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

CRIMINAL APPEAL NO. AAU 040 of 2021
[In the High Court at Suva Case No. HAC 20 of 2020]

BETWEEN	:	**THE STATE**
		Appellant
AND	:	**NIMATI QIONIMUA**
		Respondent
Coram	:	**Prematilaka, RJA**
Counsel	:	**Mr. L. Burney for the Respondent** **Mr. M. Fesaitu and Ms. Vulimainadave for Respondent**
Date of Hearing	:	**05 December 2023**
Date of Ruling	:	**11 December 2023**

RULING

[1] The respondent had been charged in the High Court at Suva with one representative count of rape under the Penal Code. The victim (aged 13) was the respondent's step daughter. The information read as follows:

'COUNT ONE

(Representative Count)

Statement of Offence

***RAPE**: Contrary to Section 149 and 150 of the Penal Code.*

Particulars of Offence

***NIMATI QIONIMUA**, between the 1st day of January 1987 and 28th day of January 1994, at Waibau, Naitasiri, in the Eastern Division, penetrated the vagina of **TT**, with his penis, without her consent.'*

[2] The assessors had unanimously opined that the respondent was guilty of rape. Having agreed with their opinion, the trial judge had convicted the respondent accordingly and sentenced him on 08 March 2021 to head sentence of 13 years imprisonment with a non-parole period of 08 years after deducting a period of remand of 01 year.

[3] The appellant had lodged in person a timely appeal against sentence. 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 conviction and 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), **Chaudry 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)].

[4] Further guidelines to be followed when a sentence is challenged in appeal are whether the sentencing judge (i) acted upon a wrong principle; (ii) allowed extraneous or irrelevant matters to guide or affect him (iii) mistook the facts and (iv) failed to take into account some relevant considerations [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].

[5] The trial judge had summarized the facts in the sentencing order as follows:

> *'[5] You are the complainant's step-father. The complainant is now 44 years of age. Her date of birth is 7 December 1976. She clearly testified to the incidents which took place since she was in Class 7. She said that she was in Class 7 in 1990. Thus she would have just turned 13 at the time.*
>
> *[6] The complainant testified that you penetrated her vagina with your penis 2-3 times a week. This had continued until 28 January 1994, the day she*

had given birth to her eldest child, who was fathered by you. Thus you had been sexually abusing the complainant for a period of over 4 years. It is clear that the complainant was a juvenile at the time you committed these offences on her.'

[6] The prosecution had called the victim and the respondent had given evidence on his behalf. His defense was 'consent'.

[7] The grounds of appeal urged by the appellant are as follows:

Sentence

Ground 1:

THAT the Learned Sentencing Judge erred in law and fact when he sentenced the respondent according to the tariff outlined in Anand Abhay Raj v The State [2014] FJSC 12; CAV 0003 of 2014 (20 August 2014) instead of the current tariff of Aitcheson v State [2018] FJSC 29; CAV0012.2018 (2 November 2018).

Ground 2:

THAT the Learned Sentencing Judge erred in principle by imposing a sentence of 14 years imprisonment with a non-parole period of 9 years which does not reflect the totality of the respondent's culpability and the seriousness of the crime and which is unduly lenient.

Grounds 1 and 2

[8] The trial judge had decided that because the offending had happened over 25 years ago, it would be unjust to use the tariff of 11-20 years laid down in **Aitcheson v State** [2018] FJSC 29; CAV0012.2018 (2 November 2018) and instead adopted the tariff of 10-16 years earlier set in **Raj v State** [2014] FJSC 12; CAV 0003 of 2014 (20 August 2014) and because ***Raj*** was a case where the appellant had been found guilty and convicted by the Suva High Court of 4 counts of rape, contrary to Sections 149 and 150 of the Penal Code. The trial judge's reasoning does not sound logical, for the tariff in ***Raj*** too was introduced in 2014 and could not have been applied for the same reason of the offending having taken place 25 years ago. The mere fact that ***Raj*** was also case under the Penal Code should have had no relevance either.

[9] Despite the seemingly contrary view (but not as an authoritative pronouncement) expressed by Keith, J in the Supreme Court in **Kumar v State** [2018] FJCA 30; CAV0017 of 2018 (02 November 2018) and **Prasad v State** [2019] FJCA 3; CAV0024 of 2018 (25 April 2019), the Court of Appeal authoritatively held that presumption against retrospective application of penal provisions would not apply to sentencing tariff set by court [vide the decisions in **Narayan v State** (majority) AAU107 of 2016: 29 November 2018 [2018] FJCA 200 and **Chand v State** [2019] FJCA 192; AAU0033.2015 (3 October 2019)] & **Tagidugu v State** [2022] FJCA 42; AAU109.2016 (26 May 2022). Finally, Keith, J in the Supreme Court remarked in **State v Tawake** [2022] FJSC 22; CAV0025.2019 (28 April 2022) that there is not yet a finality to the issue surrounding the applicability of presumption against retrospective application as far as sentencing tariff is concerned. The Court of Appeal view seems to be supported by the decisions in UK as well (see **R. (Uttley) v Secretary of State for the Home Department** [2005] 1 Cr.App.R. (S.) 91 & **R v H** (J) [2012] 1 WLR 1416).

[10] Since the debate on whether a guideline judgment applies retrospectively continued unresolved by the Supreme Court as discussed at length and highlighted in **Kumar v State** [2022] FJCA 164; AAU117.2019 (24 November 2022), this court in **Seru v State** [2023] FJCA 67; AAU115.2017 (25 May 2023) favoured the view expressed in **Zhang v R** [2019] NZCA 507 as to whether a guideline judgment applies retrospectively and expressed most recently the applicable principle as follows in **State v Chand** [2023] FJCA 252; AAU75.2019 (29 November 2023):

> '*A Guideline judgment applies to all sentencing that takes place after that date of its delivery regardless of when the offending took place. The more difficult issue is whether it should also apply to those who have already been sentenced and if so in what circumstances. A guideline judgment only applies to sentences that have already been imposed, if and only if two conditions are satisfied: (a) that an appeal against the sentence has been filed before the date the judgment is delivered; and (b) the application of the judgment would result in a more favourable outcome to the appellant (vide **Zhang v R** [2019] NZCA 507).*'

[11] In **Zhang** the Court of Appeal in New Zealand said:

> *[187] This judgment is to be issued on 21 October 2019. It applies to all sentencing that takes place after that date regardless of when the offending*

took place. The more difficult issue is whether it should also apply to those who have already been sentenced and if so in what circumstances. (emphasis added)

[188] The approach that has consistently been taken by this Court in previous guideline judgments is that the judgment only applies to sentences that have already been imposed, if and only if two conditions are satisfied: (a) that an appeal against the sentence has been filed before the date the judgment is delivered; and (b) the application of the judgment would result in a more favourable outcome to the appellant. (emphasis added)

[189] We have considered whether this approach is consistent with s 25(g) of the New Zealand Bill of Rights Act and s 6 of the Sentencing Act. Section 6 states that an offender has the right, if convicted of an offence in respect of which the penalty has been varied between the commission of the offence and sentencing, to the benefit of the lesser penalty. Section 25(g) is to similar effect.

[190] However, we have concluded that neither section is engaged in the current context. That is because a change in sentencing practice does not alter the penalty provided by the legislation creating the offence but is an exercise of the sentencing discretion in an individual case. To put it another way, a change in guideline does not amount to a change of penalty for the purposes of those two provisions.

[12] **Zhang** affirms the retrospective application of sentencing tariff at the point of sentencing regardless of when the offending took place despite the Bill of Rights provision that states that an offender has the right, if convicted of an offence in respect of which the penalty has been varied between the commission of the offence and sentencing, to the benefit of the lesser penalty. However, when a subsequent guideline judgment is to be applied to appellants who have already been sentenced previously, it should be applied only if (a) an appeal against the sentence has been filed before the date the guideline judgment is delivered; and (b) the application of the guideline judgment would result in a more favourable outcome to the appellant.

[13] Therefore, in my view there is no contradiction between section 4(2) of the Sentencing and Penalties Act which requires the sentencing judge to have regard to the ***current*** sentencing practice including guideline judgments and section 14(2)(g) of the Constitution of Fiji. Since the appellant was sentenced by the trial judge in the original

court, he should have applied the sentencing tariff in ***Aitcheson.*** However, as pointed out by the respondent's counsel the ultimate sentence was still within ***Aitcheson*** tariff.

[14] In addition, I also have reservations about the trial judge calling the appellant a first time offender and a person of previous good character, having identified the offending as a campaign of rape over a period of 04 years and on account of that granting the appellant 02 years of discount which he may not have deserved.

[15] I am also concerned with the disproportionate gap of 05 years between the non-parole period and the head sentence as it may breach of the principle that the gap should not only be sufficient to allow for rehabilitation and should achieve expected deterrence as well [see **Tora v State** [2015] FJCA 20; AAU0063.2011 (27 February 2015)].

[16] On the other hand there is no certainty as to whether the complainant's pregnancy (treated as an aggravating factor by the trial judge) was the result of acts of rape or consensual sex between the two which she said occurred at times.

[17] While rectifying the sentencing errors, whether the original sentence itself needs to be disturbed is a matter for the Full Court to decide as what matters at this stage is the ultimate sentence (**Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006) which is within ***Aitcheson*** tariff [**Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015)].

Order of the Court:

1. Leave to appeal against sentence is allowed.

COURT OF APPEAL FIJI

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

Solicitors:

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