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

CRIMINAL APPEAL NO. AAU0049 of 2014
(High Court HAC 102 of 2012)

BETWEEN	:	**OTETI SIVOINATOTO**
		Appellant
AND	:	**THE STATE**
		Respondent

Coram	:	**Calanchini P** **Gamalath JA** **Bandara JA**
Counsel	:	**Appellant in person** **Mr A Singh and Mr S Babitu for the Respondent**
Dates of Hearing	:	**11 and 25 May 2018**
Date of Judgment	:	**1 June 2018**

JUDGMENT

Calanchini P

[1] I agree that the appeal against conviction and sentence should be dismissed.

Gamalath JA

[2] The Appellant is seeking through this appeal to assail the conviction on a charge of Rape pronounced against him in the High Court at Lautoka, on 25 March2014, and he relies on the following four grounds of appeal;

> *"First Ground of Appeal;*
> *That the learned Trial Judge erred in law and fact by accepting the evidence of MN on the use of the knife when MN did not mention anything about the knife in her police statement. This was highly prejudicial evidence against the Appellant and the acceptance of the said evidence contributed substantially to the conviction and sentence.*
>
> *Second Ground of Appeal;*
> *That the learned Trial Judge erred in law and fact when he failed to direct the assessors and himself that the omission of a knife threat when the complainant made her police statement and the stating of such evidence in Court can only go to the complainant's credibility.*
>
> *Third Ground of Appeal;*
> *That the learned Trial Judge erred in law and fact when he failed to direct the assessors and himself of count one as a representative or specimen count and that a conviction is only appropriate when there is no reasonable doubt and all assessors and the trial Judge are to be unanimous of one incident of rape did take place and the trial Judge's failure to do so, renders the summing up defective and cause doubt on the safety of the conviction.*
>
> *Fourth Ground of Appeal;*
> *That the learned Trial Judge erred in law and in fact when he failed to direct the assessors and himself that if the evidence given by the complainant refers to one act of sexual misconduct, then the particulars of the offence must be sufficient for the defendant to properly prepare his defence and in this case particulars of offence given was manifestly insufficient."*

[3] The first two grounds are based on a common premise directly relating to a factual issue arising out of "a knife" to which the complainant, MN (name suppressed) had referred in her evidence. The two grounds, therefore, can be considered together. The evidence of the case in brief is as follows;

[4] MN was a 15 years old, Form 3 student, when the appellant had allegedly raped her. According to her evidence, the appellant is a distant cousin brother of her mother. After MN's father died, the appellant had offered to sponsor the education of MN. As a result MN had moved to the house of the appellant to live with the appellant and his wife and from there to attend school. The appellant's wife was running a small business at Coral Coast. She used to leave on Wednesdays each week and returned on Fridays or Saturdays. Whenever that happened the appellant and the complainant were alone at home. MN said that the appellant used to "touch her body," when both of them were alone at home.

In 2010, on an unspecified date, in the night, while MN was sleeping in the bedroom the appellant had entered the room and had sexual intercourse with MN, forcibly. According to MN this single incident had been one of the incidents of a series of incidents of sexual advances made by the appellant over a considerable period of time.

Unfortunately at the trial a clear narration of the incidents relating to the alleged sexual advances has not been elicited through MN's evidence. In the sense, the complainant's narrative of the events relating to the sexual harassments at the hand of the appellant has not been obtained in a sequential manner with details. However, according to her evidence on the whole, it is possible to gauge that the appellant had been making sexual advances towards MN repeatedly for a considerable period of time. On certain such occasions the appellant indulged in having sexual intercourse without her consent. Eventually, MN became pregnant. The appellant wanted the pregnancy terminated and he had been persuading MN to do certain things like drinking various concoctions and eating eggs, most probably kind of unorthodox methods to procure an abortion.

At the trial the complainant was asked as to why she did not take any steps to report the incidents either to the police or to anyone else and in responding MN had stated that; *"I did not report the matter to police. He used to take the knife and threaten and he also slapped me."*

The appellant's main complaint against MN's evidence revolves around this fact. At the trial, in the cross-examination of MN, it was pointed out to her that the appellant's threats at the knifepoint had never been reported to police, for MN's police statement does not show that. The appellant claims that this omission is tantamount to a contradiction that makes the evidence of the complainant untrustworthy.

The appellant's defense in the trial had been one of consent. The Counsel appearing for the appellant at the trial suggested that it was the complainant who lured the appellant to indulge in sex and MN denied the suggestion.

In the re-examination of the complainant, the complainant was specifically questioned as to why she did not tell the police about the threats by the appellant at knifepoint. The complainant's response was that she had been in "a great shock" and as a result she had failed to tell the police about this important matter.

[5] The appellant gave evidence at the trial. He denied that he ever had sex with the complainant without her consent. He stated that it was the complainant who enticed him to have sex with her, starting from 2010. Accordingly, one day in 2010, around 6.30pm, whilst cooking in the kitchen the complainant had walked into the kitchen with her towel and dragged him into her bedroom and pleaded with him to have sex with her. He was reluctant as his wife and some friends were also in the front of the house chatting away. However, the complainant was persisting and finally he had caved into her request.

In the trial the appellant's caution interview was admitted in evidence without any objection. In the caution interview also he had maintained that he had consensual sex with the complainant.

However, one can find by comparison that there is an incompatibility between his evidence at the trial and the relevant portions of his caution interview with regard to the manner in which the first sexual encounter with the complainant had occurred. According to the caution interview the appellant had started the sexual intimacy by "caressing" the complainant and according to him this had been continuing for a considerable length of time, culminating in him having sexual intercourse with MN, with her consent. Another important fact is that in the cross-examination of the complainant, these propositions were never put to her to rebut her version of the incident.

[6] As referred to earlier, the first two grounds of appeal are revolving around the fact that the complainant's statement to police has no mentioning of the "threats at knifepoint" and the seriousness of the omission shall have a direct impact on the credibility of the evidence of the complainant, who denied that she consented to having sex with the appellant.

[7] Focusing on the summing-up on this issue, I find that the learned Trial Judge had dealt with this aspect adequately and accurately. In the summing up, under the sub-heading of "Consistency" the learned Trial Judge had directed the assessors and himself on how they should evaluate the evidence of the complainant in the light of an omission.

> *"You must also consider the issue of omission to mention something that was adverted to in evidence on a previous occasion on the same lines. You must consider whether such omission is material to affect credibility and weight of the evidence. If the omission is so grave, you may even consider that to be a contradiction so as to affect the credibility or weight of the evidence or both."* (Emphasis added)

[8] I find that the above directions are satisfactory and there is no serious objection to raise against it.

[9] When a court is dealing with the issues arising out of "contradictions", "*omissions*", it is necessary for the Court to carefully examine the impact that such discrepancy could have on the total credibility of evidence of a witness. As decided in the case of **Appabhai v.**

State of Gujarat, AIR 1988, S.C. 694, (1988 Cri.L.J.848) (a decision of the Indian Supreme Court).

> *"The Court while appreciating the evidence must not attach undue importance to minor discrepancies. The discrepancies which do not shake the basic version of the prosecution case may be discarded. The discrepancies which are due to normal errors of perception or observation should not be given importance. The errors due to lapse of memory may be given due allowance. The court by calling into aid its vast experience of men and matters, in different cases must evaluate the entire material on record by excluding the exaggerated version given by any witness. When a doubt arises in respect of certain facts alleged by such witness, the proper course is to ignore that fact only unless it goes into the root of the matter so as to demolish the entire prosecution story. The witnesses nowadays go on adding embellishment to their version perhaps for the fear of their testimony being rejected by the Court. The Courts, however, should not disbelieve the evidence of such witnesses altogether if they are otherwise trustworthy."*

In the case of **Arjun and Others v. State of Rajasthan**, (1994) AIR - SC-2507, it was held that; (A decision of the Indian Supreme Court).

> *"A little bit of discrepancies or improvement do not necessarily demolish the testimony. Trivial discrepancies, as is well known, should be ignored. Under circumstantial variety, the usual character of human testimony is substantially true. Similarly, innocuous omissions are inconsequential."*

[10] More often contradictions and omissions become the main tool used in courts to evaluate the testimonial trustworthiness of a witness's' evidence. As defined in the Oxford Dictionary "contradictions" means 'to offer the contrary'. On the other hand, if a witness has testified in the examination-in-chief on a certain thing which he has omitted to state in his statement to the police, it is called "omission". If the said omission is on minor points, it is not contradiction and court will not take cognizance of those omissions. Court will take cognizance of those omissions which are on material points and they are called "contradictions by way of omissions". In order to prove the omissions, it is necessary to find out as to what the witness has deposed before the court in the examination-in-chief.

[11] Any statement of a witness made to an investigating police officer does not form part of the evidence in trial. Court would not be looking into police statements of witnesses to find out the truth involved in a case. However, if any party to a law suit is depending on 'contradictions' or 'omissions' to assail the trustworthiness of the evidence of any witness, it is necessary not only to highlight the 'contradictions 'or 'omissions', but also to prove them at trial, so that the court could consider the effect of them according to the criterion laid down in the decided decisions referred above.

[12] Whenever it appears in the proceedings of a trial that the witness's evidence is tainted with certain contradictions and/or omissions, opportunity should be given to such witness to explain the basis for such infirmities. If the explanation is plausible that would have a direct impact on the credibility issue.

[13] In the case of **Sri Cruz Pedro Pacheco v. State of Maharashtra**,1998 (5) Bom. L.R. 521-1998 Crim.L.J.4628, it was decided that; (an Indian Decision)

> *"Credibility of the witness can be impeached only after obtaining his explanation for the contradictory statement and by pointing out that the explanation given by him is not true or unsatisfactory. Then only the Court will be in a position to consider whether or how far the credibility of that witness is affected in that court. It is absolutely necessary to give the witness an opportunity of explaining the alleged contradiction. It must be borne in mind that the trial has to be fair not only to the accused but also to the witness who may be the aggrieved party himself."*

[14] Reverting back to the proceedings of the instant appeal and having examined the evidence of the investigating police officers, I am unable to find any material to conclude that the defense had proved the omission relating to the "alleged used of a knife to threaten the complainant." The fact that the omission upon which the appellant placed reliance to impeach the credibility of the victim's evidence has not been properly proved through the police officer who recorded the statement of the complainant is a lapse on the part of the defense. Any party that relies on infirmities to assail the strength of a case of the

opponent should be vigilant to ensure lapses of this nature are avoided. Unproved infirmities such as contradictions or omissions should not be considered as providing a valid basis in law for a court to take cognizance. Such infirmities sans any proof are tantamount to mere suggestions without any legal strength being attached to them. English Common Law also recognizes the requirement of proving contradictory statements and the need for the witness under scrutiny to be given an opportunity to explain the reasons for infirmities; see, *Archbold* 2005,para 8-124a, pg 1205; **Rv. Bashir**, 54 Cr.App.R.1 at 5; **R v. Funderburk**,90 Cr.App.R.466 CA.

[15] The complainant in this case has given a reason for her failure to inform the police about the threat hurled at her by the appellant at knifepoint. She explained that she was in great shock and could not tell the police about the threats. As this part of evidence with details had surfaced in the re-examination of the witness, the defense with the permission of Court, should have cross-examined her to challenge her evidence. The evidence of the complainant relating to this aspect remains unchallenged.

[16] I have already dealt with the relevant parts of the summing up in which the learned Trial Judge had dealt with the issues relating to the first and the second grounds of appeal. There is nothing objectionable to the relevant directions contained therein. In the circumstances, I find that the first and the second grounds are without any merits and therefore, cannot succeed in this appeal.

The Third Ground of Appeal

[17] To repeat the 3rd ground verbatim for clarity is,

> *"The learned trial judge erred in law and fact when he failed to direct the assessors and himself of count one as a representative or specimen count and that a conviction is only appropriate when there is no reasonable doubt and all assessors and trial judge are to be unanimous of one incident of rape did take place and the trial judge's failure to do so , renders the summing up defective and cast doubt on the safety of the conviction."*

[18] I find that this ground of appeal is unclear and ambiguous. However, later on, in order to make things clear, the appellant had stated that the Learned Trial Judge had "failed to direct himself to the law, especially section 70(3) of the Criminal Procedure Act 2009."

[19] In **State v. Etonia Kabaura** [2010] HAC 117/105, it was cited that Sec 70(3) of the Criminal Procedure Act 2009, (Cap. 021A) has codified the common law position on representative charge.

> *"When the prosecution alleges multiple incidents of sexual offence by charging with a representative count, the Court must be satisfied that at least one incident of sexual offence had occurred over the period covered by the charge to convict the accused."*

A representative count is a single charge representing more than one offence of an identical nature, that is to say, the charge represents more than one offence of the kind alleged. A representative count is also referred to as "sample" count. A representative count alleges the commission of an offence in circumstances where that offence is representative of other offences of an identical nature; which have also been committed. For example where an accused person indecently assaults a victim over a period of time, e.g. 1 month, but the complainant is uncertain as to exactly how many times the conduct occurred other than to say it occurred more than once, the prosecution may allege a single charge of indecent assault that acts as the specimen of the more systematic pattern of conduct alleged by the complainant. Where a charge sheet or indictment contains a representative count the sentencing court must be informed that it is representative in nature. In addition, the Court must be advised as to the precise offending which is to form the basis of the representative charge for sentencing purposes. Australian Courts dealing with the subject had observed as follows;

DPP v. CPD [2009] VSCA 114 (2009) 22 *VR533;*

> *"Representative counts are relevant at sentencing for two reasons; First, a representative count prevents an accused person submitting in*

mitigation that the offence was isolated or out of character incident – but is not itself an aggravating factor."

DPP v. McMaster (2008) 19 VR 191 at [42] – [49].

Second, the sentencing Court must consider the accused's behavior demonstrated by the representative count to place the offending in its full context – or consider the full picture - and give appropriate weight to culpability specific deterrence and rehabilitation; **DPP v. CPD** (2009) 22 VR 533 at [38].

One legitimate means by which the relevant circumstance of the offence can be expanded beyond the scope of the particularized offending is by the charging of representative or sample charges (formerly representative counts). By this mechanism, the factual significance of a charge is revealed not just by particulars, but additionally by the terms of an agreement between the parties. Discussed in **R v. SBL** [1998] VSCA 144.
R v. Giordano [1998] 1VR 544 at 549 Winneke, P observed;

"A general overview of the sentences imposed by Courts over a substantial period for offences of a similar character must inevitably play its part in provoking the instinctive reaction of any court which is asked to consider whether a particular sentence is manifestly inadequate."

[20] Harking back to the decision in **State v. Ebonia Kabaura**, in the trail of this appeal, although the Appellant was originally charged for having committed representative counts of rape, the evidence of MN, points directly to a single act of rape that had happened in 2010. In any event since the appellant had admitted having sex with the complainant, with consent I do not consider there is a serious miscarriage of justice occurred as a result of the manner in which the first count of Rape had been presented.

[21] In the light of such material the third ground of appeal is without any merit.

[22] The fourth ground of appeal is that;

"The learned trial judge erred in law and in fact when he failed to direct the assessors and himself that if the evidence given by the

complainant refers to one act of sexual misconduct, then the particulars of the offence must be sufficient for the defendant to properly prepare his defence and in this case particulars of offence given was manifestly insufficient".

[23] The appellant states in his written submissions that he is relying on the same argument advanced under the third Ground of Appeal in support of this ground as well. One can easily identify the commonality of the two grounds. It is to be noted that at no stage during the trial, especially at the commencement of the trial, there was any objection raised to the manner in which the "particulars of the offence" have been given. The appellant had defended himself without any apparent difficulty and in fact offered to testify at the trial. His was a defence of consent and there is nothing on record to conclude that he was anyway misdirected by the particulars of crime. In support of this ground there are no authorities cited and in the circumstances, I am unable to agree with the contention that the appellant was mislead in any way by the purported inadequacy of the particulars of crime given with the charges. I, therefore, find no merits in this ground of appeal as well.

[24] On the Sentence; although there is no specific ground of appeal advanced against the Sentence, in his submissions the Appellant has stated as follows;

"We submit that the trial judge had made serious errors that should render the conviction unsafe and the corresponding sentence awarded in Count One must therefore be quashed.

Given that the Appellant had pleaded guilty to Count Two, we submit that the Appellant had now been in prison for four years and had served the sentence awarded in count two.
We therefore submit that the Appellant must justly be released from prison forthwith."

The learned Trial Judge imposed the following sentences;

1st Count of Rape; 13 years, and for the 2nd Count of Abortion 2 years. The Learned Judge, applying the totality principle ordered the sentences to be served concurrently. The learned High Court Judge's starting point for Rape was 11 years. Since this had been

inconformity with the decisions of **Raj v. State** [2014] FJSC 12; CAV0003.2014 (20 August 2014) there is no error in deciding on the starting point which is at the lower range of the tariff for Rape.

The learned trial Judge having considered the above decisions has picked 11 years imprisonment as the starting point for the charge of Rape. He has considered the following aggravating factors to increase the sentence of imprisonment by 3 years.

(a) The victim was of a younger and tender age;
(b) You completely breached the trust shared between you and the victim;
(c) Victim was subjected to more than one sexual act;
(d) You had made the victim sexually active at a young age;
(e) You had traumatized the life of the victim.

Clearly the grounds (a), (c) and (d) are not aggravating factors.

Following the dicta in **Raj v. State** [2014] FJSC 12; CAV0003.2014 (20 August 2014) I find there is nothing objectionable to the starting point picked by the learned High Court Judge.

[25] Further in relation to the aggravating factors in this case there is evidence that the appellant had abused the position of trust placed on him by the mother of the complainant and the complainant herself who by accepting the appellant's offer to sponsor the complainant's education had moved into the appellant's house to live with him. One can assume that the initial trust that existed between the complainant and the appellant was similar to that of a foster father towards an adopted daughter. Following her father's demise the complainant may have moved into the appellant's house expecting him to help her to further her educational ambitions. It is evidence in this case that the complainant's mother may have had financial difficulties in looking after the educational prospects of the complainant. In this situation one cannot ignore the fact that under the roof of the appellant a 15 years old complainant may have been in a vulnerable situation.

[26] At this juncture I wish to refer to the evidence of the second witness called by the prosecution namely Mereani Lomawai. According to her evidence somewhere in April

2011 the appellant had visited her at her house and informed her that the complainant was having a stomach ache. Then the witness had visited the appellant's house where she met the complainant. On examination of the complainant the witness had found that the complainant was pregnant. The witness has inquired from the complainant as to how she became pregnant. Only after the third time of enquiring the complainant started to cry and informed the witness that the accused was threatening her. The witness has told the appellant that he had done "a lowly thing". At that stage the appellant has told this witness that the complainant was his sister's daughter. These facts would clearly show the vulnerable situation under which the complainant had been living in the house of the appellant. In addition there was another very important aggravating factor that the learned Trial Judge had failed to take into account in the computation of the final sentence of imprisonment. The complainant in her testimony stated that the appellant threatened her at knifepoint and used to slap her to subjugate her. This is evidence of violence in a sexual offence case. Although some of the aggravating factors referred in the sentencing order of the learned trial Judge are not accurate in its concepts, the fact that the complainant was in a vulnerable position and the fact that the appellant had used violence would provide ample grounds of aggravating factors for the justification of the sentence imposed by the learned High Court Judge. Under the circumstances, I do not think that a different sentence should have been passed in terms of section 23(3) of the Court of Appeal Act 1949.

Conclusion

[25] In the light of the above reasons I find that there is no merit to either of the grounds advanced against the conviction or the sentence.

Bandara JA

[26] I agree with the reasons and the conclusion arrived at by Gamalath JA.

Orders of the Court

(i) *Appeal against conviction dismissed.*

(ii) *Appeal against sentence dismissed.*

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

Hon. Justice S. Gamalath
JUSTICE OF APPEAL

Hon. Justice W. N. Bandara
JUSTICE OF APPEAL