IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CRIMINAL APPEAL NO.AAU 75 of 2019
[In the High Court at Suva Case No. HAC 98 of 2018]

BETWEEN : **STATE**

Appellant

AND : **RAJESH CHAND**

Respondent

Coram : **Prematilaka, ARJA**

Counsel : **Mr. L J. Burney for the Appellant**
: **Mr. A. K. Singh or the Respondent**

Date of Hearing : **09 August 2021**

Date of Ruling : **13 August 2021**

RULING

[1] The respondent had been indicted in the High Court at Suva on one count of rape contrary to section 207 (1) and (2) (a) of the Crimes Act, 2009 and a representative count of rape contrary to section 207 (1) and (2)(a) of the Crimes Act, 2009 committed in Nausori in the Central Division.

[2] The information read as follows:

COUNT ONE

Statement of Offence

Rape: *contrary to section 207(1) and (2)(a) of the Crimes Act No. 44 of 2009.*

Particulars of Offence

RAJESH CHAND*, on the 28th day of January, 2018 in Nausori, in the Central Division, penetrated the anus of* ***SK,*** *with his penis without his consent.*

COUNT TWO

(Representative Count)

Statement of Offence

Rape: *contrary to section 207(1) and (2)(a) of the Crimes Act No. 44 of 2009.*

Particulars of Offence

RAJESH CHAND, *between the 29th day of January and 30th day of January, 2018, in Nausori, in the Central Division, penetrated the anus of* ***SK,*** *with his penis without his consent.*

[3] After the summing-up, the assessors had expressed a unanimous opinion that the respondent was guilty of both counts. The learned High Court judge had overturned the assessors' opinion on count 01, acquitted the respondent of rape but convicted him of defilement contrary to section 215 of the Crimes Act, 2009. The trial judge had sentenced the respondent 31 May 2019 to 03 years of imprisonment with a non-parole period of 01 year for defilement (the effective serving period being 02 years and 11 months and 14 days after the period of remand was deducted). The trial judge had also disagreed with the assessors and acquitted the respondent of count 2.

[4] The appellant had lodged a timely appeal against sentence and filed written submissions on 02 September 2020. The respondent too had filed written submission on 08 December 2020. Both parties have consented in writing that this court may deliver a ruling at the leave to appeal stage on the written submissions without an oral hearing in open court or via Skype.

[5] In terms of section 21(1) (c) of the Court of Appeal Act, the appellant could appeal against sentence only with leave of court. For a timely appeal, the test for leave to appeal against sentence is **'reasonable prospect of success'** [see **Caucau v State**

[2018] FJCA 171; AAU0029 of 2016 (04 October 2018), **Navuki v State** [2018] FJCA 172; AAU0038 of 2016 (04 October 2018) and **State v Vakarau** [2018] FJCA 173; AAU0052 of 2017 (04 October 2018), **Sadrugu v The State** [2019] FJCA 87; AAU 0057 of 2015 (06 June 2019) and **Waqasaqa v State** [2019] FJCA 144; AAU83 of 2015 (12 July 2019) that will distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudhry v State** [2014] FJCA 106; AAU10 of 2014 (15 July 2014) and **Naisua v State** [2013] FJSC 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds [see **Nasila v State** [2019] FJCA 84; AAU0004 of 2011 (06 June 2019)].

[6] Further guidelines to be followed for leave to appeal when a sentence is challenged in appeal are well settled (vide **Naisua v State** [2013] FJSC 14; CAV0010 of 2013 (20 November 2013); **House v The King** [1936] HCA 40*;* (1936) 55 CLR 499, **Kim Nam Bae v The State** Criminal Appeal No.AAU0015 and **Chirk King Yam v The State** Criminal Appeal No.AAU0095 of 2011) and they are whether the sentencing judge had:

> *(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.*

[7] The appellant's grounds of appeal against sentence are as follows:

> ***Sentence***
>
> *i) The Learned Sentencing Judge erred in law in treating the sex of the victim as a relevant factor when he reasoned that: "It follows that, defilement of a female child where the Accused penetrates her vagina with his penis should be considered more serious compared to the offence of defilement committed by penetrating the anus of a child with his penis." Male victims of defilement are entitled to equal protection under the law.*
>
> *ii) The Learned Trial Judge erred in principle in treating the Respondent's conduct during trial as a mitigating factor in the particular circumstances of this case.*

iii) The sentence is unduly lenient having regard to the tariff proposed in State v Mawi – Sentence [2019] FJHC 324; HAC17.2017 (12 April 2019), which proposed tariff the Appellant seeks to support.

[8] For the purpose of sentencing the trial judge had summarised the factual scenario of the case as follows:

> *[3] The victim in this case was about 13 years and 09 months old at the time you sexually exploited him. At the time you committed the offence, you were working in a DVD shop. You were 46 years old then. The victim came with you to the said shop during daytime on a Sunday where the shop was closed for business. You penetrated the victim's anus with your penis inside that shop. The evidence suggested that the incident may have taken place with the victim's consent. The position you took during the trial was that, you did attempt to penetrate the victim's anus because the victim requested you to do so, but you were not successful as you are unable to have erections due to an accident you had more than 10 years ago.*
>
> *[7] In this case, according to the evidence, the victim came to the video shop where you were employed. The explanation given by the victim in his evidence as the reason for him to go to that video shop with you during daytime on a Sunday when it was closed for business was not that convincing and the evidence in its entirety does not suggest that you instigated the event.*

[9] Before considering specific grounds of appeal some important general observations are called for. The trial judge had followed his own decision in **State v Mawi - Sentence** [2019] FJHC 324; HAC17.2017 (12 April 2019) where he had 'decided' that 'appropriate tariff ' for the offence of defilement is an imprisonment between 02 and 08 years, in sentencing the respondent.

[10] The appellant does not seem to have an issue with the 'tariff' and adopted by the trial judge in ***Mawi*** *per se* but its position is that the impugned sentence meted out to the appellant is unduly lenient having regard to the 'tariff' suggested in ***Mawi.*** However, the appellant submits that the 'tariff' for defilement adopted by the trial judge had thrown the current sentencing practice into confusion and uncertainty among other judges and magistrates in as much some High Court judges still follow pre- ***Mawi*** tariff of suspended sentence to 04 years for defilement [for e.g. **State v Peceli -**

Sentence [2019] FJHC 1002; HAC186.2017 (23 October 2019) and **State v Malo** [2020] FJHC 179; HAC302.2018S (2 March 2020)] while some other High Court judges follow ***Mawi*** [for e.g. **State v Matayalewa - Sentence** [2020] FJHC 2; HAC150.2018 (14 January 2020)].

[11] Similar confusion and uncertainty currently prevails in many other areas such as aggravated robbery, aggravated burglary, possession and/or cultivation of cannabis sativa/marijuana etc. This situation, needless to say, is unacceptable and an unsatisfactory state of affairs. The resulting lack of consistency as a result of dual system of tariff in defilement cases can be observed in many cases such ***Mawi,*** **State v Dinono - Sentence** [2019] FJHC 871; HAC336.2018 (5 September 2019), **State v Koroi** [2019] FJHC 483; HAR02.2019 (24 May 2019).

[12] In **Daunivalu v State** [2020] FJCA 127; AAU138.2018 (10 August 2020) I highlighted some problems arising out of a single judge of the High Court changing an existing tariff or declaring a new tariff unilaterally:

> *'[15] However, it is clear that some High Court judges had felt, perhaps rightly, the need to revisit the 'old tariff', may inter alia be due to the increase in the number of cases of aggravated burglary in the community and the need to protect the public, by having a sentencing regime with more deterrence than the 'old tariff' offers. In my view, there is nothing wrong in a trial judge expressing his view even strongly in such a situation so that the DPP could take steps to seek new guidelines from the Court of Appeal at the earliest opportunity. Yet, when an existing sentencing regime is changed by a single judge unilaterally, only to be followed not by all but a few other judges, a serious anomaly in sentencing is bound to occur undermining the public confidence in the system of administration of justice.*
>
> *[16] Therefore, one must bear in mind the provisions relating to guideline judgments in the Sentencing and Penalties Act namely section 6, 7 and 8 which govern setting sentencing tariffs as well. It is clear that a High Court is empowered to give a guideline judgment only upon hearing an appeal from a sentence given by a Magistrate and then that judgment shall be taken into account by all Magistrates and not necessarily by the other judges of the High Court. However, before exercising the power to give a guideline judgment, the DPP and the Legal Aid Commission must be notified particularly on the court's intention to do so and both the DPP and the LAC must be heard.*

> *[18] Moreover, when a guideline judgment is given on an appeal against sentence by the Court of Appeal or the Supreme Court it becomes a judgment by three judges and shall be taken into account by the High Court and the Magistrates Court. A judgment of a single judge of the High Court does not enjoy this advantaged position statutorily conferred on the Court of Appeal and the Supreme Court. In addition the doctrine of stare decisis requires lower courts in the hierarchy of courts to follow the decisions of the higher courts.'*

[13] I think it would also not be inapt to repeat my remarks in **Vakatawa v State** [2020] FJCA 63; AAU0117.2018 (28 May 2020), **Kumar v State** [2020] FJCA 64; AAU033.2018 (28 May 2020) and **Daunivalu v State** [2020] FJCA 127; AAU138.2018 (10 August 2020) and **Jeremaia v State** [2020] FJCA 259; AAU030.2019 (23 December 2020) on the adverse consequences of the dual system of sentencing tariff on the due administration of justice:

> *'Suffice it to say that the application of old tariff and new tariff by different divisions of the High Court for the same offence of burglary or aggravated burglary is a matter for serious concern as it has the potential to undermine public confidence in the administration of justice. Treating accused under two different sentencing regimes for the same offence simultaneously in different divisions in the High Court would destroy the very purpose which sentencing tariff is expected to achieve. The disparity of sentences received by the accused for aggravated burglary depending on the sentencing tariff preferred by the individual trial judge leads to the increased number of appeals to the Court of Appeal on that ground alone. The state counsel indicated that the same unsatisfactory situation is prevalent in the Magistrates courts as well with some Magistrates preferring the old tariff and some opting to apply the new tariff. The state counsel also informed this court that the State would seek a guideline judgment from the Court of Appeal regarding the sentencing tariff for aggravated burglary. I hope that the State would do so at the first available opportunity in the Court of Appeal or the Supreme Court. Until such time it would be best for the High Court judges themselves to arrive at some sort of uniformity in applying the sentencing tariff for aggravated burglary.'*

[14] Thus, since the DPP is of the view that there is a need to revisit the existing tariff of suspended sentence to 05 years for defilement and deliver a 'long overdue' guideline judgment given that the maximum sentence for defilement now is 10 years of imprisonment under the Crimes Act, 2009 as opposed to 05 years under the Penal Code, the DPP could take steps to seek such guidelines from the Court of Appeal or the Supreme Court at the earliest opportunity in terms of provisions in sections 6, 7

and 8 of the Sentencing and Penalties Act, because when an existing and long-established sentencing regime is changed by a single judge unilaterally, only to be followed not by all but by a few other Judges and Magistrates, a serious anomaly in sentencing is bound to occur undermining the public confidence in the system of administration of justice. Even more worryingly, the trial judge had declared the new tariff of 02-08 years for defilement contrary to section 215(1) of the Crimes Act, 2009 without adhering to the mandatory provisions in sections 6, 7 and 8 of the Sentencing and Penalties Act which renders it invalid in law.

[15] Therefore, until the Court of Appeal or the Supreme Court considers this issue more fully it is advisable for all Judges and Magistrates to follow the well-established tariff of suspended sentence to 04 years for defilement being mindful that a sentence even above the upper limit of 04 years can be meted out with reasons why the sentence is outside the range as highlighted in **Koroivuki v State** [2013] FJCA 15; AAU0018 of 2010 (05 March 2013).

[16] Therefore, the above reasons alone are good enough to grant leave to appeal against sentence.

01st ground of appeal

[17] The trial judge has stated in paragraph 6 of the sentence order:

> *[6] In **Mawi** (supra), the accused (Mawi) was 30 years old and the victim's age was 13 years and 02 months. The age gap therefore was 17 years. The victim in the said case was a girl and the accused had unprotected sexual intercourse with her where he penetrated the victim's vagina with his penis. Vaginal intercourse with a female child has the inherent danger that it could lead to the child being impregnated. It follows that, defilement of a female child where the accused penetrates her vagina with his penis should be considered more serious compared to the offence of defilement committed by penetrating the anus of a child with the penis.*

[18] Obviously, the above reasoning is illogical and flawed. If defilement results in unwanted pregnancy in female victims it would certainly be an aggravating factor but no risk of pregnancy in male victims would not make the offence less serious. The trial judge's reasoning also defies protection afforded to children and every other person irrespective of their gender by the Constitutional provisions [see Articles 41(1)(d), 26(1) and 26(3)]. Legally, it also does not matter whether it is vaginal or anal intercourse as far as the statutorily prescribed maximum sentence for defilement is concerned. Further, potential pregnancy is not the only harm that could possibly be caused by penetration of vagina or anus. Physical injuries to vagina or anus and sexually transmitted diseases are examples of other serous harms. The trial judge's reasoning would also be sending a wrong signal to offenders having predatory tendencies towards male children that even if they are caught they would be treated leniently by courts than their counterparts committing similar crimes against female children.

[19] Therefore, this ground of appeal has a reasonable prospect of success in appeal.

02nd ground of appeal

[20] The trial judge had considered the respondent's conduct during trial as a mitigating fact. However, the appellant's conduct at the trial set out at paragraph 09 of the sentencing order does not seem to support the judge's decision to grant the respondent a discount:

> *[9] In your mitigation, your counsel tried to convince this court that you did not contest that you committed the offence of defilement and you have admitted committing defilement when you were interviewed by the police. The argument is that, had you been charged for defilement, you would have pleaded guilty at the inception. This position however, was not reflected in your evidence or from the questions put to the victim during cross-examination. You clearly denied penetration during the trial. As stated before, your evidence was that you are unable to have erections after your accident 10 years ago. Further, there was no indication before the trial that you are willing to plead guilty for defilement. However the admissions made by you during the trial did in fact assist me to reach my conclusion with regard to your guilt for the offence of defilement.*

Therefore, I do agree that the said conduct during the trial where you made crucial admissions should earn you a discount in your sentence.

[21] In any event, the trial judge has not referred to any act of remorse on the part of the respondent during the trial warranting a mitigation of the sentence. The trial judge has clearly fallen into a sentencing error.

[22] Therefore, this ground of appeal has a reasonable prospect of success in appeal.

03rd ground of appeal

[23] I have already dealt with the necessity of laying down new sentencing guidelines by way of tariff for defilement in view of the corresponding increase on the maximum sentence under the Crimes Act, 2009 departing from the earlier tariff set under the Penal Code [*vide* **Donumainasava v The State** [2001] FJHC 25; Haa0032j.2001s (18 May 2001)]. The High Court at paragraph 13 in ***Koroi*** seems to have accepted this. Lord Justice Lawton's helpful remarks at page 185 of **R v Taylor** (1977) 64 Cr. App. R. 182 may provide a useful basis in setting new guidelines.

[24] As I have already indicated the necessity of a new guideline judgment for the offence of defilement under the Crimes Act, 2009 alone is sufficient to grant leave to appeal in this matter.

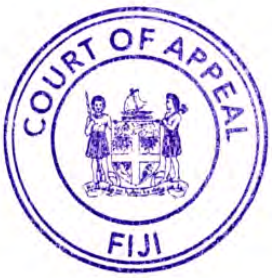
[25] On the other hand, I am conscious of the fact that it is the ultimate sentence that is of importance, rather than each step in the reasoning process leading to it. When a sentence is reviewed on appeal, again it is the ultimate sentence rather than each step in the reasoning process that must be considered **(vide Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006). In determining whether the sentencing discretion has miscarried the appellate courts do not rely upon the same methodology used by the sentencing judge. The approach taken by them 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 [**Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015)].

[26] The trial judge in ***Mawi*** had sentenced a 30 year old man after trial for 07 years' imprisonment (05 year non-parole) for defilement of a 13 year old girl whereas he had sentenced the respondent, 46 year old, to 03 years of imprisonment (01 year non-parole) for defiling a 13 year old boy after trial. The only material distinguishing feature between the two cases appears to be the gender of the victim. This striking anomaly needs to be looked into by the full court as *prima facie* the sentence does not seem to fit the gravity of the offending in view of the maximum sentence prescribed for defilement under the Crimes Act, 2009. However, the final sentence is a matter for the full court to decide.

Order

1. Leave to appeal against sentence is allowed.



.....
Hon. Mr. Justice C. Prematilaka
ACTING RESIDENT JUSTICE OF APPEAL