

IN THE COURT OF APPEAL, FIJI

[On Appeal from the High Court of Fiji]

CRIMINAL APPEAL NO: AAU0066 of 2015

[High Court Case No: HAC38 of 2015]

BETWEEN : GORDON AITCHESON

Appellant

AND : THE STATE

Respondent

Before : Hon. Mr. Justice Daniel Goundar

Counsel : Mr. M. Yunus for the Appellant
Ms. P. Madanavosa for the Respondent

Date of Hearing : 17 January 2017

Date of Ruling : 24 January 2017

RULING

[1] This is a timely application for leave to appeal against sentence pursuant to section 21(1) (c) of the Court of Appeal Act, Cap, 12. The test for leave to appeal against sentence is whether there is an arguable error in the exercise of the sentencing discretion (*Naisua v State* unreported Cr App No CAV0010 of 2013; 20 November 2013).

- [2] The appellant was charged with one count of indecent assault and six counts of rape. He appeared in the High Court at Lautoka and pleaded guilty to the charges. He was represented by counsel when he entered the guilty pleas. On the charge of indecent assault, he was sentenced to 4 years' imprisonment, and on each count of rape, he was sentenced to 16 year' imprisonment, to be served concurrently. The total effective sentence was 16 years' imprisonment with a non parole period of 15 years.
- [3] The facts admitted by the appellant revealed that 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. 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 digitally 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 many occasions regarding the sexual abuse of their daughters but the appellant threatened to kill her if she reported the matter to police.
- [4] The initial Notice of Appeal and the grounds of appeal were filed by the appellant in person. The grounds of appeal are:
- (i) That the learned High Court judge did not give proper consideration to the remand period.
 - (ii) That the learned High Court judge did not give proper consideration to the guilty plea.
 - (iii) That the learned High Court judge did not consider the appellant's previous good character.
 - (iv) That the learned High Court judge erred in exercising his sentencing discretion to the extent that the non-parole period is too close to the head sentence resulting in much more severe punishment.
 - (v) The non-parole period is inconsistent with section 27(2) of the Prison Corrections Act 2006.

[5] At the leave hearing, Mr Yunus abandoned grounds four and five based on the decision of the Full Court in *Singh v State* unreported Cr App No AAU009 of 2013; 30 September 2016. In that case, the Court said at [12]:

Further it cannot be said that fixing a non-parole period is the only manner by which conditions for promotion and facilitation of rehabilitation can be established. Rehabilitation in my view is a part of the duties of the Correction Institute and should be afforded to all inmates. The fact that the non-parole period fixed is one year, does not offend section 18(4) of the Sentencing and Penalties Decree 2009. In my view a Sentencing Judge cannot be faulted for failure to spell out in his Sentencing Order the very wording of the Sentencing and Penalties Decree 2009 as to the purposes for which the sentence was imposed. (per A Fernando JA).

[6] In sentencing the appellant, the learned High Court judge adopted the two-tiered approach. He identified the tariff by reference to earlier cases and picked a starting point of 13 years for rape. The sentence was then adjusted to reflect the mitigating and aggravating factors. There were multiple aggravating factors. The victims were vulnerable due to their tender age. There were two victims. Their trusts were breached. They were threatened during the incidents. Their mother was also threatened if she complained. The abuse continued over a period of eight years. The sentence was enhanced by four years to reflect these aggravating factors.

[7] In considering the mitigating factors, the learned High Court judge said that the appellant was 37 years old and pleaded guilty at the first reasonable opportunity. By doing so, the appellant saved the time and resources of the court, and more importantly the victims were relieved from the trauma of giving evidence. The learned High Court judge also took into account that the appellant had been in custody on remand, but he did not state the actual length of the remand period. At the leave hearing, Mr Yunus advised the Court that the appellant's remand period was three months. For these factors, the sentence was reduced by one year. The final sentence for rape was 16 years' imprisonment.

[8] In the sentencing remarks, there is no reference to the appellant being a person of previous good character. Mr Yunus advised this Court that the appellant was a first offender. It is clear that that the learned High Court judge gave very little weight to the appellant's mitigating factors and remand period. The reasons are unclear.

[9] Also, the learned High Court judge made no assessment as to whether the appellant was genuinely remorseful when he pleaded guilty at the first reasonable opportunity. A guilty plea that reflects a genuine remorse is a compelling mitigating factor deserving greater reduction in sentence.

[10] Counsel for the State concedes that the complaints regarding the sentence are arguable. I agree. I am satisfied the appeal against sentence is arguable.

[11] **Result**

Leave granted.



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The Hon. Mr. Justice Daniel Goundar
JUSTICE OF APPEAL

Solicitors:

Office of the Legal Aid Commission for the Appellant
Office of the Director of Public Prosecutions for the Respondent