IN THE SUPREME COURT OF FIJI
AT SUVA

CRIMINAL PETITION NO: CAV 028 OF 2016
[Court of Appeal No: AAU 27 of 2012]

BETWEEN	:	**ANTHONY**
		Petitioner
AND	:	**THE STATE**
		Respondent
Coram	:	**The Hon. Mr. Justice Suresh Chandra,** **Justice of the Supreme Court**
		The Hon. Mr. Justice Buwaneka Aluwihare **Justice of the Supreme Court**
		The Hon. Mr. Justice Priyantha Jayawardena **Justice of the Supreme Court**
Counsel	:	**Mr. S. Waqainabete for the Petitioner** **Ms. P. Madanavosa for the Respondent**
Date of Hearing	:	**6 April 2017**
Date of Judgment	:	**20 April 2017**

JUDGMENT

Chandra J

[1] The Petitioner seeks special leave to appeal against the judgment of the Court of Appeal dated 27th May 2016 by which his conviction and sentence was affirmed.

[2] The Petitioner was charged with one count of rape contrary to section 207(1)(2)(b) of the Crimes Decree No.44 of 2009. After trial the Petitioner was convicted by the High Court at Lautoka on the Assessors returning a unanimous opinion of guilt with which the learned High Court Judge concurred. The Petitioner was sentenced to a term of 14 years imprisonment with a non-parole period of 12 years.

[3] The Petitioner's application for leave to appeal against his conviction and sentence was refused by a Single Judge of the Court of Appeal.

[4] The Petitioner thereupon appealed to the full court of the Court of Appeal and the Court of Appeal by judgment dated 27th May 2016 dismissed his appeal.

[5] In his application seeking leave to appeal to the Supreme Court he has set out the following grounds :

Conviction

(i) That the learned Trial Judge in the High Court had erred in law and in fact when he did not disqualify the other two assessors.

Sentence

(i) That his sentence was harsh and excessive taking into account some other related cases whereby other accused persons received lenient sentences.

Factual Matrix

[6] The evidence led at the trial revealed that the victim MB who was 5 years and 10 months old, was with her mother, Leba Latileta, and aunt Mereani Tamoi in the afternoon on 26 November 2010. The petitioner who was living about 50 metres away from the dwelling of the witnesses in the same neighbourhood, was well-known. They had been on visiting terms to each other for several months until 26 November 2010 on which date the

incident took place. The Petitioner had come with a lamb neck around 4.00 p.m. and requested Leba Leatilata to cook a curry. As she did not have chilies at home, the Petitioner had offered to give her the chilies and took MB to send chilies for Leba Latileta. Later, as witness Leba walked up to the petitioner's shop to bring potatoes, she found the slippers of her daughter, MB, outside the house of the petitioner while all doors of the house remained closed. She as a curiosity stricken witness then knocked on the doors, as a result of which, the petitioner had opened the front door. MB, immediately upon seeing the mother, told that the petitioner poked into her vagina. MB was subjected to medical examination by the Pediatric Registrar of Lautoka Hospital where redness on the left labia majora and two tears of the hymen were observed. The doctor had come to the conclusion that her findings were consistent with the history of penetration of the vagina with a finger, as narrated by the victim. At the trial after the close of the prosecution case, the petitioner chose to remain silent and did not call any witnesses.

The Present Application

[7] The ground of appeal raised by the Petitioner against his conviction was not raised in the Court of Appeal. It has been the practice not to allow fresh grounds of appeal to be raised in applications for leave to appeal to the Supreme Court except where there has been a grave miscarriage of justice.

[8] In **Tuwai v State** [2016] FJSC 35; CAV0013.2015 (26 August 2016) it was held that where new grounds of appeal are raised for the first time and which were not raised in the Court below, that the Supreme Court may only allow it in the most exceptional circumstances.

[9] The ground raised by the Petitioner presently is in relation to the decision to proceed with two Assessors after the third Assessor was disqualified by the learned Trial Judge at the commencement of the trial.

[10] Learned Counsel who appeared on behalf of the Petitioner at the trial had objected to one of the Assessors on the basis that the said lady Assessor had been seen in conversation with the Chief Investigating Officer. Counsel had moved to have the said Assessor disqualified and to proceed with the trial with the remaining two Assessors.

[11] The learned trial Judge had upheld the said objection and disqualified the said Assessor from participating at the trial and decided to continue with the remaining two Assessors.

[12] Learned Counsel having at first agreed to continue with the remaining two Assessors, took up an objection after the trial had come to an end, regarding their participation at the trial on the basis that they would have been biased as they had been with the Assessor who was disqualified in the early stages of the trial.

[13] Counsel for the Petitioner and the State had filed written submissions regarding this objection and the learned trial Judge by a written ruling dated 4 April 2012 rejected the application made by Petitioner's Counsel.

[14] The Petitioner did not challenge the said Ruling either before the Single Judge of the Court of Appeal or before the full Court of the Court of Appeal.

[15] It is too late in the day to bring in this ground of appeal specially when the threshold to grant leave to appeal to the Supreme Court is very high in terms of Section 7(2) of the Supreme Court Act, 1998.

[16] The failure to urge a ground of appeal before the Court of Appeal cannot be considered to be an exceptional circumstance in considering an application for special leave to appeal to the Supreme Court and therefore this ground of appeal has no merit.

[17] The other ground of appeal is as regards the harshness of the sentence imposed on the Petitioner.

[18] The Petitioner has been sentenced to 14 years imprisonment with a non-parole term of 12 years.

[19] At the hearing of this application Counsel for the Petitioner submitted that the Petitioner was now 70 years old and that the sentence was harsh and excessive.

[20] Although the Petitioner had appealed against his sentence in his appeal to the Court of Appeal, the Court of appeal did not interfere with the sentence on the basis that the sentence was within the tariff of 10 to 16 years set in **State v Ananda Abhaya Raj** (HAC 09/2010) where 12 years was picked up as the starting point to reach a 12 year term of imprisonment when the offender had raped a ten year old step daughter.

[21] In his sentencing judgment the learned trial Judge had stressed on the fact that there was a great disparity between the ages of the victim (5 years and 10 months) and the offender who was 66 years at the time of sentencing. He also considered the fact that the Petitioner had two grown up sons, a daughter and two grandchildren, that he either knew or ought to have known the value of children and that they needed protection and shelter from adults and that the victim would have been in the same age range as his grandchildren and thereby occasioned a serious breach of trust and morality.

[22] The learned trial Judge had also considered the fact that the conduct of the Petitioner had been a calculated one as he had taken the victim into a closed house and committed the crime.

[23] The learned trial judge at paragraph 18 of his sentencing judgment stated:

> "The accused's engagement in his unilateral sexual activity with a little girl who was insensitive to such activity is most abhorrent. This kind of immoral act on a little girl of MB's standing is bound to yield adverse results and psychological trauma, the effect of which is indeed difficult to foresee and assess even by psychologists or sociologists. The depravity of the accused in committing the offence should be denounced to save little children for their ***Respondent*** own future; and, the men of the accused's calibre should not be allowed to

> deny the children of their legitimate place in the community. In passing down the sentence in a case of this nature, deterrence is, therefore, of paramount importance."

[24] It is on this basis that the learned trial Judge had picked a starting point of 14 years by taking into account the aggravating features in this case which I consider as erroneous. On this ground I would grant leave to the Petitioner to canvas his appeal regarding sentence.

[25] The Court of Appeal refused the appeal of the Petitioner regarding conviction and sentence as well and failed to consider the propriety of the sentence which the Petitioner challenged as being harsh.

[26] Regarding the starting point in sentencing, the Court of Appeal in **Koroivuki v State** [2013] FJCA 15; AAU0018.2010 (5 Mar4ch 2013) stated:

> "[26] The purpose of tariff in sentencing is to maintain uniformity in sentences. Uniformity in sentences is a reflection of equality before the law. Offenders committing similar offences should know that punishments are even-handedly given in similar cases. When punishments are even –handedly given to the offenders, the public's confidence in the criminal justice system is maintained.
>
> [27] In selecting a starting point, the court must have regard to an objective seriousness of the offence. No reference should be made to the mitigating and aggravating factors at this stage. As a matter of good practice, the starting point should be picked from the lower or middle range of the tariff. After adjusting for the mitigating and aggravating factors, the final term should fall within the tariff. If the final term falls either below or higher than the tariff, then the sentencing court should provide reasons why the sentence is outside the range."

[27] The learned trial Judge, having stated that the tariff was between 10 to 16 years picked 14 years as the starting point which was fairly high on the scale. Having taken into account

the aggravating features in picking the starting point the learned trial Judge added two years to that for the same features he had used to pick the starting point. This would amount to double counting and is an error in the sentencing judgment.

[28] The learned trial Judge had then in considering the mitigating circumstances stated that he did not see favourable circumstances to mitigate the sentence other than the previous record free from blemishes but stated that the seriousness of the offence committed outweighed his previous good behavior. As he was a first offender, two years were reduced on that account in reaching the final sentence of 14 years.

[29] It would appear therefore that the learned trial Judge had not given any reduction for his previous good behaviour (the Petitioner being 66 years at the time of sentencing) during which time he was free from blemishes.

[30] In the above circumstances a sentence of 12 years imprisonment with a non-parole period of 8 years imposed on the Petitioner would meet the ends of justice.

Aluwihare J

[31] I agree with the reasoning and conclusions of Chandra J.

Jayawardena

[32] I agree with the reasoning and finding of the Court.

Orders of Court:

(1) The application for special leave to appeal to the Supreme Court regarding sentence is granted.

(2) The appeal of the Petitioner regarding conviction is dismissed.

(3) The sentence imposed on the Petitioner is varied to 12 years imprisonment with a non-parole period of 8 years.

Hon. Mr. Justice S. Chandra
JUDGE OF THE SUPREME COURT

Hon. Mr. Justice B. Aluwihare
JUDGE OF THE SUPREME COURT

Hon. Mr. Justice P. Jayawardena
JUDGE OF THE SUPREME COURT

Solicitors:
Office of the Legal Aid Commission, Suva for the Petitioner
Office of the Director of Public Prosecutions, Suva for the Respondent