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

CRIMINAL APPEAL AAU 0066 OF 2015
(High Court HAC 38 of 2015)

BETWEEN : **GORDON AITCHESON**

Appellant

AND : **THE STATE**

Respondent

Coram : **Calanchini P**
Gamalath JA
Bandara JA

Counsel : **Mr M Fesaitu for the Appellant**
Mr M Korovou for the Respondent

Date of Hearing : **18 May 2018**

Date of Judgment : **1 June 2018**

JUDGMENT

Calanchini P

[1] The appellant was convicted on his plea of guilty on one count of rape contrary to sections 149 and 150 of the Penal Code Cap 17, on five counts of rape contrary to section

207(1)(2)(a) and (3) of the Crimes Act 2009 and on one count of indecent assault contrary to section 154(1) and (2) of the Penal Code. On 1 June 2015 the appellant was sentenced to terms of imprisonment of 16 years for each conviction for rape and four years imprisonment for the conviction of indecent assault all sentence to be served concurrently with a non-parole term of 15 years.

[2] The appellant subsequently filed a timely notice of appeal against sentence. Leave to appeal against sentence was granted by a Judge of the Court in a Ruling delivered on 24 January 2017. In written submissions filed on 13 April 2018 by the Legal Aid Commission on behalf of the appellant the grounds of appeal were stated as:

> *"1. That the learned High Court Judge did not give proper consideration to the remand period.*
>
> *2. That the learned High Court Judge did not give proper consideration to the guilty plea.*
>
> *3. That the learned High Court Judge did not consider the appellant's previous good character."*

[3] The background facts may be stated briefly. The offences were committed between 1 January 2006 and 22 February 2015. Two victims were involved. The victims were the appellant's biological daughters. The first victim was the elder daughter and the second victim was the younger daughter. Both were minors when the sexual abuse started. The first victim was only six years old when the appellant penetrated her vagina with his finger in 2006. Between 2007 and 2015 the appellant committed penile rape on the same victim on numerous occasions. In 2014 the appellant moved on to his younger daughter, the second victim. The appellant committed penile rape on his younger daughter on three occasions. The facts also revealed that the appellant's wife confronted the appellant on numerous occasions regarding the sexual abuse of their daughters but the appellant threatened to kill her if she reported the matter to police.

[4] At this stage it should be noted that the sentence for rape under both the Penal Code and the Crimes Act is a maximum of up to imprisonment for life.

[5] In the present case the learned Judge noted that the tariff for rape of a child was 10 – 16 years imprisonment. He selected 13 years as the starting point for each of the six counts of rape after considering the seriousness of the offences. The Judge then outlined a number of matters that he regarded as aggravating factors and added a further 4 years onto the sentence for each offence for a total of 17 years imprisonment. The Judge then proceeded to consider whether and to what extent that sentence of 17 years should be reduced.

[6] The first ground of appeal claims that the sentencing judge did not give proper consideration to the remand period. It was not disputed that the time spent in remand was 87 days. The learned Judge dealt with this issue ever so briefly in paragraph 17 wherein he observed in the last sentence:

> *"I consider the time that you have spent in remand prior to this sentencing in favour of you."*

[7] It should be noted that paragraph 17 concerned that part of the sentencing decision relating to the appellant's mitigating factors. In the same paragraph the judge referred only to his age being 37 years old and to his plea of guilty to all charges at the first available opportunity. Then in paragraph 18 of the sentencing decision the Court in consideration of the mitigating factors to which reference was made in paragraph 17 reduced the sentence by one year.

[8] The position with regard to time spent in remand is dealt with in section 24 of the Sentencing and Penalties Act 2009 which states:

> *"If an offender is sentenced to a term of imprisonment, any period of time during which the offender was held in custody prior to the trial of the matter or matters, shall, unless a court otherwise orders, be regarded by the court as a period of imprisonment already served by the offender."*

[9] The correct approach for a court when called upon to consider section 24 was considered by the Supreme Court in **Sowane –v- The State** [2016] FJSC 8; CAV 38 of 2015, 21 April 2016. In that decision Gates CJ observed in paragraph 10 – 12;

> *"However section 24 does not cast any burden on the Corrections Department. The burden is cast upon the court. The provision is mandatory. For the court **shall** regard any period of time during which the offender has been held in custody prior to the trial of the matter or matters as a period of imprisonment already served by the offender, "unless the **court** otherwise orders."*
>
> *By what methodology is that to be done? In the past courts have commenced that process by fixing a sentence on a range approved by decisions of the courts, usually with the authority of one of the appellate courts. The sentencing judicial officer proceeds to give some increase of sentence for specified aggravating factors, and some discount for approved mitigating factors. Within mitigating factors is often included the period spent on remand by the offender in custody awaiting his trial. If this is done, the final term of imprisonment imposed could sometimes fall well below the normal tariff for such offending.*
>
> *Alternatively the sentencing court could carry out the calculation by the above method, and initially without regard to the period spent in custody, state the sentence for the particular offending. Secondly, the court could go on to set out the actual sentence to be served, after deducting the period of prior custody referred to in section 24. Such a judgment would state what the court's sentence was for the gravity of the offending, and at the same time – by the court's order pursuant to section 24 – set out and hand down the effective sentence that must be served, prior to the consideration of any eligibility for parole, a matter not of sentence but of administrative action with the jurisdiction of the Corrections Department."*

[10] And at paragraph 14 the Chief Justice noted:

> *"However the clear wording of section 24 states it is for the sentencing court to have regard to the remand period and to make the necessary order. The burden is cast upon the court. In doing so it is not necessary to make exact allowance for days or even weeks spent on remand. It depends upon its total significance."*

[11] The Chief Justice stated in paragraph 16 that *"uniformity of approach in sentencing procedure is important. Whilst both methods may serve the spirit of the [Act], nonetheless a preferred procedure must be decided upon."*

[12] The Supreme Court concluded that the proper way to give effect to section 24 is for the sentencing court to determine the range or tariff and fix a starting point. The court should then proceed to give some increase to the sentence for specified aggravating factors and some discount for approved mitigating factors and then (as a first step) without regard to the period spent in custody state the sentence for the particular offending. Then, as a second step, the court should set out the actual sentence to be served, after deducting the period of prior custody referred to in section 24.

[13] In the present case the Judge has included the period spend on remand by the appellant within mitigating factors. That approach is not consistent with the approach preferred by the Supreme Court in **Sowane** (supra). If it is accepted that 87 days spent in remand is about 3 months it must be assumed that the 3 months has been subsumed in the total period of 12 months allowed by the judge for mitigating factors. The Judge has expressly stated that the time spent in remand is to be regarded in favour of the appellant as a period of sentence already served. However whether the three months was properly considered by the sentencing judge will also depend upon its significance with the reduction allowed for mitigating factors.

[14] The second ground of appeal relates to the issue of the appellant's guilty plea. It was not disputed that the appellant had pleaded guilty at the earliest opportunity. As noted above the learned sentencing Judge had allowed a total reduction of 1 year for mitigating factors. This included the approximate 3 months spent in remand. The result is that about 9 months has been allowed for the plea of guilty entered at the first available opportunity which reduced the sentence of 17 years to 16 years imprisonment.

[15] In considering this ground of appeal reference must first be made to section 4(2)(f) of the Sentencing and Penalties Act which states:

"In sentencing offenders a court must have regard to: -
(a) - (e) _ _ _
(f) whether the offender pleaded guilty to the offence, and if so, the stage in the proceedings at which the offender did so or indicated his intention to do so
(g) - (k) _ _ _ ."

[16] The manner in which a court should apply this obligation that is imposed on a sentencing court has been the subject of some discussion in decisions of this Court. In **Rainima –v- The State** [2015] FJCA 17; AAU 22 of 2012 (27 February 2015) Madigan JA observed:

> *"Discount for a plea of guilty should be the last component of a sentence after additions and deductions are made for aggravating and mitigating circumstances respectively. It has always been accepted (though not by authoritative judgment) that the "high water mark" of discount is one third for a plea willingly made at the earliest opportunity. This court now adopts that principle to be valid and to be applied in all future proceeding at first instance."*

[17] In **Mataunitoga –v- The State** [2015] FJCA 70; AAU 125 of 2013 (28 May 2015) Goundar JA adopted a similar but more flexible approach to this issue:

> *"In considering the weight of a guilty plea, sentencing courts are encourage to give a separate consideration and qualification to the guilty plea (as a matter of practice and not principle) and assess the effect of the plea on the accused by taking into account all the relevant matters such as remorse, witness vulnerability and utilitarian value. The timing of the plea, of course, will play an important role when making that assessment."*

[18] In the present case it is clear that the sentencing judge did not have proper regard to the appellant's guilty plea in sentencing him as required by section 4(2)(f) of the Sentencing and Penalties Act. That is an error in the sentencing discretion. This Court must therefore exercise the discretion given under section 23(2) of the Court of Appeal Act 1949.

[19] It must be acknowledged that the offending was extremely serious. The victims were the appellant's biological daughters. Rape of young daughters by fathers must attract a punishment that reflects the gross breach of trust arising from the father – daughter relationship. However there are some compelling mitigating factors like the early guilty plea, remorse and the time spent in remand. These factors are not adequately reflected in the appellant's total sentence of 16 years imprisonment with a non-parole period of 15 years.

[20] I would quash the sentences imposed by the High Court and substitute a term of 13 years imprisonment for each count of rape and 3 years imprisonment for indecent assault to be served concurrently effective from 1 June 2015. The total sentence is now 13 years imprisonment with a non-parole term of 11 years. In arriving at the head sentence and the non-parole term, I have considered the appellant's remand period of about 3 months.

[21] The third ground relates to the issue of good character as a mitigating factor. However having perused the appellant's criminal history sheet I am firmly of the view that it was not open to the appellant to claim that he was entitled to be regarded as a person of good character for the purposes of mitigation.

Gamalath JA

[22] I agree.

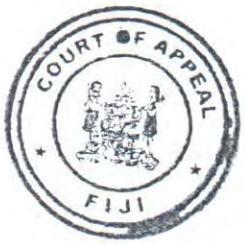
Bandara JA

[23] I agree with the reasoning and conclusions of Calanchini P.

Orders:

1. *Appeal against sentence allowed.*
2. *Sentence passed by the High Court is set aside.*
3. *Appellant is sentenced to a term of imprisonment of 13 years with a non-parole term of 11 years effective from 1 June 2015.*

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



Hon. Justice S. Gamalath
JUSTICE OF APPEAL

Hon. Justice W Bandara
JUSTICE OF APPEAL