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

CRIMINAL APPEAL NO. AAU 82 OF 2013
(High Court No. HAC 21 of 2013)

BETWEEN : **SEMI RAINIMA**

Appellant

AND : **THE STATE**

Respondent

Coram : **Calanchini, P**
Gamalath, JA
Prematilaka, JA

Counsel : **Ms. C. Choy for the Appellant**
Mr. L. Fotofili for the Respondent

Date of Hearing : **22 August 2017**
Date of Judgment : **14 September 2017**

JUDGMENT

Calanchini, P

[1] I agree that the appeal against sentence should be allowed. I also agree with the sentence that Gamalath JA has proposed for the reasons stated.

Gamalath, JA

[2] The appellant Semi Rainima faced trial in the Magistrate's Court at Labasa on two counts of Rape, one under sections 149 and 150 of the Penal Code, (Cap. 17) and the other one under section 207(1)(2) (a) of the Crimes Act (CAP 017A). It was alleged that the respective crimes had been committed between 1 and 31 December 2009 and 1 and 28 February 2010, at Vunidamoli Village, Wailevu.

[3] Both the appellant and the victim VY were villagers from Vunidamoli Village, Wailevu. According to the available evidence, at the time of the incident the appellant was only 21 years old, a farmer and was already married.

[4] The victim VY was a teenager, about 16 years of age, when she was ravished by the appellant. The incident made her pregnant and consequently she gave birth to a child in August 2010.

[5] After trial the learned Magistrate convicted the appellant only on the 1st Count and acquitted him on the 2nd Count for as it opined by the learned Magistrate the evidence relating to the 2nd Count was inherently weak to sustain a conviction.

[6] Since the learned Magistrate formed the opinion that the appellant should be suitably sentenced by a High Court exercising powers under Section 190(1)(b) of the Criminal Procedure Act, the case was transferred to the High Court at Labasa.

[7] Having assumed jurisdiction accordingly, the learned High Court Judge sentenced the appellant to 16 years imprisonment with a non-parole period of 14 years, on 15th April 2013.

[8] Against the conviction and the sentence of imprisonment, the Appellant appealed.

[9] Having examined the available material, the learned Single Judge, whilst refusing to grant leave to appeal against the conviction, granted leave to proceed against the sentence of imprisonment.

[10] Based on the learned Single Judge's ruling the appellant renewed his appeal to this Court challenging both the conviction and the sentence. However, on 14 July 2017, the learned Counsel appearing for the appellant informed this Court that the present appeal is confined only to canvass the sentence of imprisonment handed down in the High Court.

[11] The appeal against the sentence contained the following grounds of appeal:

> *"The learned trial Judge erred in principle and also erred in exercising his sentencing discretion to the extent of,*
>
> *(a) taking a high starting point at 12 years imprisonment and then adding separately the aggravating factors which were already part of the starting point thereby punishing the Appellant twice;*
>
> *(b) failing to take into account the period in the remand as a separate factor which would have reduced the sentence;*
>
> *(c) failing to take into account the following relevant factors as part of mitigation which was available on the facts of the matter;*
>
> *(i) the victim was not physically harmed or threatened;*
> *(ii) young offender;*
> *(iii) cooperation with the police during investigations."*

[12] In the written submissions to this Court, supported with the oral submission at the hearing of the appeal, the learned State Counsel presented the position of the State as follows:

> *"(i) that there is merit to the 1st ground of appeal for there was double counting of the aggravating factors and it has had a direct impact on the final quantification of the sentence;*
>
> *(ii) the period in remand custody had not been deducted from the sentence and therefore there is merit to the ground (b);*
>
> *(iii) that ground C(i) is devoid of merit, and therefore arguable;*
>
> *(iv) on the ground of the learned Sentencing Judge's consideration of the fact that the appellant was a young offender, the State concedes that there is merit.*

(v) *cooperation with the police during the investigation – the State sees no merits to this ground."*

[13] Before dealing with the above contentious matters, I wish to discuss briefly the facts of the case on which there is no contention in this appeal;

The facts

[14] The trial against the appellant in the Magistrate's Court Labasa, commenced on 9th October, 2012. The victim and several other witnesses testified for the prosecution and the appellant also testified on his behalf. The incident relating to the charge of Rape occurred in a rural setup where the appellant and the victim were living.

[15] According to the agreed facts, at the time of the incident, the victim was only 15 years old (born on 21 November 1994), a village damsel still attending school. On the other hand at the relevant time the appellant was 22 years old, (date of birth 28 September 1988) whose livelihood was farming.

[16] The agreed facts further show that the appellant and the victim were family friends. The appellant used to visit the victim's house where he narrated various stories to the victim and her siblings.

[17] On the day of the incident during the day time while the victim was alone at home, the appellant visited her house and invited her to accompany him to his coconut land to cut copra. In the desolate atmosphere in the coconut land where only the two of them were present, the appellant had violated the victim. According to the victim's evidence at the trial, the appellant while disregarding her protestations had pulled away her cloths and ravished her. He, after having had sex with the victim left her then and there and went away. She was frightened and did not want to divulge this to her parents. Once again, in February whilst going towards her own family farm the appellant had accosted her and allegedly ravished her for the second time. However, as already stated, since that evidence was found out to be inherently week the learned trial magistrate did not proceed to act upon them. Hence, the verdict of acquittal from the second count.

[18] After the incident also the victim continued to attend the school. What had happened between the appellant and the victim remained a secret, until the signs of pregnancy appeared through morning sickness. Thereafter a complaint was made to the police. The appellant was arrested and charged .The victim gave birth to a child in August.

The overall sentence in the High Court

[19] The learned High Court Judge, having assumed jurisdiction under section 190 (1) (b) of the Criminal Procedure Act, imposed a total sentence of 16 years imprisonment with the prescribed non-parole period of 14 years. The learned High Court Judge's starting point was 12 years. The State has conceded that there is double counting in picking the starting point. The State further concedes that aggravating factors are already subsumed in the 12 years starting point. I see merits in the position taken by the State on this matter.

[20] The learned State Counsel informed this Court that the appellant had been in remand custody for a composite period of 14 months. The learned High Court Judge had not given any credit to that factor in the final computation of the sentence. It is clearly not keeping in line with the legal principles on sentencing. Therefore, the period of 14 months should be deducted from the total period of imprisonment.

[21] The appellant was only 22 years at the time of the commission of the alleged offence. His past record is unblemished. The learned High Court Judge had added one year for his good past record. That shall remain intact.

In the appeal

[22] This appeal against the sentence should be treated favourably. There is merit to the appellant's contention, with which the State has also agreed partially, that the Learned High Court Judge has erred in arriving at the sentence of 16 years. For instance, the learned High Court Judge had erred by not reducing the appellant's 14 months period in remand custody from the final sentence.

[23] In reviewing the sentence of imprisonment in the lower Courts this Court is guided by the dicta found in, *inter alia* the following decisions;

House v. The King (1936) 55 CLR 449;

> *"If the trial Judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the fact, if he does not take into account some relevant considerations, then the Appellate Court may impose a different sentence. This error may be apparent from one reason for sentence or it may be inferred from the length of the sentence itself."*

[24] In **Simeli Bili Naisua v. The State**, Criminal Appeal No. CAV 0010 of 2003;

> *"If it is clear that the Court of Appeal will approach an appeal against sentencing using the principles set out in **House v. The King** (1936) 55 CLR 449 and adopted in **Kim Nam Bae v. The State**."*

[25] In **Kim Nam Bae v. The State** Criminal Appeal AAU0015 of 1998S, High Court Criminal Case No. HAC 0002 of 1997, it was decided that;

> *"The task of sentencing is not an exact science which is capable of mathematical calculation. An appropriate sentence in any case is fixed by having regard to a variety of competing considerations. In order to arrive at the appropriate penalty for any case, the Court must have regard to sentences imposed by the High Court and the Court of Appeal for offences of the type in question to determine the appropriate range of sentence."*

[26] I have given the due consideration to the aforementioned dicta and the factual matrix of the case. As conceded by the State as well, the learned High Court Judge's final computation of the sentence had been based on certain erroneous considerations.

[27] Taking into account the factual matrix and the overall attendant circumstances relating to this appeal, it is my considered opinion that the sentence of 12 years imprisonment, with the non-parole period of 11 years would serve the course of justice. The sentence will be effective from 15 April, 2013.

Prematilaka, JA

[28] I agree.

Order

1. *The appeal against sentence is allowed.*

2. *The sentence of 12 years imprisonment with a period of non parole of 11 years is imposed. The sentence will be effective from 15 April, 2013.*

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

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Hon. Justice S. Gamalath
JUSTICE OF APPEAL

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Hon. Justice C. Prematilaka
JUSTICE OF APPEAL