IN THE HIGH COURT OF FIJI
AT LAUTOKA
IN THE WESTERN DIVISION
APPELLATE JURISDICTION

CRIMINAL APPEAL CASE NO.: HAA 68 OF 2016

BETWEEN : **CHANDAR PRAKASH**

APPELLANT

AND : **STATE**

RESPONDENT

Counsels : **Mr I. Khan for the Appellant**
: **Ms S. Kiran for the Respondent**

Date of Judgment : **07th April, 2017**

JUDGMENT

INTRODUCTION

1. The Appellant filed this appeal against the conviction and sentence.

2. The Appellant was charged in the Magistrates Court of Lautoka with one count of 'Indecent Assault' contrary to Section 212 (1) of the Crimes Decree 2009. The Complainant was Appellant's granddaughter.

3. The Appellant was convicted of the charge after a full trial and on 14th November, 2016, the learned Magistrate sentenced the Appellant to 18 months' imprisonment.

4. The Appellant has filed a Notice of Appeal against the conviction and sentence within time.

5. **FACTS ACCEPTED BY THE TRIAL MAGISTRTAE**

The Complainant is Appellant's granddaughter. She was 12 years old at the time of the incident. On the 04th February 2015, she was staying at Appellant's place. When she was lying down on a bed Appellant came and sat beside her. Appellant put his hand inside her top and touched her breasts. Then he touched her private parts on top of her cloths. Appellant asked her how she feels when he touched her breasts. The Complainant started crying and she informed her sister about the incident. Later they informed about the incident to their father and the matter was reported to the Police.

6. **GROUNDS OF APPEAL**

CONVICTION

I. Learned Magistrate erred in law and in fact in not directing himself to the evidence if the complainant/witness who were juveniles and as such proper direction ought to have been given regarding taking oath;

II. Learned Magistrate erred in law and fact in not taking into consideration the Appellant's submission on 'no case to answer' at the end of Prosecution case. He also did not apply the relevant laws to the facts that were presented by the State;

III. Learned Magistrate erred in law and in fact in not adequately directing and misdirecting that the prosecution evidence before the court proved beyond reasonable that there were serious doubts in the prosecution case and as such the benefit of doubt ought to have been given to the Appellant;

IV. Learned Magistrate failed to direct himself on the question of burden of proof in that the Prosecution has proved all the allegation against the Appellant beyond all reasonable doubts;

V. Learned Magistrate erred in law and in fact in not properly analyzing all facts before him before he made a decision that the Appellant was guilty as charged on the charge of indecent assault;

VI. Learned Magistrate erred in law and in fact in not directing himself to the possible defence on evidence;

VII. Learned Magistrate erred in law and in fact in not considering and/or rejecting the evidence of defence witnesses that were called by the defence;

VIII. Learned Magistrate erred in law and in fact in failing to give proper weight as to when the date of the complaint was made by the complainant against the Appellant and to say *"that it appears the witnesses have given their statements to the police soon after the incident"* raised serious doubt in the prosecution case;

IX. Learned Magistrate erred in law and in fact in not adequately directing himself to the significance of prosecution witnesses conflicting evidence during the trial;

X. Learned Magistrate erred in law and in fact in not taking into adequate consideration the evidence if all the defence witnesses in deciding that the Appellant was guilty of the offence charged.

<u>SENTENCE</u>

I. Sentence is harsh and excessive and wrong in principal in all circumstances of the case;

II. Learned Magistrate erred in law and in fact in taking irrelevant matters into consideration when sentencing the Appellant and not taking relevant matters into consideration;

III. Learned Magistrate erred in law and in fact in denying the Appellant his right to mitigation of sentence.

ANALYSIS

Ground 1

Learned Magistrate erred in law and in fact in not directing himself to the evidence if the complainant/witness who were juveniles and as such proper direction ought to have been given regarding taking oath;

7. At the trial, Prosecution called two witnesses, the victim (12) and her sister (11) both of whom were children within the meaning of the Juveniles Act at the time they gave evidence.

8. As per the record, both child witnesses gave sworn evidence. The trial Magistrate, before proceeding to record their evidence under oath, did not hold a competency test to ascertain whether the child witnesses understood the nature and solemnity of the oath.

9. The Counsel for Appellant submits that the trial Magistrate did not comply with Section 10 (1) of the Juveniles Act and fell into error when he found the Appellant guilty on evidence of child witnesses whose evidence was not tested against competency.

10. Section 10 (1) of the Juveniles Act provides as follows:

> *"Where in any proceedings against any person for any offence or in any civil proceedings any child of tender years called as a witness does not in the opinion of the court understand the nature of an oath, his evidence may proceed not on oath,*

if, in the opinion of the court, he is possessed of sufficient intelligence to justify the reception of his evidence and to understand the duty of speaking the truth; and the evidence though not given on oath but otherwise taken and reduced into writing so as to comply with any law in force for the time being, shall be deemed to be a deposition within the meaning of any law so in force:

Provided that where evidence is admitted by virtue of this section on behalf of the prosecution, the accused shall not be liable to be convicted of the offence unless that evidence is corroborated.

11. There is a requirement under Section 10, that a child witness of tender years should be subjected to a competence inquiry where he or she is required to demonstrate an understanding of the nature and solemnity of an oath. The oath test required children to express knowledge of the fact that they would be committing a sin and *"burn in the fires of hell"* if they lied on oath (**R v Brasier** (1779) 168 Eng. Rep. 202 (K.B.).

12. If the child witness passes the oath test, he is competent to give sworn evidence, but his or her evidence is still subjected to the common law warning of corroboration. If the child witness fails the competency test, the trial court can record unsworn 'evidence' if it was satisfied that the child witness possessed sufficient intelligence to justify the reception of evidence and understood the duty of speaking the truth. However, the accused is not liable to be convicted on unsworn evidence unless that evidence is corroborated.

13. The effects of section 10 were clearly explained by Shameem J in ***Agnu v State*** unreported Criminal Appeal No. HAA067 of 2008; 5 September 2008 at

p5:

> *"The law on the evidence of children is that where a child gives unsworn evidence, corroboration is required **as a matter of law**. That means that without corroboration, a conviction is impossible. Where however a child gives sworn evidence, a corroboration warning should be given **as a matter of practice** on the basis that the evidence of children may be unreliable without some supporting evidence independent of the child and implicating the accused".*

14. A careful examination of case law in Fiji would indicate that up until the landmark judgment of ***State v. AV*** [2009] FJHC 18; HAC192.2008 (2 February 2009), the courts in Fiji had strictly applied the rules of evidence concerning children of tender years as was provided in Section 10 of the Juveniles Act and the failure to hold an inquiry into the competency of a child witness had resulted in the conviction being quashed (***Lal Khan*** (1981) 73 Cr App R 190, ***Fazal Mohammed v the State*** (1990) 91 Cr App R 256, C. A. Z. (1990) 91 Cr App R 203, ***Suresh Chand v R*** Ltk Cr App No. 77/83, ***Kepueli Jitoko v the State*** [1991] 37 FLR 14, ***Mohammed Salim Nur Khan v The State*** Cr App No. HAA004 of 2008).

15. The High Court in ***AV*** (supra), held that section 10 of the Juveniles Act, Cap. 56 and the common law requirement for corroboration and competency test for child witnesses unfairly discriminated against children on the ground of age and deprived them equality before the law as guaranteed by the Constitution Amendment Act 1997 (the 1997 Constitution). Therefore, the Court considered Section 10 of the Juveniles Act as 'stricken from the said Act'.

16. In ***AV*** (supra), the victim was called to give evidence at the magistracy. Before

receiving her evidence, the trial Magistrate did not carry out a competency inquiry as was required by Section 10 of the Juveniles Act Cap. 56. The trial Magistrate believed the victim's evidence and convicted the offender. The case was then transferred to the High Court for sentence. The High Court confirmed the correctness of the conviction and sentenced the offender.

17. The same issue arose before the Court of Appeal in the case of ***Kumar v State*** [2015] FJCA 32; AAU0049.2012 (4 March 2015), which was decided under the present Constitution where a similar equality provision has been incorporated. Section 26(1) of the Constitution states:

> *"Every person is equal before the law and has the right to equal protection, treatment and benefit of the law".*

18. Endorsing the sentiments expressed in ***AV*** (supra), and having analyzed the case law in England and Canada, the Court of Appeal (Gounder JA) observed:

> *We endorse the above remarks. Every child in Fiji now has a constitutional right to be protected from abuse or any form of violence. This right is expressly provided by section 41 (1) (d) of the Constitution. Rape is the worst kind of sexual abuse that can be inflicted on a child. The courts have a constitutional duty to protect the children from any form of sexual abuse by taking into consideration matters that are in their best interests. Section 41 (2) of the Constitution states:*
>
> > *"The best interests of a child are the primary consideration in every matter concerning the child."*

...In our judgment, any law that restricts child victims of sexual abuse or violence from testifying about their victimization cannot be regarded as being in the child's best interests and is inconsistent with the children's right to equality before the law. There is a growing recognition that child sexual abuse is often perpetrated by family members, close family friends or trusted community figures. In these circumstances, corroboration, that is, independent evidence implicating the accused to the alleged sexual abuse will rarely exist. The competency inquiry and the requirement for corroboration for child witnesses have no legitimate purpose in criminal proceedings involving children as victims of sexual abuse. Both the competency inquiry and requirement for corroboration for child witnesses in criminal proceedings are invalid under section 2(2) of the Constitution"

19. The object of this interpretation was to apply to children the ordinary test of competence regardless of any real or notional additional test previously imposed on them if they gave sworn or unsworn evidence, such as a requirement to determine whether the child understands nature and solemnity of the oath and the special importance of telling the truth in a court in addition to his or her duty to do so as part of normal social conduct.

20. However in ***Kumar*** *(supra)*, Calanchini P, had some reservations about the need to give corroboration warning. His Lordship acknowledged that evidence of the child witness did not have to be corroborated, but he said that a warning about the danger of convicting a defendant on the uncorroborated evidence of a child should still be required if the child does not understand the nature of the oath. Calanchini P concluded his judgment by saying that *"children, especially young children, are still young children with all the frailties that are associated with childhood"*.

21. The Supreme Court in ***Kumar v State*** [2016] FJSC 44; CAV0024.2016 (27 October 2016) held that the requirement in Section 10 of the Juveniles Act that unsworn evidence of a child witness has to be corroborated is unconstitutional and therefor invalid.

22. It was further observed:

> *"In other jurisdictions, a child's evidence is given unsworn. That has been the position in England in respect of children under the age of 14 since 1988: see section 33A (1) of the Criminal Justice Act 1988. That recognizes that the form in which the evidence is given is far less important than the child's ability to understand the questions they are being asked, to give answers which can be understood, and to appreciate the need to tell the truth. Giving evidence in court can be an intimidating experience even for adults, and requiring a child to take the oath could serve to increase their discomfort. In my opinion, therefore, it is far more appropriate for a child to give evidence unsworn, and for the distinction in section 10(1) of the Juveniles Act between the sworn and unsworn evidence of a child to be abolished, as has occurred in England"*

23. Of the requirement to conduct a "competence inquiry", the Supreme Court observed:

> *"The same applies to the existing requirement for a judge to conduct a "competence inquiry" before the child gives evidence to ascertain whether, to use the language of section 10(1), the child "is possessed of sufficient intelligence to justify the reception of his evidence and to understand the duty of speaking the*

truth".

In my opinion, the more appropriate course is to follow what has been the practice in England for almost 30 years, and to leave it to the judge to decide whether to conduct a "competence inquiry" before the child gives evidence, and for the requirement in section 10(1) of the Juveniles Act that the judge must do so to be abolished, although again I can only give effect to that view if that requirement is inconsistent with the Constitution.

24. Of the requirement of giving corroboration warning, the Supreme Court observed:

> *The same also applies, albeit with one refinement, to the warning to the assessors of the danger of convicting a defendant on the uncorroborated evidence of a child...*
> *...The more appropriate course is to follow what again has been the practice in England for almost 30 years, and for the requirement at common law for the judge to warn the assessors of the danger of convicting a defendant on the uncorroborated evidence of a child to be abolished.*

25. The Supreme Court was not prepared to accept the proposition that the practice to give corroboration warning and the obligation to hold a competence inquiry discriminated against children. The Court observed:

> *"It also follows that I am in respectful disagreement with Goundar JA's judgment in the Court of Appeal that the "competence inquiry" which the judge is required by section 10(1) to conduct before a child can give evidence, and the requirement at common law for a warning of the danger of convicting a defendant on the*

uncorroborated evidence of a child, are inconsistent with the Constitution and therefore invalid. However, whether the requirement for a warning of this kind should remain part of the common law is another matter. For the reasons given in [33] above, I believe that Fiji should follow the path taken in England many years ago, and treat that requirement as no longer representing part of our common law. Accordingly, the fact that the trial judge did not give the assessors that warning does not undermine Kumar's conviction. Having said that, there may be some cases in which the trial judge thinks that a warning of this kind is desirable. That may have something to do with the nature of the child's evidence, or the way it was given, or it may have something to do with the assessors themselves. The trial judge is in the best position to assess that. So although there should no longer be any requirement on trial judges to give a warning of this kind, they may do so if they think that it is appropriate in a particular case...

...The same is true of the inquiry which the judge is required to conduct to determine, before the child gives evidence, whether the child can give unsworn evidence, namely whether the child "is possessed of sufficient intelligence to justify the reception of his evidence and to understand the duty of speaking the truth". I do not see how such a requirement discriminates against children. Whether the witness is a child or an adult, the judge always has to assess the witness' competence to give evidence. A child may not be mature enough to give evidence, in just the same way as an adult may have a mental disorder which makes him incompetent as a witness. So the need for the judge to determine whether a particular witness understands the questions they are asked, or is able to answer those questions in a way which can be understood, or appreciates the need to tell the truth, applies just as much to adults as it does to children. Section 10(1) does no more than to emphasize the need for that when the witness is a

child.

26. However, the Supreme Court did not disagree with the proposition that a requirement in any law restricting child victims of sexual abuse or violence from testifying about their victimization is in conflict with the child's best interests.

27. Gounder JA in ***AV*** (supra) referred to rights which the Constitution affords to children. His Lordship referred to Article 41(1) (d) of the Constitution which affirms the right of every child to be protected from abuse and also to Article 41 (2) of the Constitution which states *"The best interests of a child are the primary consideration in every matter concerning the child."*

28. The Supreme Court in ***Kumar*** (supra) concluded:

> *"that the trial judge should have determined before the child witness gave evidence whether he or she could give sworn evidence. If he had decided that she could not, he should then have determined whether she could give unsworn evidence".*
>
> ***However, failure to do those things does not mean that the conviction of the defendant has to be quashed.*** *(emphasis added)*

29. In its concluding remarks, the Supreme Court observed:

> *As Goundar J noted in both his judgment in AV at [19] and in his judgment in the Court of Appeal in the present case at [22], there have been many cases in which the failure of the judge to inquire into the competency of the child to give evidence, whether sworn or unsworn, has resulted in the conviction being*

quashed. With some diffidence, I question this line of authority – at any rate in its application to this case. I do not believe that the assessors were less likely to accept the girl's evidence if it had been unsworn than if it had been sworn. And if it had been apparent to the trial judge in the course of the girl's evidence that she did not satisfy the conditions for giving even unsworn evidence, he would have directed the assessors to disregard her evidence. The fact that he did not do that means that he must have thought that she was intelligent enough to understand that she had to tell the truth. ***In the circumstances, despite the trial judge not having done what section 10(1) required him to do, no substantial miscarriage of justice occurred*** *(emphasis added)*

30. In the present case the child witnesses were 12 and 11 years of age. Once the witnesses had begun to testify, the trial Magistrate would have made them incompetent witnesses if they appeared to him to be of unsound mind, incoherent or lacking communication skills. The trial Magistrate did not do that. He, having carefully listened to the evidence, appears to have proceeded on the assumption (a fair assumption in the light of the trial magistrate's decision to allow the girls to be sworn) that the witnesses had sufficient intelligence to understand the nature of the oath.

31. I am of the view that the failure on the part of the Magistrate to hold the competence inquiry at the beginning of child witnesses' testimony did not prejudice the Appellant.

32. Two child witnesses in this case gave evidence under oath. Therefore, question of giving corroboration warning arises only if that requirement is still valid in

Common law. The Common law rule that evidence of child witness (whether sworn or unsworn) need to be corroborated has now been abolished.

33. However, if the trial Magistrate had formed the view that child witnesses were not possessed of sufficient intelligence to justify the reception of their evidence and that they did not understand the duty of speaking the truth then the law predates AV judgment required, as a matter of law, evidence of the victim to be corroborated if the witnesses gave unsworn evidence.

34. Corroboration is evidence independent of the witness to be corroborated which confirms in some material particular not only that the crime was committed but that the accused committed it (***R v Baskerville*** (1910) 2 KB 658).

35. In the present case, the victim was in fact corroborated in material particular by her sister. Victim's sister said that she was playing outside with her small sister and when she was crossing a room inside the house she saw the grandfather (Appellant) touching her sister's private parts and asking if she liked it. She said that she saw her sister crying. Therefore, assuming that common law requirement to give corroboration warning with regard to sworn evidence as enunciated in ***Agnu v State*** *(supra)* is still applicable, failure to conduct the competency test did not prejudice the Appellant because the child victim was corroborated in material particular. Therefor, even if the the obligation on the Magistrate to be satisfied at the beginning that the child had the necessary capacity to give evidence is still valid in Fiji, the trial Magistrate did not fell into error because child victim's evidence was corroborated by her sister on material particular.

36. In the case of ***State v A.V*** (supra) the learned High Court Judge had stated that when a child of a tender age appears in court as a witness, the only obligation the magistrate or the judge has, is to remind the child of the importance of telling the truth before receiving his or her evidence.

37. The Court of Appeal in ***Chand v State*** [2016] FJCA 20; AAU065.2011 (26 February 2016) held that the obligation on the part of the magistrate or the judge to remind the child of the importance of telling the truth before receiving his or her evidence would amount to a violation of section 26(1) of the Constitution: *(at paragraph 15 to 19)*

> *"Counsel for the Appellant had sought to place reliance on the High Court case of The State v A.V, [2009] FJHC 24; HAC 192 of 2008 (21 February 2009) which he states was endorsed by the Court of Appeal in the case of Rahul Ravinesh Kumar v The State; Criminal Appeal No AAU0049 of 2012. In the case of The State v A.V the learned High Court Judge had stated that when a child of a tender age appears in court as a witness, the only obligation the magistrate or the judge has, is to remind the child of the importance of telling the truth before receiving his or her evidence. I have examined this decision and find this had been stated by way of obiter. This undoubtedly is a good practice but it cannot be said that the failure to do so was fatal to the conviction of the Appellant. To hold otherwise would amount to a violation of section 26(1) of the Constitution, which states: "Every person is equal before the law and has the right to equal protection and benefit of the law". Section 26(3) of the Constitution prohibits unfair discrimination against a person directly or indirectly on the ground of age. Section 26(7) of the Constitution states treating one person differently from another on any of the grounds prescribed under subsection (3) is discrimination, unless it can be*

established that the difference in treatment is not unfair in the circumstances. Section 26(8) prescribes circumstances under which the right to equality and freedom from discrimination can be derogated but none of those circumstances apply to the evidence of children of tender years.

38. In light of this Judgment, failure on the part of the trial Magistrate to remind the child witnesses of their duty to tell the truth is not a fatal irregularity.

39. I am of the view that the Appellant was accorded due process before he was convicted on the child witness's valid testimony. I conclude that the trial Magistrate's decision to disregard section 10 of the Juveniles Act is in the best interest of the child guaranteed under the Constitution. This ground of appeal therefore should fail.

Ground 2

40. According to the Court Copy Record at page 23 and 24, as soon as the prosecution case was closed, Counsel for the Appellant informed court that she wished to summon the mother of the complainant to give evidence. By saying this, she appears to have accepted that there was a case to answer on the available evidence. Hence she did not make an application or submission in support of 'no case to answer'. Appellant cannot complain now that he was not given the opportunity to make an application for no case to answer or any submission in its support.

41. There was no submission made by the Appellant on no case to answer at the end of the prosecution case. Therefore, the claim that the learned Magistrate failed to consider her submission on no case to answer does not hold water.

42. Moreover, Sections 178 and 179 of the Criminal Procedure Decree 2009 clearly state that the court has to determine the evidence at the end of prosecution case and then inform the accused of his rights after reading the charge to him again.

43. Relevant part of Sections 178 and 179 read as follows:

> *178. If at the close of the evidence in support of the charge it appears to the court that a case is not made out against the accused person sufficiently to require him or her to make a defence, the court shall dismiss the case and shall acquit the accused.*

> *179 (1) At the close of the evidence in support of the charge, if it appears to the court that a case is made out against the accused person sufficiently to require the making of a defence, the court shall ....*

44. The test applicable in the Magistrates Court is whether, taken at its highest, a reasonable court could convict on the Prosecution case. At the close of the prosecution case, there was ample evidence before court against the Appellant sufficient a reasonable court could convict on the Prosecution case. Therefore, trial Magistrate's decision to read out the charge and put the Appellant to his defence did not violate the procedural requirement of the law.

Ground 3 & 9

45. There is no submission before this court of what is the 'serious doubt' as was claimed by the Appellant. Nor is there any submission before this court to be considered that prosecution witnesses gave conflicting evidence during the trial. I considered the evidence given by two prosecution witnesses and found no material contradiction sufficient enough to discredit the version of the Prosecution. These grounds are incomplete and not substantiated by the Appellant.

46. In any event, the learned trial Magistrate has quite clearly said in his Judgment that the prosecution case was consistent and reliable as compared to the defence witnesses who were inconsistent. There is no merit in these grounds.

Ground 4

47. At paragraph 4 of the Judgment, the learned Magistrate set out that it is the prosecution's duty to prove the offence against the accused beyond reasonable doubt. There is no basis for the claim of the Appellant that the learned Magistrate did not direct himself to the law on burden of proof.

48. The Appellant submits that by stating that "the defence could not challenge the evidence given by the Prosecution..." the learned Magistrate shifted the burden to the defence to prove his innocence. I do not find any basis for this submission.

49. Trial Magistrate at the close of the prosecution case only had the prosecution version and therefore one side of the story. Upon being satisfied that there is a case to answer, the court is required to give an opportunity to the accused to tell his side of the story and also attack the credibility of the version of the Prosecution. In the process of evaluating evidence of the defence, the court is required to assess the credibility of the evidence adduced by the defence.

50. In this case, the learned Trial Magistrate stated with the words highlighted by the Appellant that evidence adduced by the defence did not damage the prosecution case or challenge the credibility of the prosecution witnesses. Ultimately, the court accepted that Prosecution has proved the offence beyond reasonable doubt. This ground has no merit and should be dismissed.

Grounds 5, 6, 7 & 10

51. These grounds are misconceived and have no basis. The Trial Magistrate in his judgment has clearly narrated in individual paragraphs the evidence of all the defence witnesses.

52. Furthermore, the trial Magistrate then analyzed the defence evidence and came to the conclusion that he does not accept the defence version. He also provided reasons for doing so.

53. I find the evidence of the Appellant self serving. Witnesses called by the Defence contradicted each other. The learned trial Magistrate has highlighted those contradictions and has given due consideration to inconsistencies when he decided to disbelieve the version of the Defence.

Ground 8

54 Appellant contends that the learned Magistrate erred in law and in fact in failing to give proper weight as to when the date of the complaint was made by the complainant against the Appellant and to say *"that it appears the witnesses have given their statements to the police soon after the incident"* raised serious doubt in the prosecution case.

55. Counsel for Appellant submits that the Prosecution did not have evidence of the date of the alleged offence and learned Magistrate's above mentioned statement is mere speculation.

56. Prosecution has led evidence of the complainant on the basis that the alleged incident occurred between the 2nd day of February and 4th February 2015. (Page 17 of the copy record) The Defence Counsel has cross examined the complainant

on the basis that the incident occurred on the 2nd day of February 2015. When the sister of the Complainant (Aaliya) was giving evidence the Defence Counsel cross examined her on the basis that she made her statement to police on 3rd day of February 2015. Therefore, there was concrete evidence before the trial Magistrate that the complaint was made soon after the incident. There is no basis for this ground and therefore should fail.

APPEAL AGAINST SENTENCE

57. First two grounds have been advanced on the basis that the sentence is harsh and excessive and wrong in principal. Therefore, grounds 1 and 2 can be considered together.

58. This Court will approach an appeal against sentence using principles set out in ***House v The King*** *[1936] HCA 40; (1936) 55 CLR 499 and adopted in* ***Kim Nam Bae v The State Criminal Appeal*** *No.AAU0015 at [2].*

59. In ***Bae v State*** [1999] FJCA 21; AAU0015u.98s (26 February 1999) the Fiji Appeal Court observed:

> *"It is well established law that before this Court can disturb the sentence, the appellant must demonstrate that the Court below fell into error in exercising its sentencing discretion. If the trial judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some relevant consideration, then the Appellate Court may impose a different sentence. This error may be apparent from the*

reasons for sentence or it may be inferred from the length of the sentence itself (House v The King [1936] HCA 40; (1936) 55 CLR 499)".

60. The Supreme Court, in ***Naisua v State*** [2013] FJSC 14; CAV0010.2013 (20 November 2013), endorsed the views expressed in ***Bae*** *(supra):*

> *"It is clear that the Court of Appeal will approach an appeal against sentence using the principles set out in House v The King [1936] HCA 40; (1936) 55 CLR 499 and adopted in Kim Nam Bae v The State Criminal Appeal No.AAU0015 at [2]. Appellate courts will interfere with a sentence if it is demonstrated that the trial judge made one of the following errors:*
>
> *(i) Acted upon a wrong principle;*
> *(ii) Allowed extraneous or irrelevant matters to guide or affect him;*
> *(iii) Mistook the facts;*
> *(iv) Failed to take into account some relevant consideration.*

61. The Fiji Court of Appeal in ***Sharma v State*** [unreported Cr. App. No. AAU0065 of 2012; 2 June 2014] discussed the approach to be taken when exercising appellate jurisdiction in reviewing a sentencing discretion of a lower court. The Court observed:

> *"In determining whether the sentencing discretion has miscarried this Court does not rely upon the same methodology used by the sentencing judge. The approach taken by this Court is to assess whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing judge or, in other words, that the sentence imposed lies within the permissible range. It*

follows that even if there has been an error in the exercise of the sentencing discretion, this Court will still dismiss the appeal if in the exercise of its own discretion the Court considers that the sentence actually imposed falls within the permissible range. However, it must be recalled that the test is not whether the Judges of this Court if they had been in the position of the sentencing judge would have imposed a different sentence. It must be established that the sentencing discretion has miscarried either by reviewing the reasoning for the sentence or by determining from the facts that it is unreasonable or unjust"

62. Tariff for indecent assault was set out in ***Rakota v State*** [2002] FJHC 168; HAA0068J.2002S (23 August 2002).

> *"Sentences for indecent assault range from 12 months imprisonment to 4 years. The gravity of the offence will determine the starting point for the sentence. The indecent assault of small children reflects on the gravity of the offence. The nature of the assault, whether it was penetrative, whether gratuitous violence was used, whether weapons or other implements were used and the length of time over which the assaults were perpetrated, all reflect on the gravity of the offence. Mitigating factors might be the previous good character of the accused, honest attempts to effect apology and reparation to the victim, and a prompt plea of guilty which saves the victim the trauma of giving evidence.*
>
> *These are the general principles which affect sentencing under section 154 of the Penal Code. Generally, the sentence will fall within the tariff, although in particularly serious cases, a five year sentence may be appropriate. A non-custodial sentence will only be appropriate in cases where the ages of the victim and the accused are similar, and the assault of a non-penetrative and fleeting type.*

Because of the vast differences in different types of indecent assault, it is difficult to refer to any more specific guidelines than these.

63. This tariff has been accepted for the same offence under the Crimes Decree, 2009 as well. ***State v Mario*** [2014] FJHC 935; HAC 70 & 71.2013 (19 December 2014).

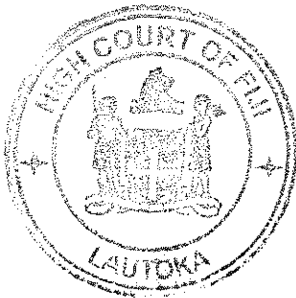
64. The Appellant received 18 months' imprisonment for indecently assaulting his granddaughter who was 12 years old. Considering the circumstances, especially the aggravating features such as the age gap and breach of trust, the Appellant has received a very lenient sentence.

65. The Appellant claims that he was not given an opportunity to file his mitigation. However, the court copy record shows otherwise. The Appellant and his Counsel were given two opportunities to file mitigation; obviously the court cannot adjourn and wait indefinitely for the Appellant to file his mitigation. Nevertheless, the learned Magistrate gave due consideration to his old age and his clear record in his mitigation.

66. As regards the 3rd ground against sentence, the Appellant has not specifically mentioned what relevant matters the sentencing Magistrate failed to take into consideration and what irrelevant matters he considered in coming to his final sentence. There are no merits in these grounds and should be dismissed.

67. Sentence imposed by the learned Magistrate is neither excessive nor unreasonable. Therefore, I affirm the sentence imposed by the learned Magistrate.

68. For reasons given in this judgment, the appeal against conviction and sentence is dismissed.



Aruna Aluthge
Judge

At Lautoka
07th April, 2017

Counsel: **Iqbal Khan & Associates for the Appellant**
Director of Public Prosecution for the Respondent