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

**CRIMINAL APPEAL NO. AAU 0013 of 2012**
**(High Court Action No. HAC 136 of 2010)**

**BETWEEN** : **NIKO VILA**

*Appellant*

**AND** : **THE STATE**

*Respondent*

**Coram** : **Calanchini P**
**Gamalath JA**
**P. Fernando JA**

**Counsel** : **Mr. J. Savou with Mr. A. Chand for the Appellant**
**Mr. M. Delaney for the Respondent**

**Date of Hearing** : **17 November, 2016**

**Date of Judgment** : **29 November, 2016**

## JUDGMENT

**Calanchini P**

1. I have had the advantage of reading in draft the judgment of Gamalath JA and agree that the appeal against sentence should be allowed and the sentence reduced to 12 years with a non-parole term of 10 years.

2. I venture to add some further observations on the issue of age as a mitigating factor. This is a matter that can rightfully be considered pursuant to section 4(2)(j) of the Sentencing and Penalties Decree 2009 (the Decree) as a mitigating factor concerning the offender.

3. When the Appellant was sentenced in March 2012 he was 67 years old. He was sentenced to a term of imprisonment of 14 years with a non-parole term of 12 years. This Court accepts that the learned Judge had not taken into account the period of 2 months that the Appellant had spent on remand as he was required to do under section 24 of the Decree.

4. Before arriving at the head sentence of 14 years imprisonment, the learned Judge had considered the fact that the Appellant was a first offender and reduced the sentence by two years. The learned Judge has not referred to the age of the Appellant as a mitigating factor although it was referred to in the context of aggravating factors.

5. It is the combined effect of the Appellant being 67 years old with up to the time of sentencing a perfectly good record that, in my judgment, requires the age of the Appellant to be taken into account.

6. There are a number of unreported decision of the Court of Appeal to which reference has been made by Mr D A Thomas in his text *"Principles of Sentencing"* (1980) in support of the proposition at page 196 that *"age is most effective as a mitigating factor when combined with another such as good character."*

7. However recognition of age as a mitigating fact does not mean that appropriate prison sentences should not be imposed on elderly offenders. More recently in **Suckley –v- R** [2001] EWCA Crim. 125; [2001] 2 Cr. App. R(S) 66 the Court of Appeal confirmed that a reduction of four years to 11 years imprisonment for the offence of attempted murder on account of the age of the Appellant (75 years old) was appropriate when a younger appellant would have received 15 years imprisonment. Having reviewed recent authorities the Court of Appeal concluded that regard must be had to age and that a discount was appropriate.

8. In this case reducing the head sentence to 12 years imprisonment with a non-parole term of 10 years is appropriate recognition of the age of the Appellant with his hitherto unblemished record and remains within the tariff for such a serious offence.

**Gamalath JA**

9. The Appellant was 67 years of age, when he was convicted for having committed the offence of digital rape of his grandniece, (his brother's son's daughter) on 25 September, 2010 at Nadi. He was sentenced to 14 years imprisonment and the non-parole period is 12 years. The conviction was pronounced on 29 February 2012. Invoking the appellate jurisdiction in time he moved this court on 29 March 2012.

10. In his petition of appeal, which was later amended on 29 March 2014, he moved to assail the conviction and the sentence based on the following two grounds;

On the Conviction:-

(1) The Learned Trial Judge erred in law and in fact when he failed to overturn the majority guilty opinion of the assessors when the evidence of the complainant did not confirm the element penetration.

(2) On the Sentence:-

(i) The Learned Trial Judge erred in law when he imposed a non-parole period when the imposition of the non-parole offended against the remission as allowed in the Prisons and Corrections Act 2016;

(ii) That Learned Trial Judge failed to discount the period the Appellant was in remand;

(iii) The Learned Trial Judge erred in law and in fact in not accepting mitigation proffered by the Appellant whilst sentencing the Appellant.

(iv) The Learned Trial Judge erred in law and fact when he treated the Appellant's case theory as an Aggravating feature whilst sentencing.

11. Having delved into the matter carefully, the Learned Single Judge granted Leave to Appeal only on the 2(ii) ground above, namely the two months period in remand should have been deducted from the total period of imprisonment imposed.

12. On 5 October 2016, a renewed notice of appeal was filed pursuant to Section 35(3) of the Court of Appeal Act .Accordingly, the notice has been given that the appellant shall renew his appeal against the conviction and further urged that the single ground of appeal against the sentence for which the leave has already been granted shall also be prosecuted.

**On the renewed ground of appeal against the conviction**

13. The prosecution's case is based on direct evidence of witnesses, including the victim (from now onwards shall be referred to as AV) who was just six years old at the time of the incident. AV's kinship to the appellant had been that her grandfather and the appellant are brothers, making her a grandniece of the appellant. In Uto Village they all lived close to each other, most probably in keeping with the traditional way of living as an extended family. According to one of the prosecution witnesses the distance between the Appellant's house and AV's house was merely about 30 steps or so, bringing in them really close to each other.

14. At around 2.00 p.m. in the afternoon on 25 September 2010, AV had been playing "baligame" in her yard with another child Meira. Around this time the appellant standing in front of his house had invited AV into his house. According to AV, she was called into the Appellant's house under the pretext of giving her some beans. In the house, the Appellant had removed the undergarments of the victim and "touched

her private parts". Whilst this was happening, the appellant had closed AV's mouth with one of his palms and silenced her.

15. According to AV she had felt a severe pain while the Appellant had been touching her genitalia. AV had somehow managed to escape from the clutches of the Appellant and ran out of his house.

16. Iliana Adi, the immediate neighbor of the Appellant had seen the victim running out of the Appellant's house in a manner that aroused her suspicion that something wrong may have happened. AV had run into the house of one Marica, and Marica in turn had brought the victim into Iliana's house in which the victim had described the incident that took place in the house of the Appellant.

17. Dr. Tier Margaret Konrate, a Pediatrician testifying at the trial said that when she examined the victim on the 27 September 2010, the following findings were seen;

"Vaginal Hymen was not visible, redness in vaginal area".

The medical evidence had concluded that there had been a vaginal penetration". During the cross examination at the trial this evidence was left unchallenged.

18. The evidence of Marica Tavakuru, the neighbour into whose house the victim ran from the Appellant's house also testified at the trial on behalf of the prosecution. According to her evidence AV came into her house, sat down and started to cry. In a state of being distraught, the victim related the story that the Appellant molested her by kissing her in the lips and touching her private parts of the body.

19. At the closing of the Prosecution's Case the Counsel for the Appellant made an application to terminate the proceedings on the basis of no-case to answer. However, quite correctly the Learned Trial Judge had turned down the application.

20. The Appellant took the stand at the trial and denied the allegation. According to him that there existed bad blood between the two families and hence the implication in this fabrication.

**The Summing Up**

21. I find that there are no objections to be raised against the Summing up. It has been presented with the precision that is expected of from a Learned High Court Judge. Explaining the ingredients of the offence, the Learned High Court Judge had spelt out the definition of the offence correctly and invited the assessors to juxtapose the facts with the law.

Mr. Savou the learned Counsel for the appellant did not strenuously urge that the ground of appeal against the conviction should be upheld. The court appreciates his forthrightness. Taking the entirety of the evidence and the contents of the summing up as a whole, I find hardly any reason to conclude that the ground of appeal against the conviction should be upheld. The Learned Single Judge had also correctly arrived at this conclusion in his decision and in the circumstances what is left to be looked at is the issue raised against the sentence in which the Learned Trial Judge had, inadvertently may be, overlooked to discount the two months period that the Appellant had been in the remand prison.

**The Sentence**

22. Inferentially, the Learned Single Judge also had decided that the fact that the Appellant was in remand custody for 2 months should have been taken into account in the computation of the total period of imprisonment. However, according to my understanding of his submissions the Learned Acting Director of Public Prosecution does not seem to be holding the same view on this matter. Going by the Judgment of the Learned Single Judge I find that the State Counsel appearing for the Director of Public Prosecutions had conceded that the failure on the part of the Learned Trial Judge to discount the 2 months remand period from the total period of imprisonment is an arguable issue.

23. I also hold the view that the two months period in remand should have been deducted from his total period of imprisonment and granting a small mercy of that kind to a

prisoner who is presently over 74 years may remind us the famous words of Portia; "The quality of mercy is not strained, it droppeth as the gentle rain from heaven upon the place beneath, It is twice blesseth him that gives and him that takes – Portia – Merchant of Venice.

24. The Ground of Appeal on sentence is allowed and the sentence of imprisonment is readjusted as follows.

25. In addition, I am now presented with another dimension to the exercise of deciding on the quantum of the final sentence.

26. I am grateful to the Hon. President of the Court of Appeal Calanchini P for raising this issue pursuant to Section 4(2)(1) of the Sentencing and Penalties Decree (2009) (the Decree).

27. This new dimension finds sound consonance with the principles enunciated in the oft used authority, the text on "Principles of Sentencing" (1980), by Mr. D.A. Thomas. Further support for this dimension is found in the citation of the Honourable President **Suckley v. R**.

28. Although this court is taking this path *ex mere motu*, in the interest of justice I find this to be a perfect approach to take.

29. In the circumstances I agree with the Honourable President Calanchini P.

**P. Fernando JA**

30. I had the benefit of reading the draft judgments of Hon. President and Hon. Gamalath JA.

31. I agree that the appeal against the conviction should be dismissed.

32. Whilst I agree that the appeal against the sentence should be allowed on the ground that the 2 months remand period should be deducted from the head sentence, I regret that I disagree that the sentence should be further reduced by 2 years without affording the parties an opportunity to address this issue which was neither urged as a ground of appeal, nor addressed by the parties at the hearing.

33. Whilst I do not disagree with the principles of sentencing set out by the Hon. President in relation to the case he mentions, the charge faced by the appellant in the instant case is rape and the maximum punishment prescribed is imprisonment for life. The applicability of that principle to a charge of this nature should be a matter that needs to be addressed by the parties.

34. In this regard I refer to the case **R. v. Mian**, *[2014] 2 SCR 689, 2014 SCC 54.* In **Mian** (supra) **Supreme Court of Canada** held:

"What Procedures Should Be Followed When an Appellate Court Exercises Its Discretion to Raise a New Issue?

> *"The risk of appellate courts appearing biased or partial will be reduced by the cautious exercise of the discretion to raise new issues, particularly when coupled with appropriate procedural safeguards. Requiring such safeguards ensures that there is no unfairness to the parties and no appearance of judicial partiality.*

*The Crown submits that when an appellate court raises a new issue, there must be notification and opportunity to respond. I agree. With respect to notification, the court of appeal must make the parties aware that it has discerned a potential issue and ensure that they are sufficiently informed so they may prepare and respond. It goes without saying that all parties should be provided with proper notice. With respect to the response, there is no single model. As the Crown submitted, "the nature of the judicial issue and its relationship to the issues raised by the parties will determine whether counsel wishes to file further written argument, address the issue orally, or both" (R.F., para. 60)."*

*This approach is practical and recognizes that the appropriate procedure will vary depending on the context and the circumstances in a given case. For example, appellate courts may become aware of potential new issues at different points in time throughout the appeal process, including before, during or after the oral hearing. Requiring that strict procedural standards be followed would fail to recognize that the issue may arise in different circumstances in different cases.*

*In my view, the following guidelines should be used to assist an appellate court in determining what the appropriate procedure should be on a case-by-case basis.*

*First, notification of the new issue may occur before the oral hearing, or the issue may be raised during the oral hearing. If the issue is raised during the oral hearing, it may be necessary to grant an adjournment to ensure a full and fair hearing (E.M.W., at para. 4). If the issue is raised prior to the oral hearing, the parties may request an adjournment of the hearing and an extension of the filing deadlines for further written argument. At all times, the court should raise the issue as soon as is practically possible after the issue crystallizes so as to avoid any undue delay in the proceedings.*

*Second, I agree with the submission of the Crown that the notification should not contain too much detail, or indicate that the court of appeal has already formed an opinion; however, it must contain enough information to allow the parties to respond to the new issue. Ultimately, the adequate content of notice will have to be determined on a case-by-case basis. It will be dependent on a number of factors, including the complexity of the issue and the obviousness of the issue on the face of the record.*

*Finally, I agree with the submission of the Crown that the requirements for the response will depend on the particular issue raised by the court. Counsel may wish to simply address the issue orally, file further written argument, or both. As the Crown in this case says, this determination is properly in the hands of both the court and the parties. In my view, the underlying concern should be ensuring that the court receives full submissions on the new issue. If a*

*party asks to file written submissions before or after the oral hearing, in my view, there should be a presumption in favour of granting the request. The overriding consideration is that natural justice and the rule of audi alteram partem will have to be preserved. Both sides will have to have their responses considered."*

35. To my mind the above sets the correct fundamental principles on how the appellate courts can raise new issues on its own. Since this opportunity was not afforded to the parties, the court must not interfere with the sentence. I disagree to reduce the 2 years as a result.

***Orders of Court***

1. *Appeal against the conviction is dismissed.*

2. *Appeal against the sentence is allowed and the sentence is adjusted as follows;*
   *(a) Head sentence of imprisonment is reduced to 12 years; and*
   *(b) Non-parole period is 10 years.*

3. *The two months period in remand custody has also been taken into account in adjusting the sentence of imprisonment.*

**Hon. Mr. Justice Calanchini**
**PRESIDENT, COURT OF APPEAL**

COURT OF APPEAL FIJI

**Hon. Mr. Justice Gamalath**
**JUSTICE OF APPEAL**

**Hon. Mr. Justice P. Fernando**
**JUSTICE OF APPEAL**