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

Criminal Appeal No. AAU 0092 of 2015
(High Court Case No. HAC 274 of 2014)

BETWEEN : **ESEKAIA DAULAKO**

Appellant

AND : **THE STATE**

Respondent

Coram : **Gamalath, JA**
Prematilaka, JA
Bandara, JA

Counsel : **Mr. M. Fesaitu for the Appellant**

Mr. S. Babitu for the Respondent

Date of Hearing : **15 May 2019**

Date of Judgment : **6 June 2019**

JUDGMENT

Gamalath, JA

[1] I have read the judgment in draft of Bandara, JA and I agree with the reasons given therein and its conclusions.

Prematilaka, JA

[2] I have read in draft the judgment of Bandara, JA and agree with the reasons and conclusions therein.

Bandara, JA

[3] The High Court in Suva has convicted the appellant of two counts of rape. The 1st count was a representative count alleging penile rape and the second count alleged a single incident of digital rape. All three assessors expressed their opinions that the Appellant was guilty. The trial Judge concurred with the opinions of the assessors and convicted the Appellant of the two counts of Rape and sentenced him to a total period of 15 years imprisonment and directed that the Appellant would have to serve a sentence of 12 years before he would be eligible for pardon.

[4] The complainant was a female child, aged 13 years when the 35 year old accused, a relation of the father who was residing with them, first committed digital rape and then committed penile rape. These acts of unlawful sexual conduct was said to have been going on for a period of about 2 months from February to March 2014, at the complainant's home.

[5] The Appellant denied any form of sexual contact with the victim, gave evidence at the trial and called a medical expert to give evidence on his behalf, regarding a medical condition he was undergoing, which he claimed incapacitated him from having sexual intercourse.

[6] The indictment against the Appellant before the High Court contained the following two counts:

"First Count – [Representative Count]

Rape: Contrary to Section 207 (i) and (2) (a) of the Crimes Act 44 of 2009.

Particulars of Offence

Between the 1st day of February 2014 and 31st day of March 2014 at Kalabu in the Central Division had carnal knowledge of FRD (Name withheld) Without her consent.

Second Count

Statement of Offence

Rape: contrary to Section 207(1) and (2) (b) of the Crimes Act No. 44 of 2009.

Particulars of Offence

That between the 1st day of February 2014, and 31st day of March 2014, at Kalabu in the central Division, penetrated the vagina of FRD with his fingers without her consent".

[7] Being dissatisfied with the said conviction and sentence the Appellant filed a timely application for leave to appeal to the Court of Appeal advancing nine grounds of appeal against the conviction and two grounds against the sentence.

[8] The single Judge who heard the application on the 13th December 2016 refused to grant leave to appeal against both his conviction and sentence. Consequently on the 23rd April 2019, pursuant to section 35 (3) of the Court of Appeal Act the appellant filed "Renewal Notice of Leave to Appeal" before the full court, advancing two grounds of appeal against the conviction and one ground of appeal against the sentence.

[9] The complainant, her mother and the medical expert (Dr. Nitika Ram) who conducted the medical examination on the complainant gave evidence on behalf of the prosecution. The Appellant gave evidence at the trial and called one witness, Dr. Epi Tamanitoakula, to give evidence on his own behalf. Dr. Epi examined the Appellant at Korovou prison in October 2014,

Salient Facts

The State's Case

[10] The complainant, FRD (name withheld) at the time of the incident was 13 years old and was about to turn 14 (being born in April in the year 2000). She had two siblings, a brother aged 13 and a sister aged 9. Her father worked as a driver and the mother was a high school teacher. At the time of the incident, the father had been working overseas. The Appellant, (aged 35 at the time of the incident) was a relative of the victim's father and lived in the same house. The victim and her siblings referred to the Appellant as "Uncle".
The victim slept in the night in a separate bedroom along with her two siblings. The two siblings slept on a bunk bed whilst the victim slept on the floor. On a day in February 2014, the first incident occurred. Around 10 pm, whilst the victim was asleep the accused came to her and inserted his middle finger into her vagina and went out.

[11] After a little while he returned and inserted his penis into her vagina. When the complainant told the Appellant 'are you crazy'? He had said: 'crazy over you', and gone out. The said offending sexual acts were repeatedly done by the Appellant for about four to five times until the latter part of March. The complainant could not recall the exact dates. The accused had inserted his middle finger into her vagina half way through and kept it there for about five seconds. The penile penetration had lasted only for 5 – 6 seconds. This duration of time becomes a vital factor, when the medical evidence led on behalf of the accused is taken into consideration.

[12] The victim has categorically stated that both digital and penile penetration were done on her without her consent. When the accused penetrated her with his penis she felt angry and scared. However, she had not raised cries. The victim had not complained the incident to anyone through fear she entertained against the accused. However one day the victim decided to disclose the whole incident to the mother with a view to have the Appellant expelled from their lives.

[13] In the course of the cross examination, it had been suggested to the complainant, that her allegation was totally false, and the reason for her to make a false allegation was that she did not like the way the accused disciplined her on housework.

[14] Witness, SD (name withheld), the mother of the victim testified that she overheard her children discussing something softly which arose some suspicion. Upon being asked as to what they were discussing, two of her children after an initial slight hesitation, had proceeded to disclose the offending incidents. The complainant had disclosed to her that the accused had engaged in sexual activities with her, without her consent for about four to five times. The appellant when questioned by the witness had denied the allegations. The witness thereafter had asked the appellant to leave the house. Witness had further told Court that the accused had been staying with them since the time the complainant was a baby.

[15] Dr. Nitik Ram had testified that he had conducted the medical examination on the complainant on 10/7/2014. The report compiled by the medical expert further reflects the following findings:
"No injuries at genital area. Hymen not intact. Any form of sexual penetration cannot be ruled out. Possibility of sexual penetration cannot be excluded."

The Appellant's Case

Appellant's claim of sexual incapacity

[16] In the course of the cross examination Dr. Nitik Ram (witness of the State) had been asked whether hernia can affect the function of sexual intercourse. The doctor had categorically stated that it does not affect erection or ejaculation.

[17] The accused giving evidence under oath had stated that he had hernia for five years and consequently was unable to achieve an erection. At the time in question, he had assisted the mother of the complainant since her husband had been overseas. He had denied having had any sexual relationship with the complainant. He had stated that the reason for the

complainant to make a false allegation against him, was that he tried to discipline the victim in doing house chores.

[18] Dr. Tamanitoakula had observed the accused suffering from lingual hernia which needed surgery. Though the appellant had told the doctor that he had been suffering from hernia for a period of 5 years, the doctor had not observed any medical findings to that effect. In the examination-in-chief Dr. Tamanitoakula testified that the condition of hernia would affect sexual intercourse. However in the course of the cross examination he had stated that, the appellant under his condition could still penetrate a vagina with his penis but it would be uncomfortable.

[19] Now I turn to address the substantive issues raised in the grounds of Appeal.

Appeal against the Conviction

[20] Ground A

The Learned Trial Judge erred in law and in fact when he failed to adequately direct the assessors on the medical evidence adduced particularly on the condition which the Appellant suffers from against the charge of Rape.

The learned trial Judge in his summing up at paragraph 21, had directed the assessors on the medical evidence adduced particularly on the condition from which the Appellant suffered, in an overtly fair manner in the following terms:

> *"He was living with the Dickson family in February and March of 2014. For the last five years (since 2009) he has been suffering from hernia which prevents him from having sexual intercourse because he cannot sustain an erection. He denies any allegation that he invaded F R D neither with his finger nor with his penis. He used to discipline her about the house work and she did not like it. He never approached her sexually but he treated her like a sister's daughter".*

"The accused called a doctor who gave evidence of having examined him in Korovou prison. He was (in October 2014) suffering from a linguinal hernia which need surgery. The accused is still waiting for the surgery at CWM hospital. The doctor opined that in his condition, it would most likely affect his ability to intercourse. But he later admitted that an erection was still possible, but it would be uncomfortable."

[21] Moreover, the complainant's specific and uncontested evidence on the issue of time duration of the sexual intercourse is as follows:-

"He put his finger in me half way for 5 seconds....Penis inside for 5 – 6 seconds".

From the above piece of evidence, it is clear and convincing that the Appellant had not engaged in a complete act of sexual intercourse from insertion to ejaculation. He had merely kept the penis in the vagina of the complainant for merely 5 to 6 seconds which action could not have been an impossibility even when the testimony of both medical experts is taken into consideration in totality.

[22] According to the opinion of both medical experts,

(1) The accused was able to achieve an erection, and penetrate a vagina;
(2) Though engaging in a full sexual intercourse could have been uncomfortable, keeping the erected penis inside the vagina for 5 to 6 seconds could not be considered as an impossibility.

[23] In **Tuwai v State** [2016] FJSC 35; CAV0013.2015 (26 August 2016) at [100] and [101] it had been held that;

"100. Before I go any further I must say that the trial judge had asked the parties if they needed any re-directions in the matter. The parties did not

seek any re-directions on the grounds they allege that the directions were inadequate. Was this done for a deliberate reason to find a ground of appeal? If that is so, the appellate courts approach must be stringent.

101. Litigants must not wait for trial judges to make mistakes to find a point of appeal. The transparent nature of litigation requires that the trial judge be given an opportunity to correct any errors made. If the trial judge has asked parties to seek re-directions and they do not and subsequently raise the issue in the appellate Court then in the absence of any cogent reason, it should be held against that party as having employed a deliberate tactic to find an appeal point".

"The raising of direction matters in this way is a useful trial function and in following it, counsel assist in achieving a fair trial. In doing so they act in their client's interest. The appellate courts will not look favourably on cases where counsel have held their seats, hoping for an appeal point, when issues in directions should have been raised with the judge".

Having regard to the above, I am of the view that ground A of the Grounds of Appeal is wholly unmeritorious.

Appeal against Conviction Ground B

"The Learned Trial Judge erred in law and in fact when he failed to properly guide the assessors on how to approach and weigh the evidence of recent complaint seeing that it was relevant to the case for the defence".

[24] Setting out the facts as to how the mother of the complainant came to know of the incident, the learned trial Judge in his Summing Up states as follows:-

"15. F's' mother was next witness who told us that she found out about the sexual abuse from her two daughters on a date in July 2014 when she overheard them talking seriously. F told her the same story that she told in her evidence in chief. Mrs D was angry and upset because he had been living with them since Francis was a baby and the children called him 'Uncle'.

16. I must tell you Ladies and Gentleman that there is no requirement in our law for the victim of rape to tell anybody else or to tell anybody else as soon as possible. That use to be the law but it is no longer. You may find the accused guilty or not guilty on the strength of evidence of the victim alone and on nothing else.

14. F told us that in February/March 2014 she was 13 years old, about to turn 14. The accused was a relative of her father and he lived in the same house with them. She said that the accused would come into the bedroom where she slept with her mother and sister. He would come in at night when she was sleeping, perhaps about 10 pm or so. He would penetrate her with his finger without saying anything then he would go out and later come back and penetrate her with his penis. He did about 4 to 5 times in the two month period. F would cry and kick him away. ***She was scared of him and what he might do to her if she told anybody. So eventually she told her mum because she wanted to get him out of her life and to be far away.*** *(Emphasis is mine)*

[25] Complainant on her own words had stated: *"(page 122 of court proceedings) "Never told anybody. I was scared of him, he might do something"*. The complainant who was at a very young age never intended to make a complaint until the mother overheard a suspicious conversation among the siblings, which compelled the latter to make an inquiry. On that point the mother testified that "It took me some time but they told me. Both told me".

Failure of the victim of a sexual assault case to make a prompt complaint at most could be used to attack her credibility, reliability, consistency and plausibility of her story. In **RV.White** [1947] S.C.R 268, it has been held that *"credibility of course is a question of fact and it cannot be determined by fixed rules. Ultimately it is a matter that must be left to the common sense of the triar of fact, in this case the trial Judge. Unless the record reveals an error of law or in principle or a clear and manifest error in the appreciation of the evidence, a Court of Appeal should not intervene in that determination".*

[26] On the issues of corroboration Section 129 of the Criminal Procedure Decree Stipulates *"where any person is tried for any offence of sexual nature, no corroboration of the complainant's evidence shall be necessary for that person to be convicted, and in any such case the judge or magistrate shall not be required to give any warning to the assessors relating to the absences of corroboration". However it is trite, that the evidence of recent complaint was never capable of corroborating the complainant's account.*

[27] In **Raj v State** [2014] FJSC 12; CAV0003.2014 (20 August 2014). The Supreme Court held that; *"It is well settled by many authorities that evidence of recent complaint can never be capable of corroborating the complainant's version and at most it is relevant to the issue of or otherwise of the complainant's conduct, vis a vis her credibility and reliability as a witness; "Fiji are no longer concerned with corroboration of a complainant's evidence in a trial for an offence of a sexual nature. Section 129 of the Criminal Procedure Decree 2009 governed the evidentiary conduct of the trial, though the events related pre-dated the imposition of that section".*

In **R. v Whitehead** (1929) 1 KB 99.) it was held that at most it was relevant to the question of consistency or inconsistency and credibility and reliability as a witness firsthand.

[28] In the instant case when it comes to the issue of consistency, credibility, reliability of the complainant's evidence and plausibility of her story, it is vitally pertinent to note the

following observations made by the Learned Trial Judge in his summing up, who had the advantage of observing the demeanour and deportment of the witness firsthand.

> "3. *The evidence against you came from the young lady now aged 15 but who was 13 years old at the time. She gave evidence of your inflicting with digital and penile rape on her in her own bedroom at least 4 times during the month of February and March, 2014. Her evidence was measured, controlled; and totally credible and she was unshaken in cross examination. I believed her completely.*
>
> 4. *In contrast I found your evidence to be evasive, contrived and dismissive. Although you don't have to prove anything to the court, it is my finding that you said nothing to deter the Court from a finding that the state has proved its case beyond reasonable doubt.*

Having regard to the above I am of the view that ground B of the appeal against conviction fails.

Failure of the defence to seek a re- direction

[29] In the appeal, if the defence contends now that the trial Judge had failed to direct the assessors in relation to the factors mentioned in Ground A and B of the Appeal the question arises, as to why it was not drawn to the trial judge's notice as a deficiency in the summing up at the trial stage and sought a re-direction.

[30] It appears from the court record that no re-direction was sought by the Appellant's trial counsel in relation to the factor mentioned in ground A and B of the Appeal when the Trial Judge asked at the end of the Summing Up;

> "Redirections Counsel"? (Page 59 of the Court Record).
> It has been held in **Singleton v French** (1986) 5 NSWLR 425, 440;

"As a general principle it is the counsel's duty at trial to draw the attention of the Trial Judge to deficiencies in the summing up and the failure to do so may debar the Accused taking the point on appeal."

[31] In **Raj v The State** (supra) it was held, "*at trial defence counsel could have raised with the Judge the proper direction to the assessors*". In **Abdul Khan Mohammed Islam** [1997] 1 Crim.Appl R.22 Buxton LJ said:-

> *"We are told that before speeches very usefully and properly, in accordance with practice repeatedly urged by this court, counsel discussed with the judge any particular directions that he should give to the jury. It was apparently agreed that he should remind the jury of the particular and limited nature and effect of the complaint evidence. In the event, however no such direction was given. At the end of the summing up neither counsel reminded the Judge of that omission".*

Appeal against the Sentence

Ground A

[32] *The Learned Trial Judge erred in law and in fact by not giving separate and adequate discounts for the time spent in remand and the Appellant's clear record.*

Both parties agree that the Appellant had been in custody on remand for a period of three months.

[33] In **Rogers v State** [2017] FJCA 134; AAU0032.2011 (30 November 2017) it is stated that;

> *Time spent in custody while on remand is a relevant factor in sentencing. There is a statutory obligation on the courts to consider the remand period in sentence, created by section 24 of the Sentencing and Penalties Act 2009. While the courts are obliged to consider the time spent in custody while on remand, no precise formula is required to discount the remand period...*

... the methodology used for discounting does not involve an error of principle (Qurai v State unreported Cr App No CAV24 of 2014; 20 August 2015). Some judges discount the remand period by subsuming it with the mitigating factors, while others discount it separately from the mitigating factors".

[34] In the instant case, the learned Trial Judge has discounted in specific terms the 3 months period of custody while on remand, by subsuming it with the mitigating factors. But the fact remains that this methodology used for discounting does not involve an error of principle since the 3 months period has been deducted in specific terms.

[35] In terms of Section 24 of the Sentencing and Penalties Act 2009, a statutory obligation is imposed on courts to consider the time spent in custody while on remand. In **Maya v State** [2017] FJCA 110; AAU0085.2013 (14 September 2017) it has been held that,

"...the methodology used for discounting does not involve an error of principle (Qurai v State unreported Cr App No CAV24 of 2014; 20 August 2015). Some judges discount the remand period by subsuming it with the mitigating factors, while others discount it separately from the mitigating factors ..."

[36] In the sentence order delivered on 22nd July 2015, the learned Trial Judge using his own methodology, in specific terms had deducted the remand period of three (3) months and one year for his clear record in the following manner;

"7. For the first count of representative penile rape I take a starting point of 12 years imprisonment. For the gross breach of trust as an "uncle" and a caregiver I add to that a term of 4 years giving an interim total sentence of 16 years. For the time spent in remand (3 months) and for his clear record I deduct one year which means he will serve a total sentence for the representative rape of 15 years".[emphasised]

Since, the learned trial Judge in specific terms had deducted the three months period that the Appellant had been in custody in remand, this ground of appeal against the sentence too has no merits.

Adequacy of the Sentence

[37] It is settled law that the sentencing tariff for rape of a child victim in between 10 – 16 years imprisonment. (**Anand Abhay Raj v State**; CAV 003.2014). In **State v Mario Tauvoli** [2011] FJHC 216; HAC 027.2011 at paragraph 5 where it was held that:

> *"[5] Rape of children is a very serious offence indeed and it seems to be very prevalent in Fiji at the time. The legislation has dictated harsh penalties and the Courts are imposing those penalties in order to reflect society's abhorrence for such crimes. Our nation's children must be protected and they must be allowed to develop to sexual maturity unmolested. Psychologists tell us that the effect of sexual abuse on children in their later development is profound".*

[38] I believe that the total term of 15 years imprisonment with a minimum term of 12 years non-parole period, imposed by the learned High Court Trial Judge on the Appellant having regard to the aggravating and mitigating factors as set out in the sentencing order, contains no error and will meet the ends of justice.

[39] For the reasons given above, I would dismiss the appellant's appeal and affirm the conviction and the sentence passed by the High Court.

The Orders of the Court are:

1. Appeal dismissed.
2. Conviction and sentence affirmed.

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Hon. Justice S. Gamalath
JUSTICE OF APPEAL

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Hon. Justice C. Prematilaka
JUSTICE OF APPEAL

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Hon. Justice N. Bandara
JUSTICE OF APPEAL