IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court of Fiji]

CRIMINAL APPEAL NO: AAU0085 of 2013
[High Court Case No. HAC 338 of 2011]

BETWEEN	:	**LUKE MAYA**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Calanchini P** **Goundar JA** **Rajasinghe JA**
Counsel	:	**Ms S Ratu for the Appellant**
		Mr L Fotofili for the Respondent
Date of Hearing	:	**18 August 2017**
Date of Judgment	:	**14 September 2017**

JUDGMENT

Calanchini P:

[1] I have read the draft judgment of Goundar JA and agree with his reasoning and his conclusions.

Goundar JA:

[2] This is an appeal against sentence only. The appellant was convicted of rape after trial in the High Court and was sentenced to 11 years' imprisonment with a non parole period of 10 years. The appellant was granted leave to appeal against sentence on two grounds. The grounds of appeal are:

(i) The learned sentencing judge erred in fact when he failed to discount the term of one (1) year five (5) months from the final sentence of the Appellant.

(ii) The learned trial/sentencing judge erroneously included matters under paragraph 4(ii) of the Sentence as Aggravating features of the offending when the same was not apparent as part of the evidence after gleaning the summing up.

Facts

[3] The victim was the appellant's de-facto partner. She was 36 years old. They were in a relationship for 11 years. Together, they had three children. At the time of the offending, the couple were separated. He was living with another woman at his sister's house. The victim was living with her three children in Narere.

[4] In the morning of 8 October 2011, the appellant turned up at the victim's home drunk. He confronted her outside her house while she was hanging clothes to dry. Her children were inside the house. He grabbed her and dragged her to her bedroom. She struggled to free herself by kicking him but he overpowered her by assaulting her. She felt weak and stopped resisting. She did not raise alarm because she did not want to frighten her children who were in the living room at the time. He forcefully removed her clothes and had sexual intercourse with her, without her consent. He ejaculated inside her.

[5] After raping the victim, the appellant slept in the bedroom for an hour and then left the house. The victim reported the matter to police after five days. On 13 October 2011, the victim was medically examined. Medical examination found abrasions on her neck, tenderness on the left shoulder and bruises on the left thigh.

[6] At the trial, the victim and her son gave evidence. He was 18 years old. He witnessed the appellant drag the victim into her bedroom. The son said he was traumatised by the incident. He attempted suicide by hanging but was stopped by his older sibling.

[7] The appellant elected not to give evidence. In caution statement, the appellant admitted having sexual intercourse with the victim but denied using any force.

Verdict of conviction

[8] After deliberation, the assessors unanimously found the appellant guilty of rape. In his judgment, the learned trial judge believed the victim's evidence. He found her to be a credible witness and was satisfied of the appellant's guilt beyond a reasonable doubt. The appellant was convicted.

Sentencing methodology

[9] The learned trial judge gave written reasons for the sentence he imposed on the appellant. The maximum penalty prescribed by law for rape is life imprisonment. The learned trial judge referred to numerous earlier decisions of this Court to identify a tariff of 7 to 15 years imprisonment for rape of an adult victim. He used a starting point of 10 years and then adjusted the sentence to reflect the aggravating and mitigating factors. The final sentence that was arrived at was 11 years' imprisonment with a non parole period of 10 years.

Remand period

[10] At the sentencing hearing, counsel for the State informed the learned trial judge that that the appellant had been in custody on remand for 1 year, 5 months and 10 days. The appellant's contention that the learned trial judge gave no discount in sentence for his remand period is incorrect. At paragraph 5 of the sentencing remarks, the learned judge took into consideration the appellant's remand. The remand period was subsumed in the mitigating factors. According to the learned trial judge, there were two mitigating factors – the remand period and no previous conviction for sexual offence. The learned trial judge gave a total discount of 2 years for these two factors. Mathematically, 1 year, 5 months and 10 days was for the remand period and the balance (about 6 months) was for previous good character.

[11] The discount for previous good character was incorrect. The appellant had a string of previous convictions. Some were spent. But in 2006 he was sentenced to 6 months imprisonment suspended for 2 years for indecently insulting females. In 2008, he was sentenced to 15 months imprisonment suspended for 3 years for larceny. The

appellant is fortunate that he received a discount of 6 months for previous good character, which he was not.

[12] Furthermore, there is no error of law regarding the method the learned trial judge used to discount the appellant's remand period. Sentencing is not a mathematical exercise. Sentencing involves an exercise of discretion involving the difficult and inexact task of weighing factors to arrive at a sentence that fits the crime (*Koroicakau v State* unreported Cr App No CAV0006 of 2005S; 4 May 2006). The relevance of the remand period to the exercise of that discretion is provided by section 24 of the Sentencing and Penalties Act 2009. Section 24 reads:

> 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.

[13] There is no ambiguity in the wording of section 24. It clearly sets out the sentencing court's obligation to consider the remand period in sentence. In the present case, the sentence was reduced to reflect the remand period. The appellant's argument is that the method that was used to make the reduction is incorrect. However, the methodology used for discounting does not involve an error of principle (*Qurai v State* unreported Cr App No CAV24 of 2014; 20 August 2015). Some judges discount the remand period by subsuming it with the mitigating factors, while others discount it separately from the mitigating factors. Unlike a recent decision of this Court in *Domona v State* unreported Cr App No AAU0039 of 2013; 30 September 2016, in *Sowane v State* unreported Cr App No CAV0038/2015; 21 April 2016, the Supreme Court did not prefer one method over the other (see, [16]). The principle that the Supreme Court endorsed was stated at [14]:

> ..., the clear wording of section 24 states it is for the sentencing court to have regard to the remand period and to make the necessary order. The burden is cast upon the court. In doing so it is not necessary to make exact allowance for days and even weeks spent on remand. It depends upon its total significance. (per Gates CJ)

[14] In the present case, the length of the remand period was significant. The learned trial judge considered the remand period and reduced the sentence to reflect that period. Any further reduction will amount to double discounting for the same factor and will constitute an error of principle. The term of 11 years' imprisonment is within the established range of sentence for rape. No error of law or fact has been established regarding the discounting of the appellant's remand period.

Children exposed to circumstances of crime

[15] The victim was the appellant's former partner and also the mother of his three children (19, 18 and 12 years old). The offence occurred in a domestic context. Section 4(3) (b) of the Sentencing and Penalties Act 2009 expressly provides that in sentencing an offender for an offence involving domestic violence, the court must have regard to whether a child or children were present when the offence was committed, or were otherwise affected by it.

[16] In the present case, the children were exposed to the circumstances of the crime and were affected by it. Two were adult children and one was a minor. The victim's 18-year old son gave evidence that he was so traumatized by seeing his mother being dragged into the bedroom by the appellant that he tried to commit suicide, but was stopped by his older sister. Not only the appellant breached the trust of his former partner, he breached the trust of his children. The son's evidence was that he knew his father was drunk when the alleged incident occurred. The victim also gave evidence that the appellant came home drunk. The victim was subjected to physical violence. She sustained physical injuries to her body. The appellant ejaculated inside her, exposing her to pregnancy and sexually transmitted diseases. These were serious aggravating factors that required denunciation from the sentencing judge.

[17] At the end of the day, I am satisfied that the sentence of 11 years' imprisonment fits the crime that the appellant committed. For these reasons, I would dismiss the appeal against sentence.

Rajasinghe JA:

[18] I agree with the reasons and conclusions by Goundar JA.

Order of the Court:

Appeal dismissed.

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Hon. Mr Justice W Calanchini
PRESIDENT, COURT OF APPEAL

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Hon. Mr Justice D Goundar
JUSTICE OF APPEAL

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Hon. Mr Justice T Rajasinghe
JUSTICE OF APPEAL

Solicitors:
Office of the Legal Aid Commission for the Appellant
Office of the Director Public Prosecutions for the Respondent