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

CRIMINAL APPEAL NO. AAU0021 of 2014
(High Court HAC 319 of 2011)

BETWEEN : **AISAKE NAULUMOSI**

Appellant

AND : **THE STATE**

Respondent

Coram : **Chandra JA**
Gamalath JA
Rajasinghe JA

Counsel : **Ms. S. Nasedra for the Appellant**
Ms. J. Prasad for the Respondent

Date of Hearing : **16 February 2018**

Date of Judgment : **8 March 2018**

JUDGMENT

Chandra JA

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

Gamalath JA

[2] The Appellant was indicted in the High Court of Suva under the following three counts;

(1) Rape, contrary to Section 149 and 150 of the Penal Code, Cap 17, the offence allegedly had taken place between 1st January 2003 to 31st December 2003.

(2) Two counts of Indecently assaulting the victim contrary to section 154(1) of the Penal Code and contrary to section 212(1) of the Crimes Decree No. 44 of 2009; allegedly committed between 1st January 2005 and 31st December 2007; and 1st January 2011 to 18 September 2011, at Kinoya and Nabua, respectively.

[3] At the conclusion of the trial in the High Court, the appellant was convicted on all three counts and the learned trial Judge imposed a cumulative sentence of 13 years imprisonment of the appellant with a ten years non-parole period.

[4] This appeal is presently to canvass both the conviction and the sentence imposed by the High Court and the following two grounds are advanced for the said purpose:

Against the conviction

> The learned Judge failed to take into account and warn himself in his Judgment on the danger of relying upon inconsistent evidence given by the complainant in Court to PW2 Savaira Sigalevu and the Doctor were different.

Against the sentence

> The learned sentencing Judge erred in principle by double (sic) the aggravating features of the offending.

The First Ground of Appeal

[5] With regard to this ground of appeal against the conviction, I have preened through the entirety of the evidence adduced in the trial to locate any area of the evidence where the alleged inconsistencies within the testimony of the victim could be found or whether there are material inconsistencies between the evidence of the witnesses called in favor of the prosecution's case. Particularly, a very special attention was paid to the evidence of Savaira Sigalevu, the teacher with whom the victim had confided about the ongoing sexual harassment at the hand of the appellant and the evidence of the medical officer Dr James Fong, who medically examined the victim during the course of the investigation into the alleged crimes. With regard to the contradictions, if I may use the legal jargon, they are called contradictions *per se* or *inter se*. After a careful examination of the totality of the evidence adduced in the trial, I am convinced that there is nothing on the face of the record to lend support to the first ground of appeal and thus it is unsustainable due to its tenuous nature.

[6] Stating the evidence briefly, the victim became prey to the sexual gratification of the appellant, who is her step father (meaning the *de facto* partner of the victim's mother who came forward in support of the appellant at the trial by becoming a witness for the defense), at an innocent tender age of six and the circumstances under which she had been living had prevented her from reporting the ongoing saga to anyone who could come in aid to rescue her.

[7] According to the victim's evidence at the trial ,in 2003 whilst being a student at grade 1, at the age of barely 6 years, she came across the first sexual encounter at the hands of the appellant, who after calling her into his bed- room , indulged in having sexual intercourse with her. Between this incident and the alleged second incident, which provides the basis for the second count on the indictment, one can observe an unusually strange lengthy interval. Accordingly, the alleged second incident had happened whilst she was a 13 years old student at grade 5. The appellant had approached her in the room where she was studying and in a sensual manner ran his hands all over herself.

Repeating the same behavior once again in 2007 the appellant had indecently assaulted the victim by touching her whole body with his hands. Being distraught by this intermittently carried out sexual aggression of the appellant towards her the victim had finally decided to break the silence by reporting her agony to her school teacher Savaira Sigalevu, who in turn had reported the matter to the police.

[8] Having been examined medically the victim was found with injuries to her vagina, the causation of which has been described by the Doctor as due to "traumatic entry to the vagina".

[9] The above material reflects in essence the gist of the case for the prosecution at the trial. As stated at the very outset, after a careful scrutiny of the entirety of the evidence for the prosecution of this case, the tasks of finding any inconsistency either inter *se or per se* is like looking for a needle in a hay stack. Under the circumstances the first ground of appeal is totally untenable.

[10] Insofar as inconsistencies/contradictions are concerned in a general legalistic sense the law is that no prudent and wise judge would disregard a testimony due to mere proof of a contradiction but that a wise judge should critically assess and evaluate the contradictions. The judge should pointedly direct his attention to this fundamental issue and also consider whether the witness has been given an opportunity of explaining those statements which are marked as contradictions.

In the case of **Bharwada Bhoginbhai Hirjibhai -v- State** of Gurajat 24 May 1983, equivalent citations 1983 AIR 753, 1983 SCR (3) 280, the Supreme Court of India pronounced that the danger of disbelieving an otherwise truthful witness on account of trifling contradictions is unacceptable.

> *"While appreciating the evidence of a witness, the approach must be whether the evidence of a witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinize the evidence more particularly*

keeing in view the deficiencies, draw backs and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hyper – technical approach by taking sentences torn out of context here and there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole.

The reasons are;

(1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.

(2) Ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrences which so often have an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.

(3) The powers of observation differ from person to person. Where one may notice, another may not. An object or movement might emboss its image on one person's mind whereas it might go unnoticed on the part of another;

(4) By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder.

(5) In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess work on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends. On the "time sense" of individuals which varies from person to person.

(6) Ordinarily a witness cannot be expected to recall accurately the sequences of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up, when interrogated later on;

(7) A witness though wholly truthful is liable to be overawed by the court atmosphere and the piercing cross examination made by counsel and

out of nervousness mix up facts, get confused regarding sequences of events, or fill up details from imagination on the spur of the moment. The subconscious mind of the witness sometimes so operates on account of the fear of looking foolish, or being disbelieved, though the witness is giving a truthful and honest account of the occurrence witnessed by him. Perhaps it is a sort of a psychological defence mechanism activated on the spur of the moment".

[11] Turning back to the appeal again that the predicament of the victim of this appeal, as a result of the terrible ordeal she had been forced to live through must be an overbearing cross on her shoulders. Having carefully examined the totality of the evidence of this appeal I see no merits to the ground of appeal against conviction and therefore this ground should fail.

The Second Ground; The learned sentencing Judge erred in principle by double counting (sic) the aggravating feature of the offending

[12] The learned trial Judge, having convicted the appellant, sentenced him in the following manner on 21 November 2013.

[13] For the First Count of Rape - 12 years imprisonment as the starting point; 3 years was added for aggravating factors and 2 years was deducted for mitigating factors.

For the Second Count of Indecent Assault, 2 years imprisonment as the starting point; added another 2 years for aggravating factors and deducted 1 year for mitigating factors.
For the Third Count of Indecent Assault; 2 years imprisonment as the starting point; added 2 years period for aggravating factors to reach the period of imprisonment to 4 years; deducted one year for mitigating factors.

The learned trial Judge ordered that all sentences should run concurrently to each other, making the total period of imprisonment to 13 years with a non-parole period of 10 years.

[14] The learned trial Judge had quite correctly and exhaustively dealt with both the factual basis and the relevant legal principles applicable to sentencing before arriving at the finality of the sentence.

[15] The most reprehensible feature in this case is that the victim was just a six years old child when the appellant first subjugated her to his sexual aggression. As it has been repeatedly pronounced by the Courts of Fiji that,

> *"The courts have made it clear that rapist will be dealt with severely. Rape is generally regarded as one of the gravest sexual offences. The physical and emotional consequences of the victim are likely to be severe."*
>
> ***State -v- Lasaro Turagabeci and Others***, HAC 0008 of 1998.

[16] In the case of **Droniki -v- The State** [2006] FJCA 26; AAU0001 2005 (24 March 2006) the court has considered the nature of the attitude that a sentencing judge should adopt in imposing a sentence of imprisonment against a rapist whose aggression has been directed at a juvenile. In the instant case, the learned trial Judge has taken into his consideration the guiding principles so eloquently pronounced in those decided cases.

[17] The dicta in the case of **State -v- AV** [2009] FJHC 24; JAC 192 2008 (2 February 2009) had been in the forefront of the learned Sentencing Judge in the computation of the appropriate sentence in this case, and accordingly it has been decided that the level of deterrence should be commensurate to the gravity of the crime.

[18] Insofar as the other two convictions are also concerned the learned trial Judge had given due recognition to the principles on sentencing for such crimes and there is nothing objectionable to his approach in that behalf.

[19] Finally, the appellant clearly had exploited the filial affection of the victim towards him and treated the six years old child filled with innocence in the most reprehensible manner. In the absence of any report of forensic analysis of the indelible impact that this sordid

affair may have left with the victim psychologically, emotionally and in any other manner, the sentencing judge is to a great extent handicapped in quantifying sentences accurately.

I find there is no merit to the second ground of appeal against the sentence and therefore, this ground should also fail.

Rajasinghe JA

[20] I have read in draft the judgment of Gamalath JA and I agree with the reasoning and the conclusion proposed therein.

Order of Court

The appeal is dismissed. The conviction and the sentence are affirmed.

Hon. Mr. Justice S. Chandra
JUSTICE OF APPEAL

COURT OF APPEAL FIJI

Hon. Mr. Justice S. Gamalath
JUSTICE OF APPEAL

Hon. Mr . Justice T. Rajasinghe
JUSTICE OF APPEAL