSC] (5 August 2014). In this case, the accused was charged in the High Court with four counts of rape and one count of indecent assault. All the counts were regarded as representative of the total wrong doing. The 10 years old victim was a daughter of the accused. The unlawful conduct was going on for a little more than one year, between January 2008 to January 2009. There were four separate counts of rape and one count of Indecent assault. These charges were preferred on the basis of 'representative counts.' Each of the four counts was related to a specific one month period. These counts were spread over a one year period. Several repeated acts of rape and indecent assaults took place in each month. Those acts continued in other months which were referable to other counts as well. The accused was convicted for each representative count.

[52] The Supreme Court considered the series of offending that took place over a period of time. It appears that Their Lordships applied the principal of totality and considered repeated offending as an aggravating factor. The basis appears to be that there were convictions for other offences that were based on respective counts. Delivering the judgment at paragraph 67, the Supreme Court pronounced that:

> *'This child suffered greatly and the punishment must reflect society's abhorrence of such prolonged ill treatment and abuse. The sentences reflected correctly the totality of the offending and were just, in accordance with the purpose expressed in section 4(1)(a) of the Sentencing and Penalties Decree."*
>
> (emphasis added)

[53] Referring to trial judge's remarks that "*The rape offences took place continuously over a long period of time. Such an experience will surely scar her for the rest of her life*", the Supreme Court, at paragraph 63, further enunciated that:

> *"These aggravating factors made this a particularly bad case of child abuse and for the specific crime charged namely rape."*

[54] Unlike **Raj's** (supra) case, in the present case there was only one representative count. The information also made specific reference to it as required under section 70(3) of the Criminal Procedure Decree. Although the victim referred to several acts of sexual nature, legally the accused could be convicted for one offence of rape. In view of the analysis above with regard to sentencing in representative count, it is my view that a judge cannot consider the repeated acts committed with in representative count as an aggravating factor. However, it appears that the learned trial judge has considered continuous offending during the period as an aggravating factor. I shall now recite paragraph 8 of the sentencing judgment:

> *"(i) Your intrusion into Nitasha's family was extremely devious and calculating. You unashamingly used religion as the perfect cover to invade and disrupt the peace and harmony of this unsuspecting family. Nitasha was a sickly 18 year old girl, at the time, and badly needed help to cure her sickness. It is not unusual in Fiji for families to seek divine intervention, to cure their sick. You well knew this, and you fraudulently pretended to be a "pundit" or priest, to win the confidence of this family. You succeeded in fraudulently winning Nitasha's family's confidence, and you cunningly put your evil intentions into action. At the age of 29 years old, you secretly planned to make Nitasha your wife, with or without her consent. You secretly planned to force yourself onto her sexually. You deviously used your mother to persuade Nitasha and her family for you to take her to your home, to be prayed over and healed. You well knew your home was in the midst of canefields, and far away from everyone – a perfect environment in which to subdue Nitasha's will to resist. You then set about to take away her virginity. Despite her continued protest, you raped her on 24th September 2010. Then you repeatedly raped her from then until 11th October 2010. You showed utter disregard for Nitasha's rights as a human being, and in fact, you treated her as a sex slave. For these misdeeds, you must pay with the loss of your freedom".*

[55] In view of the above reasoning, in the present case before me, I hold that the learned trial judge has erred in considering the repeated acts of rape for the purpose of sentencing as an aggravating factor. The next question is , in the circumstances, whether any discount should be made in the sentence. It seems the learned trial judge has not considered the following as aggravating circumstances:

i. The trust reposed to by the victim on the appellant in going and staying in the house of the appellant for healing purpose. The appellant has breached the trust reposed on him by the victim. It was not that the appellant coming to the house of the victim to pray.

ii. The threat and fear instilled prior to the acts of rape saying that he would kill the victim, her father, and he would do something so that for her mother would elope with a Fijian.

iii. The victim was isolated and the appellant took advantage of it.

[56] In **Raj's** *(supra)* case the Supreme Court considered following as well as aggravating factors (paragraph 63)

i. Breaching trust,
ii. Subjecting victim to threat to kill her,
iii. The victim was in real fear of the accused and causing fear and anxiety over a long period.

[57] Thus, in the present case the trial judge should have considered those additional aggravating factors as mentioned above.

[58] Therefore, judge erring with regard to the above mentioned against the appellant may not have eventually changed the head count of the sentence of 13 years.

[59] The final sentence of 13 years was within the range of the tariff i.e 7 to 15 years. Thus the sentence imposed by the learned trial judge is in accordance with the principle and guidelines on decided cases. The sentence is neither excessive nor harsh.

[60] Therefore I hold that the appellant has not established the ground of appeal relating to sentence. I am not satisfied that this ground is made out. Therefore there is no reason to interfere with the sentence.

[61] Accordingly, the appeal of the appellants on both the conviction and sentence failed.

[62] I would dismiss the appeal and affirm the conviction and the sentence.

P. Fernando JA

[63] I too agree with the reasoning and the conclusion of Jayamanne JA.

The Orders of the Court are:

1. *Appeal against conviction is dismissed.*
2. *Appeal against sentence is dismissed.*

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Hon. Mr. Justice E. L. Basnayake
Justice of Appeal

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Hon. Mr. Justice S. Jayamanne
Justice of Appeal

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Hon. Mr. Justice P. Fernando
Justice of Appeal